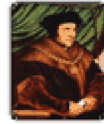
CHRISTIAN LEGAL SOCIETY



Thomas More SOCIETY

NAE | National Association of
Evangelicals

To: Equal Employment Opportunity Commission

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From: Christian Legal Society
Thomas More Society
Christian Medical & Dental Associations
Council For Christian Colleges & Universities
National Association of Evangelicals

Date: Tuesday, October 10, 2023

RE: Proposed Rule To Implement The Pregnant Workers Fairness Act (Published 8-11-2023)

**Submitted electronically via Federal Rulemaking Portal: https://regulations.gov*
**Format: Microsoft Word*

The undersigned organizations commend the Congress and the President on enactment of a law protecting women and their unborn children. We also affirm the Commission for dutifully proposing regulations that would vigorously implement the laudable purposes of the Pregnant Workers Fairness Act (PWFA).

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We comment specifically on two issues in the NPRM: A) the unjustifiable inclusion of elective abortion as a "related medical condition" that covered employers must accommodate, and B) the importance of clarifying in the final regulations the Title VII religious organization exemption as it applies in the context of the PWFA.

A. Congress did not provide the authority to the Equal Employment Opportunity Commission ("EEOC" or "the Commission") to interpret the PWFA's term "related medical condition" to include elective abortion. Rather, Congress made it clear that elective abortion was not a circumstance covered by the PWFA. Senator Bob Casey, lead sponsor of the bill in the Senate, stated on the Senate floor: "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."[1] This statement was later endorsed and described as the intent of Congress by Sen. Daines: "Senator Casey's 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."[2] No Senator objected to that characterization.[3]

When Congress wishes to clarify that it wants a law to address situations surrounding abortions, it knows how to do so. Consider, for example, the Freedom to Clinic Entrances (FACE) Act, 18 U.S.C. § 248. This law does not guarantee access to abortions or subsidize abortions, but it does express Congress' interest in preventing people from physically impeding others 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."

This clear statement in the FACE Act stands in sharp contrast to the language Congress chose in the PWFA. Whereas the FACE Act covers "services relating to pregnancy or the termination of a pregnancy," the PWFA simply covers "pregnancy, childbirth, or related medical conditions."42 U.S.C. 2000gg(4), 2000gg-1. In the PWFA, even in the wake of the *Dobbs v. Jackson Women's Health* decision, 142 S. Ct. 2228 (2022), 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 the Act does not

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[1] 168 CONG. REC. 7050 (daily ed. Dec. 8, 2022) (statement of Sen. Bob Casey).

[2] 168 CONG. REC. S10081 (daily ed. Dec. 22, 2022) (statement of Sen. Steve Daines). *See also* the clarifying remarks of the Ranking Member on the Senate Health Education Labor & Pensions Committee. 168 CONG. REC. S7050 (daily ed. Dec. 8, 2022) (statement of Sen. Bill Cassidy).

[3] When the Senate Health Education Labor & Pensions Committee reported the PWFA out of committee by a vote of 19-2, Senator Patty Murray stated: "Too many pregnant workers still face pregnancy discrimination and are denied basic accommodations—like being able to sit or hold a water bottle—to ensure they can stay healthy and keep working to support themselves and their families. No one should be forced to decide between a healthy pregnancy and staying on the job—so we must pass the Pregnant Workers Fairness Act without delay." These comments clearly do not contemplate an intent to cover abortion.

delegate to the EEOC the authority to compel employers to make accommodations for employees that want to terminate the lives of their unborn children.

B. We also urge the Commission to clarify that the Religious Organization Exemption Congress enacted in Title VII (Section 702a) shields qualifying religious employers from the accommodation requirement to the extent that it requires accommodation contrary to their religious creed and conduct standards, including Commission investigations surrounding that carveout. To this end, we submit the following Comments to the questions put forth to the public by the EEOC at 88 Fed. Reg. 54746:

1. What accommodations provided under PWFA, 42 U.S.C. 2000gg-1, may impact a religious organization's employment of individuals of a particular religion, and what accommodations may not impact a religious organization's employment of such individuals.

These Commenting Organizations are not concerned with particular accommodations, but rather with the conduct that would trigger employer responsibility for accommodations. Specifically, we write to urge the Commission: 1) to amend the proposed rule expressly to exclude abortion from the definition of "related medical conditions" [Section A, above]; and 2) as the Commission proposes, to add "a rule that construes the PWFA as not requiring a religious entity to make any accommodation that would conflict with the entity's religion." 88 Fed. Reg. 54746 n.185.

For millennia, biblically observant branches of the Christian religion (many denominations and traditions), as well as many (if not most) other world religions, have considered elective abortion (that is, any abortion that is not necessary to save the physical life and health of the mother) to be the killing of innocent, sacred human life, contrary to God's will.

Many religious employers sincerely and logically desire to employ people of the same religion who uphold this view of the dignity and worth of each human being, born or unborn. As recognized by Congress in defining "religion"[4] when enacting Title VII, to hire people of the same religion may legitimately comprehend hiring only those who share and uphold in their personal conduct this practice and belief about abortion.

In the PWFA, Congress explicitly reserved for religious employers their rights under Title VII, including Section 702a's Religious Organization Exemption ("Section 702a").[5] The meaning of Section 702a is plain, and the exemption it provides is broad:

[4] "The term 'religion' includes all aspects of religious observance and practice, as well as belief." 42 USC 2000e-(j) [Section 701j of Title VII].

[5] 42 U.S.C. 2000-gg-5(b) (explicitly subjecting PWFA to Section 702a of Title VII) (cited in the NPRM at 88 Fed. Reg. 54746 (proposing 29 CFR 1636.7(b) ("Rule of Construction")).

> (a) Inapplicability of subchapter to certain aliens and employees of religious entities
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> > This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 USC 2000e-1 [Section 702 of Title VII].

"This subchapter" refers to Title VII - - all of it. In the Religious Organization Exemption, Congress thus excluded from the Commission's remit and jurisdiction anything falling within a religious organization's employment practices based upon religion. In Section 701j, Congress made plain and broad the scope of the "religion" being protected by 702a: "all aspects of religious observance and practice, as well as belief." 42 USC 2000e-(j). Moreover, Congress amended Section 702a in 1972 to eliminate "religious" as a modifier or limitation on the scope of "activities" protected by the exemption.[6]

Courts affirm this reading of Section 702. The leading case on the application of the Title VII exemptions to employee conduct is *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991). The Third Circuit placed particular emphasis on the impermissibility of a civil court, in the context of a religious employer, evaluating employee *conduct*:

> Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals *faithful to their [i.e., the organization's] doctrinal practices*, whether every individual plays a direct role in the organization's "religious activities." Against this background and with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the exemption broadly. We conclude that the permission to employ persons "of a particular religion" includes permission to employ only persons whose beliefs *and conduct* are consistent with the employer's religious precepts. Thus, it does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in *conduct regarded by the school as inconsistent with its religious principles.*

Id. at 951 (emphasis added).

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[6] Equal Employment Opportunity Act of 1972, Pub.L No. 92–261, § 3, 86 Stat. 103, 104; *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (agreeing with the district court that Congress' purpose in amending was to minimize governmental "interfer[ence] with the decision-making process in religions"); *Spencer v. World Vision*, 619 F. 3d 1109, 1117 (9th Cir. 2011), *amended and superseded by* 633 F.3d 723 (9th Cir. 2011).

Other courts have similarly concluded that the Title VII religious exemptions apply to employee conduct to which an employer has a religious objection. *Kennedy v. St. Joseph's Ministries*, 657 F.3d 189, 194 (4th Cir. 2011) ("Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices…. [P]ermission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."); *Hall v. Baptist Mem. Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (the Title VII exemptions have "been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer"); *see also Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 201 Cal. App. 4th 1041, 1052 (Cal. App. 2011) (citing *Kennedy* and *Hall* with approval for the proposition that the decision to employ persons "of a particular religion" under the Title VII exemptions includes the decision to terminate an employee whose conduct is inconsistent with the religious beliefs of the employer); *Saeemodarae v. Mercy Health Serv.*, 456 F. Supp. 2d 1021, 1039-40 (N.D. Iowa 2006) (Title VII exemptions allow religious employer to terminate employee whose conduct is inconsistent with religious beliefs of the employer); *Newbrough v. Bishop Heelan Catholic Sch.*, 2015 WL 759478 *12-13 (N.D. Iowa 2015) (citing *Little* and *Saeemodarae* for the same proposition).

Judge Brennan on the United States Court of Appeals for the Seventh Circuit recently summarized the proper reading of Section 702:

> The debate as to whether the exemption applies is with the qualifying clause: "with respect to the employment of individuals of a particular religion." § 2000e–1(a). Under Title VII, "religion" is a defined term that "includes all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). But who decides the requisite religious belief, observance, or practice? And what must courts do when a covered employer supplies a religious reason for an adverse employment decision that implicates a protected class other than religion? These questions reveal the fault lines when considering the statutory text, caselaw, and the parties' arguments. Fitzgerald posits that the "religion" referenced in the exemption is the individual's religion. But were that the focus, the exemption would read differently, as the "individual's religion." Instead, the exemption states, "individuals of a particular religion." § 2000e–1(a) (emphasis added). "Of" in ordinary usage has both a possessive and a descriptive meaning, and to choose between the two, context is instructive. Of, GARNER'S MODERN ENGLISH (4th ed. 2016). The term "particular" in the phrase "individuals of a particular religion" already hints at a religious employer's selectivity in employment. Considered as a whole, the exemption's text applies only to a religious employer and only "with respect to the employment of individuals … to perform work connected with the carrying on by such [religious employer] of its activities." § 2000e–1(a). This context shows that the § 702(a) exemption is concerned with "alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339

> (1987). The focus is on a religious employer's ability to perform its religious activities.

Fitzgerald v. Roncalli High School, 73 F.4th 529, 535 (7th Cir. 2023) (Brennan, J., concurring)

Section 702a shields religious employers from all *other* Title VII claims, not just claims of religious discrimination. At least four decisions—two from federal circuit courts and two from federal district courts—have applied the Title VII exemptions as a defense to a Title VII claim of sex discrimination when the religious employer asserted a theological or doctrinal basis for its challenged employment decision. *See Curay-Cramer v. Ursuline Academy of Wilmington, Del.*, 450 F.3d 130 (3d Cir. 2006); *E.E.O.C. v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980); *Maguire v. Marquette Univ*., 627 F. Supp. 1499 (E.D. Wis. 1986), *aff'd in part on other grounds*, *vacated in part*, 814 F.2d 1213 (7th Cir. 1987); *Bear Creek Baptist Church v. E.E.O.C.*, 571 F. Supp. 3d 571 (N.D. Tex. 2021).

In a case decided just last year, Circuit Judge Frank Easterbrook, concurring, noted that when religious employer exemptions apply, they shield the employer from *all* claims under Title VII, not just claims of religious discrimination. *Starkey v. Roman Catholic Archdiocese of Indianapolis*, 41 F.4th 931 (7th Cir. 2022). Judge Easterbrook observes that some courts have mistakenly interpreted Section 702(a) to apply only to claims of discrimination based on religion. He notes, as we do, that religious organizations are not categorically exempt from Title VII. But he emphasizes, with a certain incredulousness that more courts were not picking up on this straightforward textual point, that "when the [adverse employment] decision is founded on the employer's religious belief, then *all of Title VII drops out*." *Id.* at 946 (emphasis added).

The Commission's own Religious Guidelines note that Section 702a exempts employers from more than religious discrimination claims:

> Consistent with applicable EEOC laws, the prerogative of a religious organization to employ individuals "'of a particular religion'. . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."

EEOC, Compliance Manual on Religious Discrimination, issued 1/15/22, § 12.I.C.1, footnotes 76-78 and accompanying text, *available at* https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

The U.S. Department of Justice likewise has recognized that the Title VII religious exemptions apply to conduct and encompass more than a mere right to hire co-religionists:

> Under that exemption [702(a)], religious organizations may choose to employ only persons whose beliefs *and conduct* are consistent with the organizations' religious precepts. For example, a Lutheran secondary school may choose to

> employ only practicing Lutherans, only practicing Christians, or *only those willing to adhere to a code of conduct* consistent with the precepts of the Lutheran community sponsoring the school.

Memorandum from the Attorney General to All Executive Departments and Agencies, *Federal Law Protections for Religious Liberty* (Oct. 6, 2017), 82 Fed. Reg. 49668, 49670 (Oct. 26, 2017) at 6 (emphasis added), *available at* https://www.justice.gov/opa/press-release/file/1001891/download.

Therefore, Section 702a determines that Title VII shall not apply to—*i.e.*, the Commission cannot regulate—any religious organization with respect to the latter's employment practices that touch on ***any aspect of religious observance, practice, or belief*** (including a staff code of personal conduct that upholds the sanctity of human life) by ***any employee*** performing ***any activities*** of the organization—from CEO to facilities assistant—regardless of the form of discrimination (religious or otherwise).

Even though the PWFA explicitly incorporates this safe harbor for religious organizations,[7] the Commission's proposed implementing regulation refers to the EEOC's *Enforcement Guidelines on Pregnancy Discrimination*, and the latter include the "decision to have or not to have an abortion" in their definition of "related medical conditions." 88 Fed. Reg. 54721 n.51. If the Commission includes abortion within the definition and scope of pregnancy-related conditions that would trigger a religious employer's duty to accommodate, then the proposed regulation will directly clash with Title VII's Section 702a Religious Organization Exemption.

We urge that the final regulation address this entirely foreseeable problem by promulgating a protective regulatory provision. By so doing, the Commission will respect the express will of Congress in Section 702a, including the broad definition of "religion" it employs from the preceding Section 701j and the resulting wide scope of employment criteria that Section 702a allows religious employers.

The NPRM contemplates a case-by-case determination by the EEOC of whether a particular employer's decisions with respect to an employee's claim for an accommodation to have or pursue or recover from an elective abortion is protected by the Religious Organization Exemption. 88 Fed. Reg. 54746 (discussing "the Commission's case-by-case consideration of whether [42 U.S.C. 2000gg-5(b)'s incorporation of Title VII's Section 702a] applies to a particular set of facts"). Religious employers should not be subjected to such uncertainty, nor does it help employees know what their rights are. By the plain language of Section 702a, as just explained, a religious organization is fully justified in choosing not to accommodate an employee's intention or conduct of obtaining or seeking or recovering from an elective abortion. The EEOC will better protect the rights and interests of both religious employers and their employees and prospective

[7] 42 U.S.C. 2000-gg-5(b) [explicitly subjecting PWFA to Section 702a of Title VII) (cited in the NPRM at 88 Fed. Reg. 54746, which proposes 29 CFR 1636.7(b) ("Rule of Construction")].

employees by promulgating a regulatory provision that makes plain the boundaries set by the Title VII exemption.

We urge that the EEOC adopt in its Final Rule a solution that the NPRM itself mentions and that is related to the congressional action on the PWFA. The NPRM asks whether or not it should adopt "a rule that construes the PWFA as not requiring a religious entity to make any accommodation that would conflict with the entity's religion." 88 Fed. Reg. at 54746. We strongly recommend promulgation of such a regulatory provision. We further recommend the language proposed by Senator James Lankford that is quoted in the NPRM at footnote 185: "This division shall not be construed to require a religious entity described in Section 702(a) of the Civil Rights Act of 1964 to make an accommodation that would violate the entity's religion." *Id.* We strongly recommend adoption of such a provision, regardless of whether the EEOC proceeds with its proposed inclusion of elective abortion as a situation requiring accommodation.

2. How accommodations provided under PWFA, 42 U.S.C. 2000gg-1 may affect those individuals' performance of work connected with the religious organization's activities, and when they may not affect those individuals' performance of such work.

Under Title VII as incorporated into the PWFA, this very question is inappropriate.

When Congress gave "religion" a broad definition (Section 701j, *supra* note 2), it expressed an intent to keep the government (including the Commission created by Title VII) away from interfering with the hiring decisions and job descriptions of "religious corporations, associations, educational institutions and societies." Section 702a, *supra*. That wide berth recognizes that religious belief often determines a broad range of behaviors, activities, and practices. For many Americans, religion is not just a creed or an hour a week spent in a church or temple.

The work connected with [carrying on] a religious organization's activities can require the consistent behavior and witness of every co-religionist employee, in every job—all conduct and every moral choice. By reserving to religious employers the right to consider religion in their employment decisions, Congress left it to those religious employers to consider whether a candidate's religious belief affects her employment responsibilities, as well as whether her conduct and choices corroborate or contradict the sincerity of what an employee or job applicant may say she believes.

Because Congress said in Section 701j that protected "religion" "includes "all aspects of religious observance and practice, as well as belief":

- Congress struck the balance between the religious employer's exclusive prerogative on the one hand and its duty to accommodate an individual employee on the other; and

- Congress found that balance in favor of the religious employer being able to prefer employees who practice and observe the religion just as the religious employer does.

Because of the wide protections of Sections 701j and 702a, it is inappropriate for the Commission to even inquire into how, where, why, or in what circumstances an employee's personal conduct might affect her performance of her employment at a religious organization. Title VII, as incorporated into the PWFA, clearly reserves those judgments to each religious employer.

In other words, by asking this question into the connection between any accommodation and the employee's particular job performance, the Commission is proposing an illegal invasion into the employer's practice of its religion.

To clarify Congress' intent not to extend the Act to reach abortion and its intent that the Commission construe it in coordination with Section 702a, the undersigned respectfully urge the Commission: 1) to amend the proposed rule expressly to exclude abortion from the definition of "related medical conditions"; and 2) as the Commission proposes, to add "a rule that construes the PWFA as not requiring a religious entity to make any accommodation that would conflict with the entity's religion." 88 Fed. Reg. 54746 n.185.

3. <u>When the prohibition on retaliatory or coercive actions in PWFA, 42 U.S.C. 2000gg2(f), may impact a religious organization's employment of individuals of a particular religion, and when it may not impact a religious organization's employment of such individuals</u>.

As discussed above in questions 1 and 2, if abortion remains something that must be accommodated, then the proposed rule could punish a religious employer for hiring and managing according to its religious convictions, even though the religious employer's right to do so is guaranteed by Title VII[8] and the First Amendment.[9]

If a religious employer exercised its religious belief against abortion, it would expose itself to the Commission's and courts' judgments that it was "retaliatory" under the proposed rule. Thus, the religious organization could find itself spending substantial

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[8] *Corp. of Presiding Bishop*, 483 U.S. at 336 (agreeing with the district court that Congress' purpose was to minimize governmental "interfer[ence] with the decision-making process in religions"); *Spencer*, 619 F. 3d at 1117, *amended and superseded by* 633 F.3d 723 (9th Cir. 2011).

[9] *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023); *Watson v. Jones*, 13 Wall. 679, 733 (1872); *Demkovich v. St. Andrew Apostle Parish*, 3 F.4th 968, 975 (7th Cir. 2021) (church autonomy is both Religion Clauses "work[ing] in unison" to protect "employment rights of religious organizations."); *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013) (quoting Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1388-89 (1981)) (the church autonomy doctrine protects their right to "'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'").

human resources as well as money on legal fees and damages to vindicate its well-established rights.

To clarify Congress' intent not to extend the PWFA to reach abortion and its intent that the Commission construe it in coordination with Section 702a, the undersigned respectfully urge the Commission: 1) to amend the proposed rule expressly to exclude abortion from the definition of "related medical conditions"; and 2) as the Commission proposes, to add "a rule that construes the PWFA as not requiring a religious entity to make any accommodation that would conflict with the entity's religion." 88 Fed. Reg. 54746 n.185. Either or both would help avoid this waste of charitably donated resources as well as avoid illegal actions by the Commission,

4. When prohibiting retaliatory or coercive actions as described in PWFA, 42 U.S.C. 2000gg-2(f), may affect those individuals' performance of work connected with the religious organization's activities, and when it may not affect those individuals' performance of such work.

Under the proposed rule, the Commission could punish a religious employer that "retaliates" against an employee by enforcing a conduct standard about killing unborn human life. This would obviously and profoundly affect both the subject employee's performance of work consistent with the employer's religion as well as the employer's right under the Section 702a exemption to employ those with the same religious observance, practice, and beliefs. The employee could violate with impunity a staff code of conduct prohibiting abortions, and the employer would risk legal liability if it did anything about that violation.

In this way, the proposed rule would usurp from the religious employer: 1) the determination of whether having an abortion complied with the employer's religious standard of conduct, and 2) the power to evaluate and reward or penalize the employee's work performance in this regard. In effect, the rule as proposed would remove abortion from the employer's religious conduct standards, no matter what the employer's religion says about abortion. This would ignore not only Section 702a of Title VII, but also the First Amendment Religion Clauses and the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4.

Title VII provides that the religious employer, not the employee or the Commission, has the right to judge whether employees are of the same religious practice and belief as the religious organization employer when they disclose their intent to abort their unborn child. The employee's compliance with the religious employer's religious standards of conduct is logically, legitimately, and *legally* a factor in determining the effectiveness of her performance of the activities of that organization.

To make clear that such determinations are not the Commission's prerogative, Congress amended Section 702a in 1972 to eliminate "religious" as a modifier or

limitation on the scope of "activities" protected by Section 702a.[10] The employer—not the Commission or a judge or jury—determines what work and employee conduct addressed by its religion advances the activities of the organization. That work could appear "religious" or "secular" to a third party; but whether an individual employee's work performance is affected by violating the religious organization's religious practices and beliefs about abortion is a decision reserved for the religious employer. It is that employer's religious practices, observances, and beliefs— "all aspects" of them—that Congress placed outside of "this subchapter" (Title VII) and beyond the Commission's authority to regulate.

To clarify Congress' intent not to extend the PWFA to reach abortion and its intent that the Commission construe it in coordination with Section 702a, the undersigned respectfully urge the Commission: 1) to amend the proposed rule expressly to exclude abortion from the definition of "related medical conditions"; and 2) as the Commission proposes, to add "a rule that construes the PWFA as not requiring a religious entity to make any accommodation that would conflict with the entity's religion." 88 Fed. Reg. 54746 n.185.

5. <u>The Commission also seeks comment regarding whether any of the above factual scenarios are expected to arise with such regularity that, to facilitate compliance with this provision, the public would benefit from a more detailed rule by the Commission than the case-by-case approach proposed and whether there are alternative interpretations of 42 U.S.C. 2000gg-5(b) of the PWFA that commenters believe, given their answers to questions 1-4, that the Commission should consider.</u>

Yes, as discussed, the public and the Commission would benefit from:

a) a sentence clarifying that "related medical condition" does not include elective abortion, and/or
b) "a rule that construes the PWFA as not requiring a religious entity to make any accommodation that would conflict with the entity's religion." 88 Fed. Reg. 54746 n.185.

If Congress had omitted Section 702a from Title VII, then greater detail from the Commission about how the proposed rule would operate might be appropriate and helpful. But Congress included Section 702a and its clear boundary line: "This subchapter shall not apply . . . ." Congress thereby drew a bright line where the Commission's regulatory power ended, leaving the religious employer's religious freedom unregulated.

So a case-by-case approach would NOT be helpful for religious organizations, because the interrogative process would exceed the power of the Commission, as argued above. The law does not empower the Commission to dissect or to dictate to religious employers what their religion permits or proscribes about the practices, observances, or beliefs of fellow believers.

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[10] *See supra* note 4 and accompanying text.

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Similarly, it doesn't matter how frequently or rarely any of the above might arise. To whatever extent the Commission's proposed rule would apply to abortion, it thereby exceeds the intent of Congress (to not include abortion) and it purports to usurp the exclusive right of religious employers to hire individuals sharing their religious practices and beliefs. If and when the rule did this, we respectfully submit that it would be *ultra vires* and a nullity.

To avoid illegal actions by the Commission, we respectfully urge the Commission to amend the proposed rule expressly to exclude abortion from the definition of "related medical conditions."

6. <u>The Commission also seeks comments regarding any alternative interpretations of PWFA, 42 U.S.C. 2000gg–5(b), that commenters believe, given their answers to questions 1–5, that the Commission should consider.</u>

"This chapter is subject to . . ." and "This subchapter shall not apply . . ." in 2000gg-5(b) and 2000e-1(a), respectively, are not ambiguous and call for no interpretation.

Section 2000gg-5(b) reads: "This chapter is subject to the applicability to religious employment set forth in section 2000e-1(a) of this title."

Section 2000e-1(a) reads: "This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

The plain meaning of 2000gg-5(b) is that the PWFA and these proposed regulations are subject to the Religious Organization Exemption in Title VII. The plain wording of that exemption removes from Title VII *any* regulation of the employment practices of religious corporations or associations to the extent the practices have to do with *any* aspect of religious observances, practices, or beliefs when hiring for *any* of their activities. Accommodating an employee's decision to have an abortion obviously may implicate one or more aspects of the religious beliefs of a religious employer. Therefore, the Section 702 exemption prohibits the Commission from including abortion in the scope of this proposed rule, at least as the rule would apply to religious employers covered by the exemption.

To clarify Congress' intent not to extend the PWFA to reach abortion and its intent that the Commission construe it in coordination with Section 702a, the undersigned respectfully urge the Commission: 1) to amend the proposed rule expressly to exclude abortion from the definition of "related medical conditions"; and 2) as the Commission proposes, to add "a rule that construes the PWFA as not requiring a religious entity to make any accommodation that would conflict with the entity's religion." 88 Fed. Reg. 54746 n.185.

<u>Expertise and Interests of the Signatories:</u>

Christian Legal Society ("CLS") is a national association of Christian attorneys and law students dedicated to glorifying God by nurturing Christian faith and discipleship within the legal profession, providing legal aid to those in need and protecting religious freedom and the sanctity of human life. Since 1975, CLS has done the latter through its Center For Law & Religious Freedom.

Thomas More Society ("TMS") is a national public interest law firm dedicated to restoring respect in the law for freedom of speech, religious liberty and for the protection of human life. A 501(c)(3) nonprofit incorporated in Illinois with offices in Chicago and Omaha, TMS pursues its purposes through civic education, litigation, and related activities. In this effort, TMS has represented many individuals and organizations in federal and state courts and filed numerous *amicus curiae* briefs with the aim of protecting the rights of individuals and organizations to communicate their political and social views, as well as to faithfully practice their religion, as guaranteed by the Constitution.

Christian Medical & Dental Associations® (CMDA) founded in 1931 is the largest Christian membership organization comprised of healthcare professionals serving throughout the United States and overseas. We provide programs and services supporting its mission to "change hearts in healthcare." CMDA is unequivocally pro-life.

Council for Christian Colleges and Universities (CCCU) is a higher education association representing over 185 institutions around the world, including more than 140 in the United States. Our institutions enroll approximately 520,000 students annually, with over 10 million alumni. The CCCU's mission is to advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth. As the leading national voice for Christian higher education, we provide a unified voice to highlight the contributions of our institutions, and of our students, to the common good.

National Association of Evangelicals (NAE) is a nonprofit association of around 40 evangelical Christian denominations representing more than 45,000 churches, as well as non-denominational churches, schools, charitable organizations, mission societies, and individuals. The NAE is the largest representative body of evangelical Christians and serves a constituency of millions.

<u>Signatory Organizations</u>:

CHRISTIAN LEGAL SOCIETY
Center For Law & Religious Freedom
Steven T. McFarland, Director
8001 Braddock Road
Springfield, VA 22151

THOMAS MORE SOCIETY
Mary Catherine Martin, Senior Counsel
309 W. Washington Street, Suite 1250
Chicago, IL 60606

CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS
Anna Pilato, Director, Federal Public Policy
P.O. Box 7500
Bristol, TN 37621

COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES
Shirley V. Hoogstra, President
321 Eighth Street NE
Washington, D.C. 20002

NATIONAL ASSOCIATION OF EVANGELICALS
Post Office Box 23269
Washington, DC 20026