ADVANCING **AMERICAN** FREEDOM

October 10, 2023

The Honorable Charlotte A. Burrows
U.S. Equal Employment Opportunity Commission
131 M Street NE, Washington, DC 20507

Re: ***Comments Regarding EEOC's Notice of Proposed Rulemaking Regarding Regulations to Implements the Pregnant Workers Fairness Act, RIN 3046-AB30 (Docket No. EEOC-2023-0004-0001)***

Below are comments from Advancing American Freedom ("AAF") on the Equal Employment Opportunity Commission's ("EEOC's") Proposed Rulemaking regarding Regulations to Implement the Pregnant Workers Fairness Act, RIN 3046-AB30, published in the Federal Register on August 11, 2023.

Introduction

AAF is a 501(c)(4) non-profit organization that advocates for conservative values and policies by developing innovative policy solutions, strategies, coalitions, and messaging that build upon the accomplishments of the last administration and expand freedom for all Americans.

AAF is deeply concerned that the EEOC is violating the will of the American people, the direction of Congress, and EEOC precedent in its proposed rule to implement the Pregnant Workers Fairness Act. Instead of following the express statutory language, the EEOC is blatantly violating the rule of law with a proposed rule that reflects nothing other than the political will of the Biden-Harris administration.

Specifically, this proposed rule ignores the plain sense of statutory language and expands the powers of a government agency in contradiction to the law's explicit and intended purpose. Further, the rule attempts to interpret statutes in a way that is antithetical to EEOC's own long-standing definition of "related medical condition," and violates the judicial standard set by *Auer v. Robbins* (1997) and narrowed in *Kisor v. Wilke* (2019).

This Rulemaking Turns the Plain-Language Meaning of the Statute on Its Head and Expands the Powers of the EEOC in Contradiction to the Law

Since the birth of the modern administrative state, administrative agencies have repeatedly flipped the plain-English definition of statutory language on its head to suit an administration's political agenda. One of the most egregious, the definition of "navigable" under the Clean Water Act's protections of "navigable waters of the United States," has been the subject of more than one case before the United States Supreme Court—especially when the EPA attempted to turn dry patches of desert sand into "navigable waters".[1]

This proposal from the EEOC represents something far more sinister. Here, we have an administration so thoroughly opposed to protecting the lives of unborn children that they are willing to turn the plain-language definitions of the Pregnant Workers Fairness Act (and, specifically, the definition of a "pregnancy-related medical condition") on their head to encompass the decision to terminate a pregnancy with an abortion.

The Biden Administration is taking a "whole of government" approach to its policy goals (as written about by numerous regulatory scholars, most-notably Wayne Crews at the Competitive Enterprise Institute).[2] The administration has attacked both religious freedom and rights to conscience in a number of different rulemakings already—from rulemakings at the Department of Health and Human Services[3] to the Department of Education[4]. Therefore, it comes as no surprise that the administration would be abusing yet another vehicle to advance their extreme pro-abortion position.

The Pregnant Workers Fairness Act (PWFA) is designed to protect pregnant workers from discrimination and ensure that they have reasonable accommodations when necessary. The purpose of the PWFA is to support women who are managing the physical and medical challenges that come with pregnancy, thereby promoting the overall welfare of both mother and child. However, this rulemaking's attempt to extend these regulations to cover women who seek out abortions, equating the two as "pregnancy-related medical issues," is a concerning overreach for several reasons.

Pregnancy is a natural process with a predictable sequence of physical changes, the successful goal of which is childbirth. Abortion, on the other hand, is a voluntary procedure to terminate a pregnancy by taking the life of the unborn child. The challenges a pregnant worker might face over several months are not the same as those a woman might suffer after an abortion. Lumping them together dilutes the specific protections that pregnant workers require.

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[1] *Sackett v. Environmental Protection Agency*, 598 U.S. ___ (2023)

[2] Crews, Wayne, *The Threat from Biden's 'Whole of Government' Regulatory Approach*, 10/26/22, https://cei.org/opeds_articles/the-threat-from-bidens-whole-of-government-regulatory-approach/, accessed 9/25/23

[3] United States Department of Health and Human Services Notice of Proposed Rulemaking, *Safeguarding the Rights of Conscience as Protected by Federal Statutes*, HHS-OCR-2023-0001-0001, Federal Register Number 2022-28505, posted January 5, 2023

[4] United States Department of Education Notice of Proposed Rulemaking, *Direct Grant Programs, State-Administered Formula Grant Programs Proposed Rule*, Docket ID ED-2022-OPE-0157, published February 22, 2023. (This rule is also known as the "Free Inquiry Rule".)

The essence of the PWFA is to ensure that pregnant workers are not forced out of their jobs or denied reasonable accommodations that would allow them to continue working while pregnant. By expanding the definition to include abortions, EEOC undermines the legislation's intended focus on pregnant women and their unique challenges.

In these comments, we outline just how out of step this proposal is—in terms of both the intent of the underlying statute and overall legal precedent. It is our strong opinion that this proposed rule should be rescinded.

EEOC has Substituted the Political Agenda of the Biden-Harris Administration for the Clear Intent of Congress

The theoretical purpose of the administrative state is to utilize the unique experience and education of "experts" to more efficiently carry out the will of Congress and the American people. Commissions like the EEOC are never meant to leverage the Administrative Procedure Act to effectuate a law against its own design. Yet that is precisely what the EEOC means to do here.

PWFA was designed by Congress to expand upon the principles set forth in the Americans with Disabilities Act ("ADA"). That is to say, it was meant to provide reasonable accommodations to pregnant mothers as they work to simultaneously provide for their families and carry their children to term.

The Act had the support of Republicans, Democrats, and clergy, as well as concerned citizens and special interest groups from both sides of the political spectrum. Even still, there was concern that the EEOC would attempt to force businesses to subsidize abortions as would this rule. However, statements from senators during the legislative process explicitly clarify that PWFA is not intended to expand access to abortion:

a. Sen. Bill Cassidy, R-LA, distinctly shut down the inclusion of abortion: ". . . I reject the characterization that [the PWFA] would do anything to promote abortion," and then characterized the bill as "pro-family, pro-mother, pro-baby, pro-employer, and pro-economy."[5]
b. Sen. Bob Casey, D-PA, followed: "I want to say for the record, however, that under the act, 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."[6]
c. Sen. Murray, D-WA, in urging her colleagues to pass the PWFA, alluded to very purpose of the legislation, which is to keep women from resorting to abortions: "[The PWFA] is a bipartisan bill that will make sure that no one is forced to choose between a job and a healthy pregnancy and everyone can get the reasonable workplace accommodations they need when they are pregnant."[7]

[5] 168 Cong. Rec 191, S7050 (2022).
[6] *Id.*
[7] *Id.* at S7049.

d. Sen. Daines, R-MT, on the Senate floor later that month, reiterated the Act's purpose: "[T]he purpose of the Pregnant Workers Fairness Act 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."[8]
e. Sen. Daines also endorsed the remarks of Sen. Casey (above): "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."[9]

But even if "related medication conditions" were meant to encompass abortions (and the above statements from members of Congress assure us they were not), this rulemaking even expands beyond the scope of reasonable accommodation according to Planned Parenthood (hardly a purveyor of pro-life policy). In discussing the post-abortion recovery process, Planned Parenthood states that "[y]ou can go back to work, school, driving, exercise, and most other normal activities the next day if you feel up to it."[10] This exceptionally quick turnaround time would suggest that very few (if any) accommodations would be needed post-abortion. Since no accommodation would be a reasonable accommodation, there is no need to mention abortion in the rule.

The EEOC Regulation's Inclusion of Abortion as a "Related Medical Condition" to Pregnancy Fails the *Auer* Deference Test, as Narrowed by *Kisor*

Auer deference is the practice of courts upholding agency interpretations of their own ambiguous regulations unless those interpretations are plainly erroneous or inconsistent with the regulation.[11] More recently, *Auer* deference was narrowed from the "plainly erroneous or inconsistent" test to a specified, six-step inquiry.[12] Often referred to as *Kisor* deference, this inquiry works as follows:

1) The regulation interpreted by the agency is "genuinely ambiguous";
2) The agency's interpretation of the regulation must be reasonable; and
3) The agency's interpretation meets the minimum threshold to warrant *Auer* deference. This is done by showing that:
    a. The agency's interpretation must be authoritative and official;
    b. The agency's interpretation should implicate its substantive expertise; and

[8] 168 Cong. Rec 200, S10081 (2022).
[9] *Id.*
[10] *What Can I expect after having an in-clinic abortion?*, Planned Parenthood (Sept. 15, 2023, 3:27 PM), https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures/what-can-i-expect-after-having-an-in-clinic-abortion.
[11] *Auer v. Robbins*, 519 U.S. 452 (1997).
[12] *Kisor v. Wilkie*, 139 S.Ct. 240 (2019).

c. The agency's interpretation should be fair and considered.

Under each step of the *Kisor* inquiry, the EEOC's proposed regulation fails, and therefore, should not warrant *Auer* deference.

I. EEOC's attempt to include abortion as a "Related Medical Condition" to be accommodated alongside pregnancy is "Genuinely Ambiguous"

Under the *Kisor* deference inquiry, "a court should not afford *Auer* deference unless, after exhausting all the "traditional tools" of construction . . . the regulation is genuinely ambiguous. A court must carefully consider the text, structure, history, and purpose of a regulation before resorting to deference. If genuine ambiguity remains, the agency's reading must still fall 'within the bounds of reasonable interpretation.'"[13]

The EEOC's attempt at defining "related medical conditions," as used in the PWFA, to include abortion *accommodations* is not only erroneous, but has created a "genuine ambiguity" in the term as they use it. All authority the EEOC claims for their definition is regarding *discrimination*. There was no ambiguity in the term until the agency attempted to include *accommodations* into its definition.

In the regulation itself, the EEOC claims authority for abortion accommodations, while citing federal cases that point only to the prevention of discrimination under Title VII.[14] All examples the agency lays out for "reasonable accommodations" point to women maintaining, or struggling with, their pregnancy or childbirth.[15] The one example in which the agency references abortion it acknowledges that "42 U.S.C. 2000gg-5(a)(2) makes clear that an employer-sponsored health plan is not required under the PWFA to pay for or cover any item, procedure, or treatment . . . For example, *nothing* in the PWFA requires or forbids an employer to pay for health insurance benefits for an abortion."[16] Without looking to any canon of statutory construction, and only to the text of the EEOC regulation itself, there is a genuine ambiguity to how the EEOC defines the term "related medical condition" within the phrase "pregnancy, childbirth, or related medical condition."

Once more looking to the phrase of "pregnancy, childbirth, and related medical conditions," and now applying the Negative-Implication Canon of statutory construction, we come to the same conclusion. Under the Negative-Implication Canon[17], the expression of one thing implies the exclusion of others, *expression unius est exclusion alterius*. By first stating "pregnancy" and "childbirth" before "related medical conditions" gives the clear implication that anything not having to do with pregnancy or childbirth is obviously not to be included in "related medical conditions." An abortion terminates a pregnancy by ending the life of the unborn child, a clear

[13] *Id*. at 241; *see also*, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); and, *Arlington v. FCC*, 569 U.S. 290, 296 (2013).
[14] 88 Fed. Reg. 154 at 54721 n.21.
[15] *Id*. at 54726.
[16] *Id*. at 54794 (emphasis added).
[17] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012), 107.

inversion of the conditions stated prior to the term "related medical conditions" that are to be accommodated by employers under the PWFA.

Using the Omitted-Case Canon[18], *casus omissus pro omisso habendus est*, which means that nothing is to be added to what the text states or reasonably implies, we come to the same result. Again, applying abortion to a list that specifies pregnancy and childbirth is unreasonable and counter to the clear, stated intent of the PWFA.

The EEOC's attempted redefinition of the term "related medical condition" in the PWFA phrase "pregnancy, childbirth, or related medical condition" has undoubtedly created a genuine ambiguity. The agency is desperately attempting to create such ambiguity into which it can cram abortion accommodations. The statutory language, according to all cited authority and precedent, does not contain authorization for such an addition. The PWFA, the federal cases cited, and common sense when reading the regulation proposal all lead to the same conclusion: the EEOC has attempted to create ambiguity where there is none in their attempt to force employers to make abortion accommodations.

II. The EEOC's inclusion of abortion accommodations in their proposed regulation is unreasonable

The EEOC's proposed regulation attempts to include abortion accommodations under the PWFA. The stated purpose of the PWFA is "to eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition."[19] Regarding this language, the EEOC states in their regulation proposal that:

> "[t]he PWFA uses the term "pregnancy, childbirth, or related medical conditions," which appears in Title VII's definition of sex. Because Congress chose to write the PWFA using the same language as Title VII, in the proposed rule the Commission gives the term "pregnancy, childbirth, or related medical conditions" the same meaning under the PWFA as under Title VII."[20]

However, in the preceding paragraph the EEOC states that their regulation includes a "non-exhaustive list" of examples that "the Commission has concluded *generally fall* within the statutory definition."[21] The Commission claims that such a *general* definition and examples come from what "Federal courts and the EEOC hav[ing] already concluded are part of the definition under Title VII as well as other conditions that are based on the expertise of medical professionals."[22]

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[18] *Id. at p. 93.*
[19] H.R. 1065, 117th Cong. (1st Sess. 2021).
[20] 88 Fed. Reg. 154 at 54721.
[21] *Id*. (emphasis added).
[22] *Id*.

Nowhere in the PWFA nor Title VII is there reference to "abortion" being encompassed in "pregnancy, childbirth, or a related medical condition."[23] The PWFA, as stated previously, was enacted to "ensur[e] reasonable workplace *accommodations* for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition."[24] Title VII protections against discrimination already exist. The PWFA requires that employers additionally make "reasonable accommodations" for "a qualified employee affected by pregnancy, childbirth, or related medical conditions."[25] However, these accommodations are meant only for women who maintain their pregnancy, go through with childbirth, or face a medical condition related to either.[26] In fact, out of the very examples laid out by the EEOC regulation proposal, every single one relates to women *maintaining their pregnancy*, not women who obtain an abortion.[27] Furthermore, the summary of the proposed regulation states:

> "The Equal Employment Opportunity Commission is issuing a proposed rule to implement the Pregnant Workers Fairness Act, which requires a covered entity to provide reasonable *accommodations* to a qualified employee's or applicant's known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the *accommodation* will cause an undue hardship on the operation of the business of the covered entity."[28]

While the EEOC regulation claims there is authority from the PWFA, Title VII, and federal court cases that their definition of the term "related medical conditions" includes accommodations for women considering, or having, an abortion, all evidence points to the contrary.

The EEOC's inclusion of abortion accommodations is inconsistent with the very source of the agency's claimed authority and goes against the intent of the empowering statute, the PWFA. Therefore, it is unreasonable.

III. The EEOC's interpretation of "related medical conditions" fails to meet the minimum threshold to warrant deference

Even if the EEOC's interpretation were determined to be reasonable, *Auer* deference still would not apply. Namely, even a reasonable interpretation will not receive *Auer* deference when the "interpretation does not reflect an agency's authoritative, expertise-based, fair or considered judgement."[29]

To be considered authoritative, the interpretation "must be the agency's . . . 'official position.'"[30] The Court explains that such interpretations must "emanate from [agency heads]" or official staff memoranda.[31] Looking to the EEOC's published notice titled "Enforcement Guidance on

[23] *See*, H.R. 1065, 117th Cong.; and, 42 U.S.C. 2000e(k).
[24] H.R. 1065, 117th Cong. (emphasis added).
[25] *Id*.
[26] *Id*.
[27] 88. Fed. Reg. 154 at 54726
[28] *Id*. at 54714 (emphasis added).
[29] *Kisor v. Wilkie* at 12.
[30] *Id*. at 15.
[31] *Id*. at 16.

Pregnancy and Related Issues," written by the Chair of the EEOC's Office of Legal Counsel, the Commission demonstrates that all cited authority in the proposed regulation it claims supports abortion *accommodation* enforcement through Title VII language and federal court rulings is being used erroneously.[32] The agency guidance states that "Title VII protects women from being fired for having an abortion or contemplating an abortion" and that "Title VII would similarly prohibit adverse employment actions against an employee based on her decision not to have an abortion."[33] Again, demonstrating all cited authority pertains to *discrimination*, and in no way authorizes requiring employers to *accommodate* an employee contemplating, or having, an abortion. However, the very same guidance acknowledges that it was written before passage of the PWFA and guides us to another page titled "What You Should Know About the Pregnant Workers Fairness Act."[34] Again, all EEOC directive points to authority authorizing protections against discrimination. There is no author of this "What to Know" page, so it is unclear if it was written under the guidance of an agency head or via official memoranda. Regardless, the page offers no background as to how the agency came to interpret discrimination laws to now include abortion accommodations. The page even states that "[t]he PWFA applies only to accommodations. Existing laws that the EEOC enforces make it illegal to fire or otherwise discriminate against workers on the basis of pregnancy, childbirth, or related medical conditions."[35] Therefore, there is no clear showing that the EEOC's interpretation of "related medical conditions" including abortion accommodations via the PWFA is authoritative or official.

For an agency's interpretation to implicate its substantive expertise, the Court in *Kisor* explains that the agency interpretation utilizes its own specialized knowledge on the subject which Congress delegated authority, such as the FAA making a regulation regarding technical components for a certain commercial aircraft design. However, this EEOC regulation was proposed "to implement the [PWFA]," in other words, to regulate according to the language of the statute.[36] Therefore, there is no substantive expertise from the EEOC to consider.

Finally, whether the EEOC's interpretation reflects "fair and considered judgement"[37] must be examined. The Court in *Kisor* stated that "when an agency substitutes one view of a rule for another" it "rarely give[s] *Auer* deference to an agency construction 'conflict[ing] with a prior' one."[38] As explained in detail above, the EEOC did not give fair and considered judgement to their interpretation of the PWFA to include abortion accommodations, as all of the cited authorities deal with discrimination.

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[32] 29 C.F.R. § 1604 (2015).
[33] *Id*.
[34] What You Should Know About the Pregnant Workers Fairness Act, http://eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act (last visited Sept. 12, 2023).
[35] *Id*.
[36] 88 Fed. Reg. 154 at 54714.
[37] *Kisor v. Wilkie* at 17.
[38] *Id*. at 18 (referencing *Thommas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

IV. The EEOC's Proposed PWFA Regulation Definition of "Related Medical Conditions" to Include Abortion Accommodations Does Not Warrant *Auer* Deference

The EEOC's proposed regulation attempts to shoehorn abortion accommodations into the PWFA contrary to all cited authority and the Commission's very own guidelines. Consequently, the EEOC attempts to create a genuine ambiguity in the phrase "pregnancy, childbirth, or related conditions" as used in the PWFA. There is no reasonable basis for the EEOC to attempt this interpretation, and furthermore, the agency does not utilize its own authority or substantive expertise in crafting this new definition. Thus, examining the *Kisor* inquiry, narrowed when *Auer* deference is applied to an agency's own interpretation, we conclude that the EEOC's interpretation of the phrase does not warrant any deference.

Conclusion

In this proposed rule, EEOC has failed to consider – or has chosen to ignore – the explicit language and intent of the statute and has instead substituted an aggressive pro-abortion agenda where the Act was created simply to address pregnant mothers in the workforce. Further, the proposed rulemaking would almost certainly fail judicial scrutiny even under the most liberal reading of *Chevron* and *Auer* deference. Even so, it is the abusive misreading of agency authority as exhibited by the EEOC that has prompted AAF to file seven amicus briefs in Federal courts this year calling for the overturning of *Chevron* and *Auer* to restore balance among the three branches of the Federal government.

Given the EEOC's unconstitutional overreach here, AAF demands that the proposed rule be rescinded.

Thank you,

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