

July 7, 2023

**EO 12866 Meeting
Pregnant Workers Fairness Act Regulations
RIN 3046-AB30
Comments by: Eric Kniffin and Natalie Dodson**

Thank you for the opportunity to provide comments on OIRA’s review of the “Pregnant Workers Fairness Act Regulations” (“Proposal”) by the Equal Employment Opportunity Commission (EEOC).

Our names are Eric Kniffin and Natalie Dodson. Kniffin is an attorney and Fellow at the Ethics and Public Policy Center (EPPC). He also served in DOJ’s Civil Rights Division under Presidents George W. Bush and Obama, and he has been involved in extensive civil rights litigation against HHS as counsel for the Becket Fund for Religious Liberty and in private practice. Dodson is a Policy Analyst and Member of the HHS Accountability Project at EPPC.

OMB cancelled a previous EO 12866 meeting we had scheduled for a different rule,¹ so we are glad you are willing to hear EPPC’s input on this rule.

Our comments below generally focus on EEOC’s anticipated decision to promulgate rules under the Pregnant Workers Fairness Act (“PWFA”), 42 U.S.C. 2000gg, which will likely define “related medical conditions” to include abortion. We understand that prominent abortion groups, such as Planned Parenthood and NARAL Pro-Choice America, strongly advocated for the PWFA and others have already begun claiming that the PWFA protects women who seek out abortions.²

More recently, the Administration’s allies have been confidentially asserting that the PWFA covers abortion:

- **ACLU:** “Does PWFA require accommodation of abortion? Yes. An employee who needs accommodation for abortion healthcare is seeking accommodation for a limitation ‘related to, affected by, or arising out of pregnancy,’ as required by PWFA.”³
- **Pregnant@Work:** “The Pregnant Workers Fairness Act gives employees a right to request and receive ‘reasonable accommodations’ that they need due to pregnancy and related conditions.

¹ Rachel Morrison, *Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion*, *National Review*, (Oct. 8, 2021), <https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-tofund-big-abortion/>.

² Planned Parenthood Applauds House Passage of Pregnant Workers Fairness Act, <https://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-applauds-house-passage-of-pregnant-workers-fairness-act> and NARAL Pro-Choice America Praises House Passage of the Pregnant Workers Fairness Act, <https://www.prochoiceamerica.org/2020/09/17/naral-pregnant-workers-fairness-act/>.

³ ACLU, “What is the Pregnant Worker’s Fairness Act?”/https://wp.api.aclu.org/wp-content/uploads/2023/06/PWFA-ACLU-CWLL-explainer.pdf.

Your employer cannot fire, harass, or punish you for asking for time off for abortion or pregnancy loss, or for taking it.”⁴

- **Planned Parenthood:** cites with approval an article on the PWFA by The 19th*, which states, “Your boss now has to accommodate pregnant workers, from morning sickness to abortion care.”⁵
- **National Women’s Law Center:** “An employer might be required to modify an employee’s schedule to allow time to attend a doctor’s appointment related to pregnancy or childbirth—for example, to address post-partum depression or to have an abortion.”⁶

To the extent that EEOC intends to interpret the PWFA as though Congress intended to cover abortions, we offer the following arguments for your consideration.

I. EPPC scholars support protections for pregnant workers but do not support the Administration’s efforts to advance abortion.

At the outset, we want to clarify that though we write in opposition to one aspect of EEOC’s anticipated rulemaking, we do not oppose the PWFA as a whole. Many scholars at EPPC have worked to advance protections for women in general and pregnant women in particular. For example, EPPC Fellow Patrick Brown directs the Life and Family Initiative at EPPC. This program is committed “to advance[ing] cultural remedies and propose robust public policies that support families and offer necessary aid to women facing unexpected pregnancies.”⁷ Along with other scholars at EPPC and throughout the pro-family movement, Patrick focuses on promoting family policies, especially ones that support pregnant women and mothers. Indeed, “EPPC is committed both to ensuring the equal protection of unborn children in the law and to providing concrete support to families by advancing a pro-life, pro-family agenda that takes our duties in justice to the unborn and to families seriously.”⁸

A number of EPPC scholars support public policies that aim to assist pregnant women and families. These policies include:

- The Child Tax Credit;
- A federal paid leave program that provides benefits to new parents;
- Fatherhood initiatives;
- Medicaid access for pregnant moms;

⁴ Pregnant@Work, “Abortion, Pregnancy Loss & Your Rights at Work: Frequently Asked Questions,” <https://pregnantatwork.org/faq-abortion-pregnancy-loss-and-work/#1658946077669-e206e6f5-621b>.

⁵ The 19th, “Your boss now has to accommodate pregnant workers, from morning sickness to abortion care,” <https://19thnews.org/2023/06/pregnant-workers-fairness-act-employer-accommodations/#:~:text=Your%20boss%20now%20has%20to,includin%20time%20off%20to%20recover>, cited at Planned Parenthood, “The Quickie: Pregnant Workers Fairness Act Goes Into Effect,” <https://www.plannedparenthoodaction.org/tipsheets/the-quickie-pregnant-workers-fairness-act-goes-into-effect>.

⁶ National Women’s Law Center, “Know your Rights: Pregnant Workers Fairness Act,” <https://nwlc.org/resource/know-your-rights-pregnant-workers-fairness-act/>.

⁷ <https://eppc.org/program/life-and-family-initiative>.

⁸ <https://eppc.org/program/life-and-family-initiative>.

- Success Sequence curricula;
- Reform the Earned Income Tax Credit;
- Honeymoon period for safety-net programs; and
- Other tax provisions.⁹

We disagree, however, with the claim made by many abortion advocates, including the Biden administration, that unlimited access to abortion is the *sine qua non* of women’s equality and women’s rights. This view is contradicted by a growing mountain of evidence that easy access to abortion is in many ways disadvantageous to women’s equality. It is also contradicted by the views of the earliest women’s rights advocates in our country. The suffragists understood that the full advancement of women would only be possible when the dignity of children, born and unborn, is protected.

A. EPPC scholars’ position on abortion.

A letter signed by multiple EPPC scholars, including EPPC’s President Ryan Anderson, articulates our position on abortion:

Every human being, born or unborn, is the bearer of profound, inherent, and equal worth and dignity. From the moment of a human being’s conception, he or she is morally entitled to legal protection from unjust lethal violence. This includes protection from acts in which the developing child’s death is not sought for its own sake but seems necessary to bring about some other goal—for instance, to avoid parenting the child in very difficult circumstances. In these cases, the child’s death is sadly the chosen means. If the child somehow survives, the procedure will have failed to achieve its end. And choosing an innocent human being’s death as a means (or end) is unjust.¹⁰

B. EPPC has already warned EEOC not to interpret PWFA to include abortion.

In December 2022, EPPC Fellow Rachel Morrison warned EEOC not to stray from the clear congressional intent of this bill. She asserts, “the federal government should not force any employer — pro-life, religious, or otherwise — to be in the business of facilitating abortion.”¹¹

II. Under the Supreme Court’s recent decision *Biden v. Nebraska* and the major questions doctrine, EEOC lacks statutory authority to extend the PWFA to cover abortion.

Before EEOC publishes its Proposed Rule, it must reexamine its legal analysis in light of the Supreme Court’s decision in *Biden v. Nebraska*, which provides much needed guidance for federal courts and for administrative agencies alike about agencies’ delegated authority from Congress to promulgate rulemaking.¹² *Biden v. Nebraska* expresses the Court’s “concerns over the exercise of administrative power”

⁹ Five Pro-Family Priorities for the 118th Congress and Beyond, <https://eppc.org/wp-content/uploads/2023/02/ifs-congress-familypriorities-final.pdf>.

¹⁰ Protecting the Unborn: A Scholars’ Statement of Pro-Life Principle and Political Prudence, <https://eppc.org/pro-life-principle-and-political-prudence/>.

¹¹ See Rachel Morrison, Pregnant Workers Fairness Act Protects Women but Promotes Abortion, National Review, <https://www.nationalreview.com/bench-memos/pregnant-workers-fairness-act-protects-women-but-promotes-abortion/>.

¹² The caselaw discussed in this section generally applies to executive agencies. The Administrative Procedure Act broadly defines “agency” to include independent commissions like the EEOC. 5 U.S.C. § 551(1). If the EEOC believes

and clarifies the criteria courts and federal agencies must use when determining whether Congress has delegated authority to address questions of “deep economic and political significance.”¹³

For the following reasons, we submit that the major questions doctrine leads to the conclusion that if Congress wanted to force employers to treat killing an unborn child as morally and legally equivalent to giving life to a child, it would have said so. Because Congress declined to address abortion in the PWFA, and because abortion is an issue of “deep economic and political significance,” *Biden v. Nebraska* makes clear that EEOC does not have the delegated authority to use this law to advance its interests regarding abortion access.

To the extent EEOC disagrees and interprets the PWFA to include a protected right to abortion, it is incumbent that the proposed rule explain why EEOC contends that its interpretation is lawful in light of the major questions doctrine.

A. Overview of the Major Questions Doctrine

The major questions doctrine “serves as an interpretive tool reflecting ‘common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.’”¹⁴ It addresses “the exercise of administrative power,” specifically situations where “the Executive seiz[es] the power of the Legislature.”

The major questions doctrine situates statutory text in context because “context is [] relevant to interpreting the scope of a delegation.”¹⁵ It is rooted in “commonsense principles of communication”:

Just as we would expect a parent to give more than a general instruction if she intended to authorize a babysitter-led getaway, we also ‘expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.’”¹⁶

This expectation of clarity is rooted in the basic premise that Congress normally “intends to make major policy decisions itself, not leave those decisions to agencies.” *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (CA DC 2017) (Kavanaugh, J., dissenting from denial of reh’g en banc). Or, as Justice Breyer once observed, “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters [for agencies] to answer themselves in the course of a statute’s daily administration.” S. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986); see also A. Gluck & L. Bressman, *Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 1003–1006 (2013).¹⁷

The major questions doctrine also acknowledges a basic feature of the federal government: the separation of powers embedded in our constitutional structure:

that the major questions doctrine does not apply to its actions, it should state and justify such position in its proposed rule.

¹³ *Biden v. Nebraska*, 600 U.S. __, __ (2023) (slip op. at 25) (cleaned up).

¹⁴ *Id.* (Barrett, J., concurring, slip op. at 5) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

¹⁵ *Id.* (Barrett, J., concurring, slip op. at 5).

¹⁶ *Id.* (Barrett, J., concurring, slip op. at 8) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

¹⁷ *Id.* (Barrett, J., concurring, slip op. at 9).

Because the Constitution vests Congress with “[a]ll legislative Powers,” Art. I, § 1, a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch. See *West Virginia v. EPA*, 142 S.Ct. 2587, 2609 (2022) (explaining that the major questions doctrine rests on “both separation of powers principles and a practical understanding of legislative intent”).¹⁸

In light of the separation of powers, courts expect “Congress to legislate on ‘important subjects’ while delegating away only ‘the details.’”¹⁹ “[W]hen it comes to the Nation’s policy, the Constitution the reins—a point of context that no reasonable interpreter could ignore.”²⁰

As shown below, when the Court’s major questions doctrine is applied to the issue at hand, trying to make the PFWA stretch to include abortion rights would be “the agency’s assertion of ‘highly questionable power’” that would go “beyond what Congress could reasonably be understood to have granted.”²¹

B. Abortion is an issue of profound “economic and political significance.”

The Supreme Court has recognized a number of relevant considerations when deciding whether a federal agency has overstepped the authority delegated to it by Congress. As relevant to our present concern—whether the Administration and the EEOC may use the PFWA to create a federal right to abortion—the most important factor is the Supreme Court’s recognition that “Congress could not have intended to delegate [] a decision of [significant] economic and political significance to an agency in [a] cryptic [] fashion.”²² In other words, Congress does not “hide elephants in mouseholes.”²³

Because the interpretation of the provision was “a question of deep ‘economic and political significance’ that is central to [the] statutory scheme,” we said, we would not assume that Congress entrusted that task to an agency without a clear statement to that effect. *Ibid.*²⁴

In such circumstances, we have required the Secretary to “point to ‘clear congressional authorization’” to justify the challenged program.²⁵

In *Biden v. Nebraska*, the Court noted that the debate over student loan cancellation “raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy.”²⁶ This description indeed sounds much like abortion, which is likewise a question of deep economic and political significance. As the Supreme Court noted in *Dobbs*, “Abortion presents a profound

¹⁸ *Id.*

¹⁹ *Id.* (Barrett, J., concurring, slip op. at 10) (quoting *Wayman v. Southard*, 10 Wheat. 1, 43 (1825)).

²⁰ *Id.*

²¹ *Id.* (Barrett, J., concurring, slip op. at 15) (quoting *West Virginia*, 597 U.S. at __ (slip op. at 20)).

²² *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

²³ *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

²⁴ *Biden*, 600 U.S. at __ (slip op. at 24) (quoting *Utility Air*, 573 U.S. at 324).

²⁵ *Id.* (slip op. at 25) (quoting *West Virginia*, 597 U.S. at __ (slip op. at 226)).

²⁶ *Id.* (quoting J. Stein, *Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers*, *Washington Post*, Aug. 31, 2022).

moral issue on which Americans hold sharply conflicting views.”²⁷ The Court in *Dobbs* also notes that the abortion issue has important economic consequences:

In *Casey*, the controlling opinion ... perceived ... that “people [had] organized intimate relationships and made choices that define their views of themselves and their places in society ... in reliance on the availability of abortion in the event that contraception should fail” and that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”²⁸

The justices in dissent agreed, quoting the same passage from *Casey* and stating that pregnancies “have enormous physical, social, and economic consequences.”²⁹ They predicted that the “The disruption of overturning *Roe* and *Casey* will therefore be profound.” It “diminishes women’s opportunities to participate fully and equally in the Nation’s political, social, and economic life. See Brief for Economists as *Amici Curiae* 13 (showing that abortion availability has “large effects on women’s education, labor force participation, occupations, and earnings” (footnotes omitted)).”³⁰ According to the dissent, the right to an abortion is “embedded in the lives of women—shaping their expectations, influencing their choices about relationships and work, supporting (as all reproductive rights do) their social and economic equality.”³¹

This Administration has declared the political and economic significance of abortion in similar terms.³²

C. Congress has never expressed an interest in advancing access to abortions.

We turn next to the unmistakable fact that Congress has never expressed an interest in advancing abortion access. While the administration is, of course, entitled to advocate for its policy objectives, it is inappropriate for the Department to use the Privacy Rule to undermine states’ rights, especially as Congress has not asserted a compelling interest in protecting access to abortion.

In the recent student loan forgiveness case, *Biden v. Nebraska*, the Supreme Court observed that “Congress is not unaware of the challenges facing student borrowers.”³³ It noted that in the 116th session of Congress alone (Jan. 2019-Jan. 2021), members introduced more than 80 student loan forgiveness bills and other student loan legislation.³⁴

The Court observed that the “sharp debates” over this controversial issue “stand in stark contrast” to the manner in which Congress passed the statute in question, the HEROES Act.³⁵ In this context, the Court found it impossible to imagine that Congress could have intended to give the Secretary of Education the

²⁷ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2240 (2022).

²⁸ *Dobbs*, 142 S. Ct. at 2238–39 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992)).

²⁹ *Dobbs*, 142 S. Ct. at 2338 (Breyer, J., dissenting).

³⁰ *Id.* at 2343–44.

³¹ *Id.* at 2349.

³² See Rachel Morrison, The Biden Administration’s Post-*Dobbs*, Post-*Roe* Response, Federalist Society, July 13, 2022, <https://fedsoc.org/commentary/fedsoc-blog/the-biden-administration-s-post-dobbs-post-roe-response>.

³³ *Biden*, 600 U.S. at __ (slip op. at 22).

³⁴ *Id.*

³⁵ *Id.*

authority to “abolish \$430 billion in student loans, completely canceling loan balances for 20 million borrowers.”³⁶ To the contrary, the Court determined that a “‘A decision of such magnitude and consequence’ on a matter of ‘earnest and profound debate across the country’ must ‘res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.’”³⁷

Applying this framework to abortion and the PWFA yields the same conclusion. Just as Congress has passed on opportunities to pass a law forgiving student loans, it has likewise passed on opportunities to pass laws advancing an interest in abortion. Since the Supreme Court decided *Dobbs*, the following bills have been introduced in Congress, none of which have become law:

- Women’s Health Protection Act of 2022 (HR 8296), aimed at preserving access to abortion nationwide at the federal level;
- Ensuring Access to Abortion Act of 2022 (HR 8297), intended to protect the right to travel to seek access to abortion and would prohibit anyone from restricting or hindering an individual’s ability to cross state lines to obtain an abortion in a state where it is legal to do so.
- Travel for Care Act (H.R.3132)
- Reproductive Health Travel Fund Act (S.2152)
- Protecting Service Members and Military Families’ Access to Reproductive Care Act of 2023 (S.1610)

None of these bills have passed into law. More broadly, *Congress has never passed a law explicitly promoting abortion.*

The Congress’ failure to advance an interest in ensuring access to abortion stands in sharp contrast to Congress’ clear actions to *protect* employers from federal abortion mandates. Congress has repeatedly and expressly passed legislation saying abortion cannot be forced on people, including employers. The following are illustrative examples of how clearly and how emphatically Congress has declared its interests in this area:

- **Hyde Amendment:** “None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion.”³⁸
- **Greenwood Amendment:** “That amounts provided to said projects under such title shall not be expended for abortions, that all pregnancy counseling shall be nondirective, and that such amounts shall not be expended for any activity (including the publication or distribution of literature) that in any way tends to promote public support or opposition to any legislative proposal or candidate for public office.”³⁹
- **Weldon Amendment:** “None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the

³⁶ *Id.*

³⁷ *Id.* (quoting *West Virginia*, 142 S.Ct., at 2616, 2620 (citation omitted)).

³⁸ 42 U.S.C. § 18023.

³⁹ *See, e.g.*, <https://www.congress.gov/104/plaws/publ134/PLAW-104publ134.pdf>.

basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.”⁴⁰

- **Livingston Amendment:** “That in awarding grants for natural family planning under section 104 of the Foreign Assistance Act of 1961 no applicant shall be discriminated against because of such applicant's religious or conscientious commitment to offer only natural family planning.”⁴¹
- **Lowey Amendment:** “Nothing in this section shall be construed to require coverage of abortion or abortion-related services.”⁴²
- **Humphrey Amendment:** “None of the funds appropriated under this title shall be used to require any person to perform, or facilitate in any way the performance of, any abortion.”⁴³

These declarations of Congressional intent are all the more important because they are not one-time deals: the amendments listed above have been passed every fiscal year by Congress since their first enactment.

D. Congress decided against protecting abortion explicitly in the PWFA.

Just as Congress has declined to pass a myriad of bills intended to protect abortion access, Congress declined to explicitly protect abortion in the PWFA. During the debates in committee and on the floor, senators raised concerns about the bill being used by EEOC to promote abortion.⁴⁴ The sponsors of the bill repeatedly denied that the PWFA covered abortion and likewise denied that the PWFA would give EEOC the delegated authority to extend the law to cover abortion:

- “Under the Pregnant Workers Fairness Act, the Equal Opportunity Employment Commission, the EEOC, could not — could not — issue any regulation that requires abortion leave, nor does the act permit the EEOC to require employers to provide abortions in violation of state law.”
– Senator Bob Casey (D)
- “I reject the characterization that this would do anything to promote abortion.”
– Senator Bill Cassidy (R)
- “[T]he purpose of the [PWFA] is to help pregnant mothers in the workplace receive accommodations so that they can maintain a healthy pregnancy and childbirth. Therefore, I want to make clear for the record that the terms “pregnancy” and “related medical conditions,” for which accommodations to their known limitations are required under the legislation, do not include abortion. On December 8, the sponsor of this legislation, Senator Bob Casey stated on the Senate floor as follows: ‘I want to say for the record, however, that under the act, under the Pregnant Workers Fairness Act, the Equal Opportunity Employment Commission, the EEOC, could not—could not—issue any regulation that requires abortion leave, nor does the act permit the EEOC to require employers to provide abortions in violation of State law.’ Senator Casey's

⁴⁰ See, e.g., <https://www.congress.gov/108/plaws/publ447/PLAW-108publ447.pdf>.

⁴¹ See, e.g., <https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg1783.pdf>.

⁴² See, e.g., <https://www.govinfo.gov/content/pkg/PLAW-106publ58/html/PLAW-106publ58.htm>.

⁴³ See, e.g., <https://www.congress.gov/bill/117th-congress/house-bill/2617/text>.

⁴⁴ See, e.g., <https://www.congress.gov/117/crec/2022/12/08/168/191/CREC-2022-12-08-senate.pdf>, <https://www.c-span.org/video/?511626-2/house-debate-pregnant-workers-bill>, and <https://www.congress.gov/congressional-record/volume-167/issue-84/house-section/article/H2321-3>.

statement reflects the intent of Congress in advancing the Pregnant Workers Fairness Act today. This legislation should not be misconstrued by the EEOC or Federal courts to impose abortion-related mandates on employers, or otherwise to promote abortions, contrary to the intent of Congress.”

– Senator Steve Daines (R)⁴⁵

Additionally, PWFA sponsors represented on multiple occasions that religious and moral employers would not be forced to violate their consciences. For example:

- “Is it possible that this law would permit someone to impose their will upon a pastor, upon a church, upon a synagogue, if they have religious exemptions? The answer is, absolutely no. . . . The Title VII exemption, which is in federal law, remains in place. It allows employers to make employment decisions based on firmly held religious beliefs. This bill does not change this.”
– Senator Bill Cassidy (R)

Congress’ decision not to cover abortions in the PWFA is not only reflected in statements from legislators. Its intent is also found in the law’s text.

When Congress wishes to clarify that it wishes a law to address situations surrounding abortions, it knows how to do so. Consider, for example, the FACE Act, 18 U.S.C. § 248. This law does not guarantee access to abortions or subsidize abortions, but it does express Congress’ interests in preventing people from physically impeding from or intimidating others out of entering houses of worship and abortion clinics. In this context, Congress defined “reproductive health services” to include “services relating to the human reproductive system, including services relating to pregnancy *or the termination of a pregnancy*.”⁴⁶

This clear statement in the FACE Act stands in sharp contrast to the language Congress chose in the PWFA. Whereas the FACT ACT covers “services relating to pregnancy *or the termination of a pregnancy*,” the PWFA simply covers “pregnancy, childbirth, *or related medical conditions*.” In the PWFA, even in the wake of the *Dobbs* decision, Congress declined to use the unambiguous language it used in the FACE Act. The PWFA contains a definitions section, 42 U.S.C. § 2000gg, but declined to state clearly that it wanted, or that it was delegating to the EEOC the authority, to use the force of law to compel employers to make accommodations for employees that wanted to terminate the lives of their unborn children.

E. Conclusion

If Congress had passed the PWFA before June 2022, EEOC would at least have been able to argue that Congress’ failure to mention abortion simply reflected its presumption that women had a constitutional right to an abortion. But the PWFA passed after the Supreme Court decided *Dobbs*. If Congress had wanted to force employers to accommodate abortion or had wanted to express an interest in abortion access more broadly, the PWFA would have been an obvious occasion for Congress to do so. The PWFA would have been a perfect occasion for Congress to declare its interest in ensuring that women cannot be discriminated against because they choose to terminate the life of their unborn child. However, Congress did not choose to declare such an interest. The Supreme Court’s recent emphasis on the major questions doctrine emphasizes the legal significance of Congress decision, months after this Administration declared its intention to protect as broadly as possible women’s ability to terminate their unborn children, not to specifically protect abortion in this law.

⁴⁵ See <https://www.congress.gov/congressional-record/volume-168/issue-200/senate-section/article/S10081-2>.

⁴⁶ 18 U.S.C. § 248(e)(5).

To contend that there is a compelling governmental interest in abortion, the EEOC must first show that there is a governmental interest in abortion. It is axiomatic that the government cannot have a compelling interest in abortion access if it has not expressed any interest in abortion access at all. That interest must be found in an act of Congress.

Therefore, if the EEOC believes that Congress has declared that the federal government has a compelling interest in protecting women's access to abortion, it should say so in its proposed rule. In order to make this argument, EEOC must point to Congressional action that indicates such an interest.

Otherwise, a proposed rule that attempts to stretch the PWFA to cover abortion would expose the Administration to yet another slap-down under the major questions doctrine:

The [EEOC's] assertion of administrative authority has "conveniently enabled [it] to enact a program" that Congress has chosen not to enact itself.⁴⁷

III. EEOC must ensure that its regulations protect employers' civil rights.

To the extent that EEOC still proceeds with proposed rulemaking that would interpret the PWFA to cover abortion, EEOC must make sure that its proposed rulemaking takes into account employers' own rights under the First Amendment and federal law. Attempting to force employers to accommodate employees that wish to terminate the lives of their unborn children would most clearly implicate employers' rights to free speech and religious exercise.

A. Using the PWFA to advance the Administration's abortion agenda would raise free speech concerns.

Forcing employers to adopt policies that treat abortions the same as childbirth might impermissibly coerce speech in violation of the First Amendment's Free Speech Clause. At the end of the term, the Supreme Court decided *303 Creative v. Elenis*, which reaffirmed that under the First Amendment's free speech clause, government cannot coerce employers to voice its preferred message. That constitutional right is applicable here, as many religious and non-religious employers have, as a key part of their identity, their moral opposition to abortion. EEOC cannot use the PWFA to force employees to communicate to their employees and the broader world that intentionally killing an unborn child is the moral and ethical equivalent of caring for an unborn child.

As the Supreme Court recently held in *303 Creative v. Elenis*, "the government may not compel a person to speak its own preferred messages."⁴⁸ This right includes not only the right to control one's speech; it also controls the right to exclude unwanted messages.⁴⁹

While most employers who would object to a federal abortion accommodation mandate would do so on religious grounds, the Administration is aware that other employers oppose abortion on secular moral grounds. As HHS acknowledged in a recent Proposed Rule regarding Section 1557 of the Affordable Care Act, secular organizations have brought and won lawsuits seeking relief from federal agencies' efforts to coerce them into treating abortifacient drugs and devices as if they were akin to other drugs intended to

⁴⁷ *Biden*, 600 U.S. at ___ (slip op. at 21-22) (quoting *West Virginia*, 142 S.Ct., at 2614).

⁴⁸ *303 Creative v. Elenis*, 600 U.S. ___, ___ (2023) (slip op. at 8).

⁴⁹ *Id.* (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995), *Boy Scouts of America v. Dale*, 530 U. S. 640 (2000)).

restore health.⁵⁰ Indeed, for secular groups like March for Life whose very identity is bound up with the pro-life message, an abortion accommodation mandate arguably violates their “acts of expressive association.”⁵¹

Whereas *303 Creative* held that an employer’s right to free speech take precedence over Colorado’s public accommodations law, a free speech claim brought against the EEOC’s PWFA regulations would be much easier to win, given that Congress has not indicated that it shares the Administration’s goal of accommodating women who choose to terminate the life of their unborn child.

Any proposed rule under PWFA must take into account concerns that defining the law to cover abortion would raise important implications about employers’ free speech rights, especially in light of the Supreme Court’s clarifying decision in *303 Creative*.

B. Using the PWFA to advance the Administration’s abortion agenda would raise religious liberty concerns.

Second, if EEOC nonetheless proceeds to define “related medical condition” to include abortion, it should take heed of other important recent court decisions regarding employers’ religious liberty rights. Though Congress may not have incorporated Title VII’s religious liberty protections into the PWFA, the law remains subject to the Religious Freedom Restoration Act (RFRA) and the First Amendment’s Free Exercise Clauses, each of which protect employers’ religious liberty against agency actions.

The Fifth Circuit recently addressed the relationship between Title VII and RFRA in *Braidwood v. EEOC*, a lawsuit brought by religious for-profit and non-profit employers seeking relief from the EEOC’s efforts to expand Title VII to cover all discrimination on the basis of sexual orientation and gender identity. *Braidwood* brought suit because it determined that the EEOC’s efforts to force the business to employ transgender people or people in same-sex relationships his would hinder its religious identity and witness and make it complicit in sin.⁵³

Braidwood brought a variety of legal claims, but the Fifth Circuit focused on its claim under the Religious Freedom Restoration Act (RFRA), the same law that served as the basis of the Supreme Court’s decision in *Hobby Lobby*. As in *Hobby Lobby*, the plaintiff bore the initial burden of showing that the law at issue substantially burdens its religious exercise, which includes showing that it has a religious identity.

The Fifth Circuit had no trouble finding that *Braidwood* had satisfied its burden to show that “applying Title VII substantially burdens its ability to practice its religious faith.”⁵⁴ “Being forced to employ someone to represent the company who behaves in a manner directly violative of the company’s convictions is a substantial burden and inhibits the practice of *Braidwood*’s beliefs.”⁵⁵

The Fifth Circuit then found that EEOC had failed to show that it had a compelling interest in denying *Braidwood* an exemption to accommodate its religious exercise. EEOC had not “even attempt[ed] to argue the point outside of gesturing to a generalized interest in prohibiting all forms of sex discrimination in every potential case. Moreover, even if we accepted the EEOC’s formulation of its compelling interest, refusing to exempt *Braidwood*, and forcing it to hire and endorse the views of employees with opposing

⁵⁰ 88 Fed. Reg. 7236, 7239 (Feb. 2, 2023) (citing *March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015)).

⁵¹ *303 Creative*, 600 U.S. at __ (slip op. at 8).

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⁵³ *Id.* at 919.

⁵⁴ *Id.* at 938.

⁵⁵ *Id.*

religious and moral views is not the least restrictive means of promoting that interest.”⁵⁶ In light of the above, the court affirmed the district court’s ruling “that Braidwood is statutorily entitled [under RFRA] to a Title VII exemption.”⁵⁷

If a court finds the PWFA is not neutral or generally applicable, it would also be vulnerable to a challenge under the free exercise clause. As the Supreme Court has made clear in recent years, “[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise.”⁵⁸

At least one district court has found that Title VII is not generally applicable under this standard as it contains secular exemptions, including its exemption for small employers and for employer on or near Indian reservations.⁵⁹ The court found that the government’s claim, that it “had an interest in eradicating all forms of discrimination” was “undercut by their willingness to grant exemptions for other purposes.”⁶⁰ “Since Defendants extend these exemptions to nonreligious decisions, they must treat requests for religious exemptions the same.”⁶¹ Under this same analysis, the PWFA is also subject to strict scrutiny, as it likewise exempts certain classes of secular employers.⁶²

Given that countless non-profit and for-profit employers oppose the Administration’s pro-abortion agenda on religious grounds, and would certainly object to EEOC’s efforts to coerce them into supporting the Administration’s agenda, any Proposed Rule must take into account recent developments protecting employers’ civil rights under RFRA and the free exercise clause.

IV. The Department must consider the market and societal costs of this proposal.

The Administrative Procedure Act requires EEOC to consider the costs associated with its Proposed Rule. In this instance, we submit that EEOC must account for the following costs:

- Irreparable loss of life to unborn who are killed via abortion as a result of abortion required or promoted by Proposed Rule.
- Irreparable harm caused by the Proposed Rule’s chilling of the free speech of employers that wish to communicate through their words and their conduct that they oppose the intentional killing of innocent human life, including the lives of the unborn.
- Irreparable harm caused by the Proposed Rule’s interference with the constitutional and statutory rights of employers whose religious exercise would be substantially burdened by a law that attempts to coerce them into accommodating abortion access.

V. The Department must consider analytical approaches when rulemaking.

⁵⁶ *Id.* at 940.

⁵⁷ *Id.*

⁵⁸ *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571, 612–13 (N.D. Tex. 2021) (quoting *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021)).

⁵⁹ *Id.* at 613.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 42 U.S.C. § 2000gg(2) (defining “covered entity” under the PWFA).

EEOC’s rulemaking under the PWFA will almost certainly count as major rulemaking, which makes the Proposed Rule subject to strict scrutiny. EEOC must therefore provide both a benefit-cost analysis and a cost-effectiveness analysis for its Proposed Rules. Furthermore, rulemaking under the PWFA will have a significant import for federal-state regulations. The civil rights goals of these rules make it particularly apposite to perform a cost-effectiveness analysis.

EEOC must also identify a valid effectiveness measure apriori to represent the expected social, legal, and economic outcomes of its Proposed Rule. The Commission needs to identify what measure of its goals are and how reasonable they are. The need to identify the need for the rule to prevent civil rights abuses also presumes the need and possibility of identifying such an effectiveness measure.

The cost-effectiveness analysis for the Proposed Rule needs to explain how the civil rights goals will be achieved based on likely behavior in response to the regulation. Given the manner in which religious employers—tax-exempt and otherwise—have responded to other agencies’ efforts to force them into facilitating contraceptives, abortifacients, and “gender transition” procedures against their religious convictions, it would be unreasonable for EEOC to presume that objecting religious employers will simply roll over and comply with the Proposed Rule. Given that a sizable number of American employers would refuse to comply with an abortion accommodation mandate, the Proposed Rule needs to anticipate how or whether its Proposed Rule is anticipated to meet the EEOC’s stated civil rights effectiveness measure.

VI. The Department must identify and measure the benefits and costs of this proposal.

EEOC’s Proposed Rule must calculate the cost of its proposal, including any impact it may have in exacerbating existing labor shortages and negative effects on the economy more generally.

VII. Other specialized analytical requirements the Department must consider when proposing this rulemaking.

EEOC must also take into account the following:

- ***Federalism.*** The rule has significant impacts on federalism and preemption of state and local law.
- ***Tribal Consultation.*** The agency should consult and coordinate with Tribal governments concerning the impacts of this rule under Executive Order 13,175. President Biden also required tribal consultation in his January 26, 2021, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships.

CONCLUSION

We urge OIRA to ensure that the statutory and regulatory process is upheld and that the proposed rule has sufficient legal and economic analysis that is rational, reasoned, and sufficiently supported by actual need, and not political, rushed, or prejudged.

Sincerely,

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