ETHICS AND PUBLIC POLICY CENTER

October 10, 2023

Via Federal eRulemaking Portal

Chair Charlotte A. Burrows
Vice Chair Jocelyn Samuels
Commissioner Keith E. Sonderling
Commissioner Andrea R. Lucas
Commissioner Kalpana Kotagal
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

Re: EPPC Scholars Comment on Regulations To Implement the Pregnant Workers Fairness Act Proposed Rule, RIN 3046–AB30, Docket ID EEOC-2023-0004

Dear Chair Burrows, Vice Chair Samuels, and Commissioners Sonderling, Lucas, and Kotagal:

We are scholars at the Ethics and Public Policy Center (EPPC), and we write in response to the Equal Employment Opportunity Commission's expansive proposed regulations implementing the Pregnant Workers Fairness Act (PWFA).[1] Rachel Morrison is an EPPC Fellow, director of EPPC's HHS Accountability Project, and former attorney at the EEOC. Eric Kniffin is an EPPC Fellow, member of the HHS Accountability Project, and a former attorney in the U.S. Department of Justice's Civil Rights Division. Natalie Dodson is a Policy Analyst and member of EPPC's HHS Accountability Project.

We are deeply committed to supporting pregnant women, mothers, and their unborn children, including in the workplace.[2] We celebrate the long overdue employment accommodation protections in law that women now have as a result of the passage of the PWFA. We are concerned, however, that EEOC's expansive proposed regulations implementing the PWFA have turned the pro-woman, pro-

[1] 88 Fed. Reg. 54714.

[2] *See, e.g.*, EPPC, Life and Family Initiative, https://eppc.org/program/life-and-family-initiative ("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."); Patrick T. Brown, Five Pro-Family Priorities for the 118th Congress and Beyond: Policies and Public Opinion on Putting Families First (Feb. 2023), https://eppc.org/wp-content/uploads/2023/02/ifs-congress-familypriorities-final.pdf (urging congress to "create a straightforward paid leave benefit for new parents with broad-based eligibility"); Patrick T. Brown, *Bolstering Social Capital Through Better Workplace Policies in* Social Capital Campaign, Social Capital Works (Dec. 2022), https://static1.squarespace.com/static/60abb375ca5a79523fb94711/t/639b64ae8ce4a71a8782c434/1671128240234/SCC-SocialCapitalWorks.pdf; Patrick T. Brown, *The Case for Child Care at Work*, Desert News (Jan. 16, 2023, 10:45 PM), https://www.deseret.com/2023/1/16/23553842/child-care-pandemic-tax-credits-day-care; Erika Bachiochi, Reva Siegel, Daniel Williams & Mary Ziegler, *We Disagree About Abortion but with One Voice Support this Urgently-Needed Law*, CNN (Dec. 14, 2022, 4:21 PM), https://www.cnn.com/2022/12/14/opinions/abortion-pregnant-workers-fairness-act-discrimination-bachiochi-siegel-williams-ziegler/index.html.

mother, and pro-baby law on its head. The EEOC's proposed regulations erase the very class of women the law is meant to protect: pregnant workers. The proposed regulations are far broader than those the pro-pregnancy and pro-childbirth PWFA would require. The EEOC's expansive proposal raises serious religious freedom and free speech concerns for religious organizations and pro-life employers. Indeed, the Commission is trying to use the PWFA to regulate way beyond pregnancy, childbirth, and related medical conditions to mandate accommodations for even the opposite—abortion. This proposed abortion mandate is contrary to the statutory text and congressional intent of the PWFA. We urge the Commission to drop its abortion mandate, fully recognize employers' statutory and constitutional protections for religious freedom and free speech, and keep the PWFA pro-woman, pro-pregnancy, and pro-childbirth.

I. EEOC should fully recognize and celebrate women in its Pregnant Workers Fairness Act regulations.

The PWFA fills a longstanding gap in employment law left by Title VII, as amended by the Pregnancy Discrimination Act and the Americans with Disabilities Act. We fully support providing pregnant women with reasonable accommodations in the workplace.

But instead of proposing regulations implementing the law as written by Congress, the Commission has used its rulemaking authority to usher in its wishlist of preferred policy positions, not voted on by Congress, that it has often failed to achieve under Title VII or the ADA. As elaborated below, we support workplace accommodations for pregnant women and their unborn children but oppose the expansive interpretation and application of the PWFA proposed by the EEOC.

Women have long faced discrimination in employment, whether from employers refusing to hire women, paying women less than men, or firing mothers when they became pregnant. The PWFA is supposed to be a triumph for women's rights and equality in the workplace, yet the EEOC's proposed regulations went out of its way to erase women and turn this fundamentally pro-woman law on its head. Indeed, EEOC legal counsel Carol Miaskoff "advised that the law's coverage is not gender-specific, and the protections aren't limited to women."[3]

Even so, apart from a few places, the EEOC used generic terms like "worker" and "employee" to refer to women who are pregnant.[4] When it did use the term "women," it felt the need to explain why. Footnote 22 states: "When using language from specific sources, EEOC uses the language of that source (e.g., 'women' or 'pregnant women')."[5]

Further, throughout the proposal, the Commission uses the plural pronouns "they" and "their" to refer to a singular employee.[6] For example, "Ava, a pregnant police officer, asks *their* union representative for help getting a larger size uniform and larger size bullet proof vest in order to cover *their* growing pregnancy"[7]; "If a worker has already provided documentation stating that because of *their* recent cesarean section, *they* should not lift over 20 pounds for two months"[8]; "Arden tells the human

[3] Anne Cullen, *EEOC Atty Tackles Thorny Questions On New Pregnancy Law*, Law 360 (Sept. 27, 2023, 6:57 PM), https://www.law360.com/employment-authority/articles/1726558/eeoc-atty-tackles-thorny-questions-on-new-pregnancy-law.

[4] 88 Fed. Reg. 54,714, 54,715.

[5] *Id*. at 54,716.

[6] *Id*. at 54,714, 54,715, 54,716.

[7] *Id*. at 54,783.

[8] *Id*. at 54,737.

resources staffer, Stanley, that Arden is dealing with complications from *their* recent childbirth and may need time off for doctor's appointments during *their* first few weeks at work"[9] (emphasis added). The proposed regulations are replete with similar examples.

While one might think the EEOC is merely using "they" to refer to a singular individual of unspecified sex instead of the (admittedly clunky) phrase "he or she" that the Commission has used in other guidance,[10] there is no ambiguity over the sex of an employee who can get pregnant, have a cesarean section, or experience childbirth. Despite what some may claim or identify as, biologically, only women (regardless of how they identify) can get pregnant, have cesarean sections, and give birth to children.

By failing to use female pronouns to refer to pregnant workers, the EEOC is denying the biological reality that females, and only females, have the capacity for pregnancy and childbirth. This basic biological distinction is that which differentiates women from men: women's bodies (gametes, hormones, reproductive system) are organized around their distinctive capacity to bear new human life, even if they never do. As the late Justice Ruth Bader Ginsburg wrote in *United States v. Virginia*: "Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible... 'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration.'"[11] As the PWFA recognizes, this biological distinction is worth celebrating—and protecting—in the American workplace.

We ask that the EEOC, the federal agency tasked with preventing and remedying pregnancy discrimination in the workplace, acknowledge and recognize the female sex by the language it uses in its PWFA regulations. Specifically, we ask that EEOC use she/her pronouns to refer to women and workers who are pregnant, have cesarean sections, or undergo childbirth.

II. EEOC should refocus its definition of pregnancy, childbirth, and related medical conditions.

The phrase "pregnancy, childbirth, and related medical conditions" is not defined in the PWFA. EEOC proposes defining "related medical conditions" as "medical conditions which relate to, are affected by, or arise out of pregnancy or childbirth."[12] As such, the proposed rule provides a "non-exhaustive" list of covered conditions, including "current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions."[13]

While many of the conditions identified in the proposed regulations (but not mentioned above) are or can be related to pregnancy and childbirth, EEOC's list (especially the conditions mentioned above) is more aptly described as "related to reproduction" generally. For example, potential or intended pregnancy, menstruation, infertility, and fertility treatments relate to reproduction but may never relate to an actual pregnancy. This means that under proposed regulations, employers could be required to

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[9] *Id*. at 54,744.

[10] *See, e.g.*, EEOC, Compliance Manual on Religious Discrimination § 12 (2021) [hereinafter "EEOC Religion Guidance"], https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

[11] 518 U.S. 515 (1996).

[12] 88 Fed. Reg. at 54,767.

[13] *Id.* at 54,774.

accommodate workers when there is no actual pregnancy or childbirth and, indeed, accommodate workers who will never be pregnant.

Indeed, even though the PWFA is pro-pregnancy and pro-childbirth, the EEOC proposes requiring accommodations when an employee's goal is to avoid or electively end a pregnancy. The use of birth control and abortion are fundamentally anti-pregnancy and anti-childbirth. Further, EEOC's list of covered conditions expands well beyond actual medical *conditions* as required by the Act to cover medical *interventions* such as the use of birth control, fertility treatments, and abortion.

Because the EEOC repeatedly emphasizes that its list is "non-exhaustive," we ask for clarity on whether the following conditions will be considered covered under the PWFA:

- Abortion unlawful under state law
- Fertility treatments for men
- Male employees "chestfeeding" infants
- Surrogacy
- Adoption
- Uterus transplants
- Hormones for gender transitions

California lawmakers have redefined "infertility" to include same-sex couples who would like to have children but obviously cannot without involving a third party.[14] Does EEOC view infertility as including those in same-sex relationships?

We also ask the Commission to clarify these important points that are ambiguous in its proposed regulations:

- Does the EEOC believe people other than women can get pregnant and give birth to a child?
- Does the PWFA provide accommodation protections for women only, like the PDA, or does it also provide accommodation protections for men?
- Under the PWFA, are men entitled to reasonable accommodations?
- Does a pregnancy have to currently or previously exist for an employer to be required to provide a reasonable accommodation under the PWFA?
- Can an employer be found to violate the *Pregnant* Workers Fairness Act for failing to accommodate an employee who was never—and could never—become pregnant?

A. Reliance on Title VII

The EEOC says it gives the phrase "related medical conditions" "the same meaning under the PWFA as under Title VII."[15] Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act in 1978, makes it unlawful for employers to discriminate on the basis of sex, including pregnancy. The law explicitly acknowledges women, stating that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes."[16] "Related medical conditions" is not defined in Title VII either.

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[14] *See* Cal. S.B. 729 (2023).

[15] 88 Fed. Reg. at 54,721.

[16] 42 U.S.C. § 2000e(k).

Title VII mentions specifically limits its protections to “women” and mentions “the life of the mother” when discussing insurance coverage for abortion.

- Does the EEOC believe that the PWFA, like the PDA, only protects women and mothers?
  - If so, we ask that the EEOC clarify that ambiguous point in its regulations.
  - If not, we ask the EEOC to explain in what circumstances and for what conditions the PWFA protects men.
- If the EEOC believes the PWFA protects more than just women, how does the EEOC justify interpreting “related medical conditions” the same as Title VII, which explicitly protects only women?

In its proposed PWFA regulations, the EEOC fails to take into account one very important distinction between Title VII and the PWFA. Whereas Title VII prohibits discrimination in the workplace based on sex (including pregnancy, childbirth, and related medical conditions), the PWFA requires accommodation of “known limitations related to [] pregnancy, childbirth, or related medical conditions.” Accommodation, unlike nondiscrimination, requires the actual existence of a protected trait.

By way of example, in the disability context, the Americans with Disabilities Act (ADA)—another law enforced by the EEOC—both prohibits employers from discriminating against employees based on disability and also requires employers to provide accommodations for disability. In other words, the ADA covers both an anti-discrimination mandate (as does Title VII for pregnancy) and an accommodation mandate (as does the PWFA).

An employer violates the ADA when it discriminates based on disability by refusing to promote an employee whom it merely suspects of having a disability, even if the employee does not actually have a disability. The same employer, however, has no legal obligation to provide an accommodation for the employee unless the employee actually has a disability.

The same is true in the context of religion. Title VII both prohibits employers from discriminating against employees based on religion and also requires employers to provide accommodations for religion. An employer violates Title VII when it fails to hire a woman because the employer believes her to be Muslim, even if she is not. But the same employer is required to accommodate her hijab or prayer breaks only when, in fact, those things are a part of her religious observance.

So, too, it should be in the context of pregnancy. The anti-discrimination mandate for pregnancy is covered by Title VII, which prohibits employers from discriminating against employees whom they merely suspect may be pregnant, who gave birth, or who have related medical conditions. The accommodation mandate for pregnancy is covered by the PWFA. Unlike the ADA and Title VII, the PWFA is only an accommodation statute; it does not otherwise address discrimination.

The PWFA requires employers to accommodate pregnancy, childbirth, and related medical conditions only where such conditions actually exist. The PWFA does not oblige an employer to accommodate a pregnancy that does not yet, and indeed may never, exist. Nor does the PWFA oblige an employer to accommodate acts that are inherently anti-pregnancy and anti-birth, such as the use of birth control and abortion.

It is arbitrary and capricious for EEOC to claim it is following Title VII when Title VII requires no such thing. It would also be arbitrary and capricious for EEOC to say it is giving the PWFA the same

meaning as Title VII and extend PWFA pregnancy accommodation protections to men when Title VII's pregnancy protections are explicitly limited to women.

B. Reliance on Federal Courts

The EEOC also says its definition relies on federal courts, but courts don't always agree. For instance, while EEOC says lactation, use of birth control, menstruation, infertility, and fertility treatments are covered under the PWFA, courts disagree whether these conditions are, in fact, covered by the PDA.

Lactation. Some courts, including the Fourth and Sixth Circuits, have found that breastfeeding does not fall within the scope of the PDA,[17] while other courts, including the Fifth and Eleventh Circuits, have found that lactation is a related medical condition of pregnancy or childbirth, or both.[18]

Use of Birth Control. EEOC fails to cite a single court case suggesting that birth control is a pregnancy- or childbirth-related medical condition. Indeed, several courts have rejected the claim that contraception is covered by the PDA. For example, the Eighth Circuit held that "contraception is not 'related to' pregnancy for PDA purposes because, like infertility treatments, contraception is a treatment that is only indicated prior to pregnancy. Contraception is not a medical treatment that occurs when or if a woman becomes pregnant; instead, contraception prevents pregnancy from even occurring."[19]

Menstruation. EEOC cites only a single court case in support of menstruation being a covered condition, but at least one other court has found that menstrual cramps are not protected under the PDA.[20]

Infertility and Fertility Treatments. Courts have generally found that infertility is *not* covered by the PDA; "[b]ecause infertility is a condition that affects both men and women, a female employee cannot claim the condition is gender specific."[21] The Supreme Court in *Auto. Workers v. Johnson Controls*

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[17] *See Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 439 (6th Cir. 2004) (acknowledging that breast-feeding is not covered by the PDA); *Notter v. North Hand Protection*, 89 F.3d 829, at *5 (4th Cir. 1996) (per curiam) (table) (acknowledging *Barrash v. Bowen*, 846 F.2d 927, 931 (4th Cir. 1988) (per curiam), "stands for the narrow proposition that breastfeeding is not a *medical* condition related to pregnancy or to childbirth"); *Stanley v. Abacus Tech. Corp.*, No. 07-CV-1013 BB/LFG, 2008 WL 11359117, at *6 (D.N.M. Nov. 17, 2008) ("breast-feeding does not fall within the scope of the PDA"), *aff'd on other grounds without reaching issue*, 359 F. App'x 926 (10th Cir. 2010).

[18] *See Hicks v. City of Tuscaloosa, Ala.*, 870 F.3d 1253, 1259 (11th Cir. 2017) ("lactation is a related medical condition and therefore covered under the PDA"); *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) (holding "lactation is a related medical condition of pregnancy for purposes of the PDA"); *Allen-Brown v. D.C.*, 174 F. Supp. 3d 463, 478 (D.D.C. 2016) (holding lactation is a medical condition related to childbirth, such that the PDA applies to lactation).

[19] *In re Union Pacific Railroad*, 479 F.3d 936, 942 (8th Cir. 2007); *see also EEOC v. United Parcel Service, Inc.*, 141 F. Supp. 2d 1216, 1218 n.1, 1219–20. (D. Minn. 2001) (explaining that it had "serious doubts about the merits of a PDA claim in this context" (citing *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996), for the proposition that "[t]he Eighth Circuit has made clear that prevention of conception is outside the scope of the PDA"); *Alexander v. Am. Airlines, Inc.*, No. 02-252, 2002 WL 731815, at *2, *4 (N.D. Tex. Apr.22, 2002) (dismissing case for lack of standing but explaining that "[b]y no stretch of the imagination does the prohibition against discrimination based on 'pregnancy, childbirth, or related medical condition[s]' require the provision of contraceptives as part of the treatment for infertility").

[20] *See Jirak v. Fed. Express Corp.*, 805 F. Supp. 193, 195 (S.D.N.Y. 1992) ("menstrual cramps are not a medical condition related to pregnancy or childbirth").

[21] Moly D. Edwards, *The Conceivable Future of Pregnancy Discrimination Claims: Pregnancy Not Required*, 4 Charleston L. Rev. 743, 764 (2010); *see, e.g.*, *Saks v. Franklin Covey Co.*, 316 F.3d 337, 343 (2d Cir. 2003) (holding

suggested this conclusion when it found that the employer's policy impermissibly classified on the basis of gender and childbearing capacity "rather than fertility alone."[22] In contrast, a few district courts have found that infertility is a pregnancy-related condition.[23] And the Seventh Circuit found that the PDA does not apply to infertility but does apply to IVF surgical procedures.[24]

In light of the above contrary and conflicting Title VII caselaw,

- How can EEOC claim it is adopting the same interpretation for the PWFA as Title VII?
- How did EEOC determine which cases it would follow and which cases it would disregard?
- If Title VII caselaw changes, will EEOC change its interpretation of the PWFA to reflect those changes?

It is arbitrary and capricious for the EEOC to claim to follow federal courts but not acknowledge, much less distinguish contrary federal court decisions.

C. Reliance on Medical Professionals

EEOC states that it relied on "the expertise of medical professionals" in coming up with its list of related medical conditions. We ask the EEOC to disclose which medical professionals it consulted and whether those medical professionals have ties to the abortion industry, such as Planned Parenthood, and stand to profit off of the proposed abortion mandate.

III. EEOC should drop its unlawful abortion accommodation mandate.

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

"discrimination based on infertility alone is not cognizable under the PDA" and employer's exclusion of surgical impregnation procedures for both males and females did not violate Title VII); *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674, 679-90 (8th Cir. 1996) (holding infertility is not pregnancy-related medical condition and explaining that both pregnancy and childbirth are "strikingly different" from infertility because pregnancy and childbirth occur after conception while infertility prevents conception).

[22] 499 U.S. 187, 198 (1991).

[23] *See, e.g.*, *Erickson v. Bd. of Governors of State Coll. and Univ*., 911 F. Supp. 316, 320 (N.D. Ill. 1995) (rejecting argument that infertility is not pregnancy-related condition under PDA); *Cleese v. Hewlett-Packard Co*., 911 F. Supp. 1312, 1318 (D. Or. 1995) (stating purpose of PDA is effectuated by extension to women trying to become pregnant); *Pacourek v. Inland Steel Co*., 858 F. Supp. 1393, 1403 (N.D. Ill. 1994) (holding infertility is pregnancy-related medical condition and plaintiff stated Title VII claim where she alleged that she was undergoing in vitro fertilization and her employer disparately applied its sick leave policy to her).

[24] *See Hall v. Nalco Co*., 534 F.3d 644, 647-49 (7th Cir. 2008) (employee terminated for taking time off to undergo in vitro fertilization was not fired for gender-neutral condition of infertility but rather for gender-specific quality of childbearing capacity).

> 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.
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> It is also possible to cause death as a foreseeable though unintended effect of pursuing a goal that is not in any way advanced by the victim's death. All innocent human beings have a right to protection against being killed even as an expected side effect of actions taken *for any but the weightiest reasons*. But when such reasons are present, accepting death as a side effect may be permissible—consistent with the right to life and just to all concerned.
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> Sometimes an unborn child's death falls in this category. It may be the side effect of treatment to save the mother from a grave medical complication—for example, removal of her cancerous uterus. Because the child's death is not a means to an end, every reasonable effort is made to preserve his or her life if possible, and the procedure is performed in a way that aims to treat his or her body with respect. If the child is not viable, then his or her death is expected, but still is not a means, as it contributes nothing to the mother's survival. (What saves her is, for instance, removal of the cancerous uterus, not the child's subsequent death.) And given the stakes, accepting the child's death is not unjust.[25]

We vehemently disagree with the claim made by many abortion advocates, including the Biden administration, that unlimited access to abortion for any reason 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, was protected.[26] This is consistent with the goals of the PWFA.

B. Statutory text and congressional intent do not support an abortion mandate.

Unsurprisingly,[27] the EEOC is interpreting the PWFA to cover abortion. But the abortion mandate is contrary to the statutory text and congressional intent. In issuing regulations implementing the PWFA, the EEOC should honor the text of the PWFA and require accommodations only for those women who are actually going through pregnancy, childbirth, and related medical conditions. Abortion mandates have no place in a law passed to accommodate women who are experiencing pregnancy and childbirth.

1. The PWFA's text does not mention abortion.

Most obviously, the text of the PWFA does not mention abortion once. The PWFA requires accommodations for the known limitations related to pregnancy, childbirth, or related medical conditions.

[25] EPPC, Protecting the Unborn: A Scholars' Statement of Pro-Life Principle and Political Prudence, https://eppc.org/pro-life-principle-and-political-prudence/.

[26] *See generally* ERIKA BACHIOCHI, THE RIGHTS OF WOMEN: RECLAIMING A LOST VISION 199-237 (2021).

[27] Rachel N. Morrison, *Pregnant Workers Fairness Act Protects Women but Promotes Abortion*, Nat'l Rev. (Dec. 9, 2022, 2:12 PM), https://www.nationalreview.com/bench-memos/pregnant-workers-fairness-act-protects-women-but-promotes-abortion/.

But abortion is not pregnancy, childbirth, or a related medical condition of either. Indeed, abortion is the act of forcibly ending a pregnancy and preventing childbirth by killing the child in the womb.

Further, the PWFA makes clear that employers are only required to accommodate "the known limitations," defined as physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. While abortion is a medical procedure, it is not a medical *condition* or a physical or mental condition. As such, under the plain reading of the text, abortion is not a "known limitation" or a "related medical condition" that employers must accommodate.

In contrast, when Congress wants to address abortion, it knows how to do so. Consider, for example, the Freedom of Access to Clinic Entrances Act (FACE Act), which makes it unlawful to physically impede or intimidate others from entering houses of worship and clinics providing reproductive health services.[28] The law defines "reproductive health services" to include "services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy."[29] Unlike pregnancy, services relating to *termination of pregnancy* are generally interpreted to include abortion. The language used in the FACE Act stands in sharp contrast to the language Congress used 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." Notably, the FACE Act used both the terms "pregnancy" and "termination of pregnancy." There would be no need to include "termination of pregnancy" in the FACE Act if it was assumed by the term "pregnancy." Likewise, accommodating pregnancy is not the same as accommodating a termination of that pregnancy.

2. Title VII caselaw and guidance do not control the PWFA.

Because the Commission cannot point to anything in the text of the PWFA that mandates abortion accommodations, it looks instead to Title VII, explaining that it is giving the PWFA's phrase "pregnancy, childbirth, or related medical conditions" the same meaning as under Title VII. In support of its assertion that abortion is a "related medical condition" under Title VII, the EEOC cites two circuit court cases, a district court case, and its nonbinding Title VII pregnancy discrimination guidance. Three pre-*Dobbs* court decisions involving employee terminations, including one by a district court, hardly create an established interpretation of Title VII nationwide, much less for the PWFA. EEOC's pregnancy guidance does not discuss abortion accommodations because Title VII is not a pregnancy accommodation statute. Most importantly, the U.S. Supreme Court has not addressed the issue of whether Title VII protects employees from abortion discrimination and has never held that Title VII's prohibition against discrimination "on the basis of pregnancy, childbirth, or related medical conditions" covers abortion. In issuing regulations implementing the PWFA, the EEOC is not bound by Title VII caselaw nor the agency's Title VII pregnancy guidance. Further, the Commission cannot substitute a couple of lower court Title VII cases and its nonbinding Title VII guidance for the text and legislative history of the PWFA.

Significantly, the PWFA did not amend Title VII. It is a separate law with separate considerations. And those considerations counsel against requiring abortion accommodations. For instance, there are significant differences between Title VII and the PWFA. The PWFA is not a general nondiscrimination law like Title VII; it requires accommodations for a protected basis. Specifically, the PWFA requires accommodations only for "the known limitations," a phrase not found in Title VII. These distinctions counsel against automatically interpreting "pregnancy, childbirth, or related medical conditions" under the PWFA identically to Title VII.

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[28] 18 U.S.C. § 248.

[29] 18 U.S.C. § 248(e)(5).

While it makes sense to consider an employer's decision not to hire a woman because she was or might become pregnant an employment decision "on the basis of pregnancy" in violation of Title VII, it stretches the imagination that an employer would be providing a *pregnancy* accommodation for a woman who is not actually pregnant or seeks to end that pregnancy electively. Indeed, the Act requires accommodations for pregnancy and childbirth, not for electively ending the pregnancy and killing a child.

Unlike the PWFA, Title VII contains an insurance provision, clarifying that an employer is not required "to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion."[30] To the extent that Title VII's insurance provision is used to suggest that Title VII otherwise covers abortion, the PWFA's insurance exclusion is not limited to abortion. The PWFA states that it does not "require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment or to affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement."[31]

3. There is no federal constitutional right to abortion.

Unlike the PDA, the PWFA was passed in a post-*Roe* world when abortion was no longer protected as a right under the United States Constitution. The PWFA is fundamentally pro-pregnancy and pro-childbirth. Abortion is neither. Abortion was and remains a controversial and polarizing topic. And it has become even more contentious since the Supreme Court in *Dobbs* returned "the issue of abortion to the people's elected representatives."[32] In response, blue states have made abortion more accessible and affordable, while red states are passing laws to limit abortion and protect unborn human lives. Under the Constitution, there is no federal governmental interest in access to abortion, much less interest in coercing America's employers to accommodate and facilitate abortion. Neither Congress nor the PWFA change that calculus.

4. Though abortion is highly polarizing, the PWFA passed with broad bipartisan support.

It was in this post-*Roe* context that the PWFA was passed with broad bipartisan support. It was cosponsored by Democrats *and* Republicans. Both Planned Parenthood *and* the United States Conference of Catholic Bishops supported the Act. It defies reason to believe that a bill mandating American employers accommodate their employees' abortions would garner that kind of support. As Senator Patty Murray (D-WA), the HELP committee chair, said, "I can't think of a more common-sense, less controversial bill." It's hard to think of anything *more* controversial than abortion. If the PWFA was about mandating abortion accommodations, it would not have benefited from widespread support from Republicans, religious organizations, and pro-life groups. It would have garnered a congressional fight that would have resulted in its demise.

5. Congressional intent makes clear that the PWFA does not cover abortion.

One of the PWFA's cosponsors, Senator Bill Cassidy (R-LA), explained that the PWFA was meant to help ensure "a safe environment for pregnant women and their unborn children in the workplace," calling the Act "pro-mother" and "pro-baby."

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[30] 42 U.S.C. § 2000e.

[31] 42 U.S.C. § 2000gg–5.

[32] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

When abortion concerns in the PWFA were raised on the Senate floor by Senator Thom Tillis (R-NC) on behalf of himself and Senators James Lankford (R-OK) and Steve Daines (R-MT), Cassidy responded, "I reject the characterization that [the PWFA] would do anything to promote abortion."[33] Lead Democrat co-sponsor Senator Bob Casey agreed, explaining that the EEOC "could not … issue any regulation that requires abortion leave, nor does the act permit the EEOC to require employers to provide abortion leave in violation of State law."[34]

Pro-abortion and left-wing media blasted Senator Tillis for even thinking such a thing. For example, in response to his abortion accommodation concerns, the *HuffPost* stated such claims were "inaccurate" because "the bill would do no such thing";[35] the *Washington Press* claimed it was "misinformation" and "an assertion that can't be further from the truth";[36] and *The Mary Sue* explained, "To be clear, this bill does not do that… Again, that's not what his bill does. Like, *at all.*"[37]

And why would they think the Act promoted abortion when the bill's sponsors vehemently denied that it did any such thing? Revealingly, the bill sponsors' statements were never contradicted by any Democrat member of Congress. Even pro-abortion and left-wing groups were mum about abortion in their letters and press statements supporting the bill.[38]

During the passage of the Act, Senator Steve Daines (R-MT) stated:

> [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

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[33] Congressional Record (2023), https://www.congress.gov/congressional-record/volume-168/issue-191/senate-section/article/S7049-2.

[34] *Id*.

[35] Alanna Vagianos, *Anti-Abortion Republicans Block Bill To Give Pregnant Workers Basic Accommodations*, Huff Post (Dec. 13, 2022, 1:35 PM), https://www.huffpost.com/entry/anti-choice-republicans-block-bill-that-gives-pregnant-workers-basic-accommodations_n_6398a7e3e4b019c696261d00

[36] Ty Ross, *ANTI-WOMEN GOP: Why Sen. Tillis Is Blocking a Bill to Allow Pregnant Workers Bathroom Breaks*, Wash. Press (Dec. 11 2022), https://washingtonpress.com/2022/12/11/anti-women-gop-why-sen-tillis-is-blocking-a-bill-to-allow-pregnant-workers-bathroom-breaks/

[37] Vivian Kane, *Anti-Abortion Republicans Once Again Prove Just How Little They Care About 'Life'*, Mary Sue (Dec. 16, 2022, 5:37 PM), https://www.themarysue.com/republican-opposition-to-pwfa-abortion-argument/

[38] *See, e.g.*, Letter to Members of Congress in Support for the Pregnant Workers Fairness Act (Sept. 14, 2020), https://www.abetterbalance.org/resources/2020-letter-of-support-for-the-pregnant-workers-fairness-act-from-over-100-supporting-organizations/; Press Release, Planned Parenthood, Planned Parenthood Applauds House Passage of Pregnant Workers Fairness Act (May 14, 2021), https://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-applauds-house-passage-of-pregnant-workers-fairness-act; Press Release, NARAL Pro-Choice America Praises House Passage of the Pregnant Workers Fairness Act (Sept. 17, 2020), https://reproductivefreedomforall.org/news/naral-pregnant-workers-fairness-act/; Press Release, ACLU Applauds Senate Passage of the Pregnant Workers Fairness Act and PUMP for Nursing Mothers Act (Dec. 22, 2022, 2:45 PM), https://www.aclu.org/press-releases/aclu-applauds-senate-passage-pregnant-workers-fairness-act-and-pump-nursing-mothers.

> 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 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.[39]

After the EEOC issued its proposed rule, Cassidy called out the EEOC for "go[ing] rogue" and "completely disregard[ing] legislative intent and attempt[ing] to rewrite the law by regulation."[40]

The EEOC should interpret the PWFA as written, intended, and interpreted and drop its abortion mandate.

C. EEOC's abortion mandate implicates the Major Question Doctrine.

If EEOC moves forward with its abortion mandate, it will likely have to convince the judiciary that Congress sought to impose an abortion accommodation mandate on employers across the country, even in pro-life states, *sub silentio*. Especially in the wake of *Dobbs* and in light of state pro-life laws, such a mandate is certainly a major question of vast political and economic significance—one that Congress must explicitly speak to.

The Supreme Court, in *Biden v. Nebraska*, expresses its "concerns over the exercise of administrative power," clarifying the criteria courts and federal agencies must use when determining whether Congress has delegated authority to address questions of "deep economic and political significance."[41]

As we explain below, the major questions doctrine requires 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 to say 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 in mandating abortion accommodations.

1. 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

[39] 168 Cong. Rec. S10081 (daily ed. Dec. 22, 2022), at https://www.congress.gov/congressional-record/volume-168/issue-200/senate-section/article/S10081-2.

[40] Ranking Member Cassidy Blasts Biden Administration for Illegally Injecting Abortion Politics into Enforcement of Bipartisan PWFA Law, August 8, 2023, https://www.cassidy.senate.gov/newsroom/press-releases/ranking-member-cassidy-blasts-biden-administration-for-illegally-injecting-abortion-politics-into-enforcement-of-bipartisan-pwfa-law.

[41] *Biden v. Nebraska*, No. 22-506 (U.S. Jun. 30, 2023) (slip op. at 25) (cleaned up). 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 that the major questions doctrine does not apply to its actions, it should state and justify such position in its final rule.

magnitude to an administrative agency."[42] 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."[43] 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.'"[44]
>
> 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 (CADC 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).[45]

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

> 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").[46]

In light of the separation of powers, courts expect "Congress to legislate on 'important subjects' while delegating away only 'the details.'"[47] "[W]hen it comes to the Nation's policy, the Constitution gives Congress the reins—a point of context that no reasonable interpreter could ignore."[48]

As shown below, when the Court's major questions doctrine is applied to the EEOC's proposed abortion mandate, trying to make the PFWA stretch to include abortion accommodations would be "the agency's assertion of 'highly questionable power'" that would go "'beyond what Congress could reasonably be understood to have granted.'"[49]

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

[43] *Id*.

[44] *Id*. (slip op. at 8) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

[45] *Id*. (slip op. at 9).

[46] *Id*.

[47] *Id*. (slip op. at 10) (quoting *Wayman v. Southard*, 10 Wheat. 1, 43 (1825)).

[48] *Id*.

[49] *Id*. (slip op. at 15) (quoting *West Virginia*, 597 U.S. at __ (slip op. at 20)).

2. 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 PWFA to create a federal right to abortion accommodations—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."[50] In other words, Congress does not "hide elephants in mouseholes."[51]

> 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.[52]
>
> In such circumstances, we have required the Secretary to "point to 'clear congressional authorization'" to justify the challenged program.[53]

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."[54] 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 moral issue on which Americans hold sharply conflicting views."[55] The Court in *Dobbs* also notes that the abortion issue has important economic consequences:

> In [*Planned Parenthood of Southeastern Pennsylvania v.*] *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."[56]

The justices in dissent agreed, quoting the same passage from *Casey* and stating that pregnancies "have enormous physical, social, and economic consequences."[57] They predicted that "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.[58] According to the dissent, the right to an abortion is "embedded in the lives of women—shaping their expectations, influencing their

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

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

[52] *Biden*, No. 22-506 (slip op. at 24) (quoting *Utility Air*, 573 U.S. at 324).

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

[54] *Id*. (quoting J. Stein, *Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers*, Wash. Post, Aug. 31, 2022).

[55] *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228, 2240 (2022).

[56] *Dobbs*, 142 S. Ct. at 2238-39 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992)).

[57] *Id*. at 2338 (Breyer, J., dissenting).

[58] *Id*. at 2343-44 (citing Brief for Economists as *Amici Curiae* 13 (showing that abortion availability has "large effects on women's education, labor force participation, occupations, and earnings") (internal citations omitted).

choices about relationships and work, supporting (as all reproductive rights do) their social and economic equality."[59]

This Administration has declared the political and economic significance of abortion in similar terms.[60]

3. Congress has never expressed an interest in advancing abortion accommodations.

We turn next to the unmistakable fact that Congress has never expressed an interest in advancing abortion accommodations. While the administration is, of course, entitled to advocate for its policy objectives, it is inappropriate for the Commission to use the PWFA to undermine states' rights, especially as Congress has not asserted a compelling interest in protecting access to abortion, much less requiring America's employers to facilitate their employee's abortion via workplace accommodations.

In *Biden v. Nebraska*, which involved whether President Biden could forgive student loans, the Supreme Court observed that "Congress is not unaware of the challenges facing student borrowers."[61] 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.[62]

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.[63] In this context, the Court found it impossible to imagine that Congress could have intended to give the Secretary of Education the authority to "abolish $430 billion in student loans, completely canceling loan balances for 20 million borrowers."[64] 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.'"[65]

Applying this framework to abortion and the PWFA yields the same conclusion. Just as Congress skipped opportunities to pass a law forgiving student loans, it has likewise passed on opportunities to pass laws advancing 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.

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[59] *Id*. at 2349.

[60] *See* Rachel Morrison, *The Biden Administration's Post-*Dobbs*, Post-*Roe *Response*, Federalist Soc'y Blog, July 13, 2022, https://fedsoc.org/commentary/fedsoc-blog/the-biden-administration-s-post-dobbs-post-roe-response.

[61] *Biden*, No. 22-506 (slip op. at 22).

[62] *Id*.

[63] *Id*.

[64] *Id*.

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

- 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 EEOC's assertion of administrative authority has "conveniently enabled [it] to enact a program" that Congress has never chosen to enact itself.[66]

Congress' failure to advance an interest in 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."[67]

- **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."[68]

- **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 basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."[69]

- **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."[70]

- **Lowey Amendment:** "Nothing in this section shall be construed to require coverage of abortion or abortion-related services."[71]

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[66] *Id*. (slip op. at 21-22) (quoting *West Virginia*, 142 S. Ct. at 2614).

[67] 42 U.S.C. § 18023.

[68] *See, e.g.*, https://www.congress.gov/104/plaws/publ134/PLAW-104publ134.pdf.

[69] *See, e.g.*, https://www.congress.gov/108/plaws/publ447/PLAW-108publ447.pdf.

[70] *See, e.g.*, https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg1783.pdf.

[71] *See, e.g.*, https://www.govinfo.gov/content/pkg/PLAW-106publ58/html/PLAW-106publ58.htm.

- **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."[72]

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.

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.[73] As explained above, 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.

D. EEOC should consider government restrictions on abortion.

There are multiple restrictions on the federal government funding abortion, including the amendments identified above. Some apply to the federal government, and others apply to private parties that receive funding from the government. These employers are thus restricted from accommodating abortion via paid leave or other ways that impose a financial burden.

- Does the EEOC take the position that its regulations trump the abortion funding restrictions under the Hyde Amendment and other amendments barring federal funding of abortion?
- If EEOC requires abortion accommodations for federal employees, how will it ensure that agencies with abortion restrictions on their funding do not pay for abortion accommodations?

Last September, the Department of Veterans Affairs (VA) issued an interim final rule to provide taxpayer-funded abortions for pregnant veterans and qualifying beneficiaries. The VA's rule blatantly violates a federal law that prohibits the VA from providing abortions. Nevertheless, the VA claims that the law was "effectively" and silently "overt[aken]" by a later VA health care act. This interpretation was conveniently rubberstamped by the Department of Justice's (DOJ) Office for Legal Counsel,[74] and the VA's rule is being used to justify performing abortions in violation of state pro-life laws.

- Does the EEOC take the position that its abortion accommodation mandate will allow the federal government to perform abortions, even in violation of state law?

E. EEOC should clarify that the PWFA does not preempt state pro-life laws.

The proposed rule states, "The EEOC has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and has determined that it does not have 'federalism

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[72] *See, e.g.*, https://www.congress.gov/bill/117th-congress/house-bill/2617/text.

[73] *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; https://www.congress.gov/congressional-record/volume-167/issue-84/house-section/article/H2321-3.

[74] Intergovernmental Immunity for the Department of Veterans Affairs and Its Employees When Providing Certain Abortion Services, U.S. Dept. of Justice, Office of Legal Counsel, https://www.justice.gov/olc/file/1537431/download.

implications.'"[75] In making such a bold statement, it appears the EEOC agrees that its regulations do not preempt any state pro-life laws. Of relevance, other agencies under the Biden administration have attempted to preempt state pro-life laws with various federal laws and agency rules. For example, the VA issued an interim final rule on abortion benefits, claiming that it was permitted to perform abortions in pro-life states in violation of state law,[76] and the DOJ argued in court that the pro-life Emergency Medical Treatment and Active Labor Act (EMTALA), which explicitly acknowledges an unborn child, preempts state laws protecting life in the womb.[77]

The text of the PWFA states that it does not invalidate state laws that "provide[] greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions."[78] Unborn children are individuals affected by pregnancy and childbirth. As such, pro-life laws protecting their lives provide "greater or equal protection" than the PWFA and should not be invalidated.

We ask that EEOC clarify in its final rule that its PWFA regulations do not preempt state prolife laws. If, however, the EEOC believes that its regulations could preempt state pro-life laws, then its regulations will have serious federalism implications, and the EEOC will have to conduct a federalism analysis as required by Executive Order 13132.

IV. EEOC's proposed list of reasonable accommodations raises concerns.

Abortion Concerns. The proposed rule identifies a "non-exhaustive" list of examples of possible reasonable accommodations, including paid leave, temporary transfer, and adjusting or modifying policies.[79] These accommodations raise concerns over their application regarding abortion for religious and pro-life organizations. We ask the EEOC to clarify the following:

- Will an employer be required to transfer an employee to a different state with more permissive abortion laws to enable that employee to obtain an abortion?
- Will a religious or non-religious pro-life organization be required to provide an employee paid leave for an abortion or other condition that violates their sincerely held beliefs?
- Will a religious or non-religious pro-life organization be permitted to maintain policies promoting life and opposing abortion?

The proposed rule states that there is no obligation to provide accommodations for "personal use."[80] We ask that if EEOC does not drop its abortion accommodation mandate, it considers elective abortion procedures as strictly for an employee's personal use and something that employers are not mandated to accommodate.

Leave Concerns. Regarding leave as an accommodation, we are concerned that the EEOC views the PWFA as requiring accommodations for leave and breaks that are more extensive than those required

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[75] 88 Fed. Reg. at 54,765.

[76] Rachel N. Morrison, *Department of Veterans Affairs Interim Final Rule on Abortion*, Federalist Soc'y Blog https://fedsoc.org/commentary/fedsoc-blog/department-of-veterans-affairs-interim-final-rule-on-abortion.

[77] 42 U.S.C. § 1395dd.

[78] 42 U.S.C. § 2000gg–5.

[79] 88 Fed. Reg. at 54,731.

[80] 88 Fed. Reg. at 54729.

under the Family and Medical Leave Act[81] and the Providing Urgent Maternal Protections for Nursing Mothers Act.[82] The "PUMP Act" was also passed by Congress in December 2022 and extends Fair Labor Standards Act protections for nursing mothers to take breaks to pump in a private place at work. If leave was covered more expansively by the PWFA, there would be no need for Congress to pass the PUMP Act. But every act by Congress is presumed to have a significant purpose, and Congress viewed both as important to pass the same session. When Congress wants to require extended leave, it knows how to do so explicitly, as evidenced by the FMLA and PUMP Act. In those two laws, Congress addressed the leave issue with specificity, establishing what it deems is reasonable leave to require of employers. The PWFA, as a more general law, should not be read as superseding the specific leave requirements in the FMLA and PUMP Act.

As stated above, we submit that EEOC's proffered interpretation of PWFA violates standard canons of statutory interpretation. EEOC should address this concern in its final rule. Specifically, we ask that EEOC address, at the least, the following questions:

- Is it the EEOC's position that the PWFA requires leave beyond what is required by the FMLA and PUMP Act? If so, how is this interpretation justified under standard canons of statutory interpretation?
- Does the Commission view indefinite leave or leave without a known end date as a reasonable accommodation?

V. EEOC's expansive proposal will cause conflict with religious organizations' religious employment decisions.

The EEOC asks when the PWFA's accommodation requirements and the prohibition on retaliatory or coercive actions would impact a religious organization's employment of an individual of a particular religion or affect those individuals' performance of work connected with the religious organization's activities.[83]

Most of the PWFA's requirements will likely pose no conflict for religious organizations. Indeed, many already welcome opportunities to support pregnant women and their children. Religious organizations willingly supported the Act, viewing it as pro-life, pro-mother, and pro-baby. Others will gladly accommodate pregnant women and their unborn children in the workplace.

However, the EEOC's expansive interpretation of the PWFA's requirements will create unnecessary conflicts with religious organizations' employment decisions. Most notably, the expansive definition of "related medical conditions" coupled with the extensive leave requirements will pose problems for many churches and other religious organizations. Specifically, the EEOC's proposal to require accommodations for abortion, use of contraception, and fertility treatments such as IVF, as well as any accommodation obligations for surrogacy and "chestfeeding," will likely pose the most conflicts with religious organizations' religious employment practices. Such accommodations would likely take the form of (paid or unpaid) leave, job transfer, and policy changes. There are also significant issues for religious organizations when it comes to the regulations' retaliation and coercion requirements, which we address in depth below.

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[81] 29 U.S.C., Pub. L. 103–3, § 2, Feb. 5, 1993, 107 Stat. 6.

[82] *See* FLSA Protections to Pump at Work, https://www.dol.gov/agencies/whd/pump-at-work.

[83] 88 Fed. Reg. at 54746.

A. EEOC should adopt a rule of construction that recognizes religious organizations' right to make employment decisions based on religion.

The PWFA includes a rule of construction that incorporates Title VII's religious organization exemption. The Act provides: "This chapter is subject to the applicability to religious employment set forth in section 2000e–1(a) of this title."[84] Section 2000e-1(a) deals with the employment of aliens and what has been deemed Title VII's "religious organization exemption." The PWFA's phrase "religious employment" is best understood to distinguish that the Act is incorporating only the religious organization exemption, not the provision in the section about alien employment.

Section 2000e-1(a) states, in the relevant part, "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 Commission specifically solicits comments on "possible alternative interpretations" of Title VII's religious exemption.[85] The scope of the rule of construction is particularly relevant for religious organizations if the PWFA is interpreted, as the EEOC proposes, to cover accommodations for abortion, contraception, and fertility treatments, like IVF. Additional conflicts would arise if the Commission were to interpret the PWFA as requiring accommodations for surrogacy, "chestfeeding," and infertility for same-sex couples.

The Commission specifically seeks comment on whether it should adopt a rule of construction that (a) "'allows religious institutions to continue to prefer coreligionists in the pregnancy accommodation context,' specifically in connection with accommodations that involve reassignment to a job or to duties for which a religious organization has decided to employ a coreligionist"; or (b) "construes the PWFA as not requiring a religious entity to make any accommodation that would conflict with the entity's religion." The Commission should adopt formulation (b).

B. Title VII's religious organization exemption applies to employment decisions based on religion.

Section 2000e-1(a) states, "*This subchapter* shall not apply to...." (emphasis added). This subchapter includes discrimination based on race, color, religion, sex, and national origin. Thus, even though religious organizations are generally subject to Title VII's nondiscrimination requirements on the basis of race, color, sex, and national origin, those prohibitions (part of "this subchapter") do not apply with respect to "the employment of individuals of a particular religion." The same is true for the PWFA. The entirety of the PWFA does not apply to qualifying religious organizations with respect to "the employment of individuals of a particular religion."

Employment, as the EEOC recognizes, covers the full range of the employer-employee relationship, which would now also include PWFA accommodations for pregnancy, childbirth, or related medical conditions.

In the proposed rule, the Commission fails to cite or address the controlling definition of religion in Title VII. Under this statute, religion "includes all aspects of religious observance and practice, as well as belief."[86] Thus, qualifying religious organizations are permitted to make employment decisions based

[84] 42 U.S.C. § 2000gg-5.

[85] 88 Fed. Reg. at 54,746.

[86] 42 U.S.C. § 2000e.

on religion, which includes beliefs, observances, and practices. Even though a certain employment decision could be characterized as discrimination based on another protected basis, such as sex, if the employment decision was based on the religious organization's religious beliefs, observances, or practices, Title VII does not apply. EEOC's Title VII Religion Guidance recognizes that Title VII's religious exemptions "allow a qualifying religious organization to assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged employment decision on the basis of religion."[87] The same should be true for the PWFA.

A religious organization's ability to make employment decisions based on its sincere religious tenets is at the heart of what it means to be a religious organization. For example, it does little good for a Catholic organization to be able to prefer a "particular religion" if that means they must accept all baptized Catholics regardless of whether they have, since their baptism, embraced beliefs, attitudes, or practices that are antithetical to the Catholic faith. Worse still, no government bureaucrat can be lawfully empowered to determine what it truly means to be Catholic or any other "particular" religion without violating the Free Exercise and Establishment Clauses. The EEOC, in its interpretation and application of the PWFA, must recognize that under Title VII, religious organizations are free to use religious criteria in their employment decisions without government interference.

Indeed, PWFA sponsors represented on multiple occasions that religious and moral employers would not be forced to violate their consciences. For example, Senator Cassidy addressed concerns about whether it is "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." He said, "The answer is absolutely no."[88] He went on to explain, "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."[89] Further, when Senator James Lankford proposed an amendment stating that "[t]his 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,"[90] Senator Cassidy explained that the exemption "addresses the same issue as a rejected amendment to the PWFA from Senator James Lankford."[91] As such, the PWFA's text and congressional intent support and require the Commission to reject formulation (a) and adopt formulation (b).

C. Title VII's religious organization exemption is not limited to "coreligionists."

It would be improper for the Commission to limit the religious exemption just to coreligionists in its final rule for several reasons. First, it would be directly at odds with the plain text of Title VII's religious exemption.[92] Indeed, *Bostock v. Clayton County*, in holding that Title VII's ban on sex

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[87] EEOC Religion Guidance § 12-1-C-1.

[88] 168 Cong. Rec. S7050 (Dec. 8, 2022), at https://www.congress.gov/117/crec/2022/12/08/168/191/CREC-2022-12-08-senate.pdf.

[89] *Id*.

[90] 168 Cong. Rec. S10069-70 (Dec. 22, 2022), at www.congress.gov/117/crec/2022/12/22/168/200/CREC-2022-12-22-pt1-PgS10065-2.pdf.

[91] *Id*.

[92] *See Fitzgerald v. Roncalli High Sch.*, 73 F.4th 529, 534 (7th Cir. 2023) (Brennan, J., concurring); *Starkey v. Roman Catholic Archdiocese*, 41 F.4th 931, 939 (7th Cir.2022) (Easterbrook, J., concurring); *Curay-Cramer v. Ursuline Acad. of Wilmington*, 450 F.3d 130, 141 (3d Cir. 2006); *EEOC v. Miss. Coll*., 626 F.2d 477, 485-86 (5th Cir. 1980); *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571, 591 (N.D. Tex. 2021); *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1502-04 (E.D. Wis. 1986), *aff'd in part, vacated in part on other grounds*, 814 F.2d 1213 (7th Cir. 1987).

discrimination includes claims of sexual-orientation and gender-identity discrimination, highlighted Title VII's "express statutory exception for religious organizations" as an available protection from "future cases" using the Court's interpretation of sex discrimination against religious groups.[93] The Commission has likewise rightly interpreted Title VII's religious exemption to bar sex discrimination claims.[94]

Second, the conflict with the text would be particularly clear given the PWFA's statutory context. A coreligionist interpretation of the exemption would be nonsensical in a statute that does not prohibit *religious* discrimination. Congress is prohibiting *pregnancy* discrimination in the Pregnant Workers Fairness Act, not religious discrimination. Therefore, Congress' importation of Title VII's religious exemption must mean that it is intended to provide protections that permit religious organizations to hire (and fire) employees based on a shared set of active religious tenets, not just a denominational label.

Third, the Supreme Court has already cautioned in *Our Lady of Guadalupe School v. v. Morrissey-Berru* that a coreligionist interpretation of Title VII's religious exemption raises "a host" of problems because "determining whether a person is a 'co-religionist' will not always be easy" and "[d]eciding such questions would risk judicial entanglement in religious issues."[95] The Commission never mentioned, much less addressed, the impact of this aspect of the Court's decision in its proposed rule.

Finally, a coreligionist interpretation of the exemption clearly falls short of what the (fresh) legislative history tells us that Congress intended by including the exemption. Members of Congress were clearly concerned about preserving religious organizations' right to hire staff that affirm *and also live out* religious doctrines. In fact, it was not until Congress incorporated the Title VII religious exemption into the PWFA that the bill secured the votes needed to pass. It would be arbitrary and capricious for the Commission to restrict what Congress clearly intended or for the Commission to use regulations to achieve a policy objective that Congress would not have passed.

EEOC's failure to honor Congress' decision to include the Title VII religious exemption would result in excessive entanglement between government and religion and will prompt unnecessary litigation over theological beliefs surrounding deeply fraught religious and moral issues such as abortion, contraception, in vitro fertilization, and surrogacy. There is little doubt that religious organizations will prevail in such litigation. EEOC's proposed interpretation of the law is indefensible. It would be arbitrary and capricious, and contrary to the common good for the EEOC to try to bully religious organizations instead of simply recognizing that Congress does not share its policy goals. The EEOC should not adopt formulation (a) limiting the PWFA's religious protections to coreligionists. We ask the EEOC to clarify that Title VII religious protections apply to hiring employees who share the faith tenets of the religious organization, not just a denominational label.

D. Title VII's religious organization exemption is not limited to claims of religious discrimination.

Some have tried to argue that the Title VII exemption applies only to claims of religious discrimination, but if this is true, then its incorporation into the PWFA would be meaningless as the Act does not include any religious discrimination claims. Such an interpretation would violate surplusage

[93] 140 S. Ct. 1731, 1754 (2020) (citing 42 U.S.C. § 2000e-1(a)).

[94] EEOC Religion Guidance §12-1-C-1 (citing *Curay-Cramer*).

[95] 140 S. Ct. 2049, 2068-69 (2020).

canon or the presumption that each word, much less provision, Congress uses is there for a reason.[96] We ask the EEOC to clarify that Title VII religious protections apply to all PWFA claims.

E. EEOC properly looks to its Title VII religion guidance.

EEOC's proposed rule cites extensively to EEOC's Title VII Religion Guidance, as it should when looking to the proper determination of the scope of Title VII's religious exemption. It would be arbitrary and capricious for the EEOC to adopt one interpretation of Title VII's religious organization exemption for purposes of its Title VII Religion Guidance and a significantly different interpretation of Title VII's religious organization exemption for purposes of its incorporation into the PWFA.

1. EEOC should not rely on unsupported OFCCP guidance.

In footnote 199, the proposed rule cites OFCCP's recent guidance titled "Rescission of Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption Rule," in which OFCCP summarily states, "In OFCCP's view, however, the cases cited in the EEOC's 2021 Compliance Manual do not support the proposition that asserting such a defense exempts the organization from the Title VII prohibitions against discrimination on the basis of race, color, sex, and national origin."

The EEOC's decision to rely on OFCCP's guidance in this area is arbitrary and capricious. First, it is unreasonable for EEOC to defer to OFCCP's guidance because it offers no analysis of the cases where EEOC guidance allegedly errored or what the appropriate analysis of those cases should be. Second, it is unreasonable for EEOC to ignore its own binding religion guidance, which was voted on and approved by the Commission. Third, there is no reason for EEOC to overlook its own interpretation of a statute on which it has expertise in favor of the opinion of another agency opining on a statute that is outside its expertise. Fourth, as we explained in our public comments to OFCCP, its interpretation of Title VII's religious organization exemption is contrary to law and contrary to EEOC guidance.[97] EEOC's actions in this instance make no sense at all. Its deference to OFCCP is only explained by the Commission's zeal to bend everything else in order to advance its interests—not Congress' interest, but its own—in promoting abortion at the expense of religious liberty.

2. EEOC should not repeat problematic "primarily religious" language.

There is one aspect of EEOC's Religion Guidance that is contrary to law that the EEOC should not blindly repeat in its PWFA guidance. EEOC's religion guidance states that an organization's "purpose and character" must be "*primarily religious*" to qualify for the religious exemption. But there are several significant legal problems with the guidance's articulation.

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[96] *See Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 477 (2017) (employing the "surplusage canon—the presumption that each word Congress uses is there for a reason"); *see also United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 797 (9th Cir. 2017) (explaining "the interpretative principle of *verba cum effectu sunt accipienda*—that if possible, every word and every provision is to be given effect" and not construed so that a word or provision has "no purpose").

[97] *See* EPPC, EO 12866 Meeting: Final Action on Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, Aug. 10, 2022, https://eppc.org/wp-content/uploads/2022/08/EPPC-Scholar-Comment-OFCCP-Proposal-EO-12866-Meeting.pdf; EPPC, EPPC Scholars Comment Opposing "Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," Dec. 9, 2021, https://eppc.org/wp-content/uploads/2021/12/EPPC-Scholars-Comment-Opposing-OFCCP-Proposal.pdf.

First, the text of the religious organization exemptions in Title VII does not use that language. Just as the EEOC points out in the proposed rule that there is no severity requirement to qualify for an accommodation because the text of the PWFA does not identify one, so too, Title VII's religious organization exemption does not have a "primarily religious" requirement.

Second, courts have not uniformly adopted the "primarily religious" standard.[98] The language comes from a 1988 Ninth Circuit case, *EEOC v. Townley Engineering and Manufacturing, Co.*[99] The Third Circuit in 2007 also applied a similar "primarily religious" standard.[100] In contrast, the Eleventh Circuit in 1997 did not use the Ninth Circuit's "primarily religious" standard; instead, it looked at the specific facts to determine whether a university was "religious" or "secular."[101] Similarly, the Sixth Circuit, while citing *Townley*, did not adopt its "primarily religious" articulation; instead, the court looked to "all the facts" and "consider[ing] and weigh[ing] the religious and secular characteristics of the institution."[102]

EEOC's Religion Guidance in footnote 58 cites to all these cases and recognizes the varying standards adopted by the courts, even while the text of the guidance wrongly implies that Title VII's religious organization exemption applies *only* to organizations whose "purpose and character are primarily religious."

Third, the "primarily religious" standard creates excessive entanglement problems. EEOC must first determine which of an endless possible number of organizational activities it should consider as relevant. Next, the agency must categorize those activities as "religious" or "secular." But some activities do not clearly fall on one side of the line or the other. The agency's attempts to determine which side of the line those activities fall can lead to constitutionally intrusive inquiries and potential discrimination against unfamiliar or not discriminate against any employee or nontraditional religious groups, as the Supreme Court has recognized.[103] After categorizing those activities, the EEOC would then have to determine what constitutes "primarily." Is it 51 percent, 70 percent, or 99 percent? Far from being clear, the "primarily religious" standard is ambiguous, constitutionally suspect, and open to discrimination and abuse by the agency at every step.

Of course, to qualify for the religious exemption, an employer must be engaging in religiously motivated conduct or operating under religious principles. We do not suggest otherwise, and neither does Title VII. As EEOC's Title VII Religion Guidance explains, "[c]ourts have expressly recognized that engaging in secular activities does not disqualify an employer from being a 'religious organization' within

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[98] EEOC's Religion Guidance incorrectly cites to *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000), to support the "primarily religious" requirement, even though the Court in *Hall* does not use that phrase once.

[99] 859 F.2d 610, 618 (9th Cir. 1988) ("In applying the [Title VII religious organization exemption], we determine whether an institution's 'purpose and character are primarily religious' by weighing '[a]ll significant religious and secular characteristics.'"); *see also Garcia v. Salvation Army*, 918 F.3d 997, 1003 (9th Cir. 2019) (same).

[100] *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007).

[101] *Killinger v. Samford Univ.*, 113 F.3d 196, 198-99 (11th Cir. 1997).

[102] *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000).

[103] *See New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) (observing the ''excessive state involvement in religious affairs'' that may result from litigation over ''what does or does not have religious meaning''); *see also McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) ("We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.").

the meaning of the Title VII statutory exemption."[104] Courts have found that Title VII's religious organization exemption applies not only to churches and other houses of worship. These include religious schools, hospitals, and charities, all of which have secular versions that engage in similar behavior without religious motivation (compare the Christian Samaritan's Purse to the secular Red Cross).[105]

VI. EEOC should fully recognize religious protections under the ministerial exception.

The EEOC is correct that "religious entities may have a defense to a PWFA claim under the First Amendment."[106] The First Amendment guarantees the "independence of religious institutions in matters of faith and doctrine."[107] That constitutional protection includes employment decisions falling under the "ministerial exception," which requires courts to "stay out of employment disputes involving those holding certain important positions with" religious organizations, such as those that "play certain key roles" and who perform "vital religious duties" at the core of the mission of the religious institution.[108] As the EEOC is well aware, though courts have generally referred to this doctrine as the "ministerial exception," the Supreme Court and lower courts have recognized that this doctrine covers a much broader range of employment positions than the term "minister" might suggest. The EEOC is correct to note in footnote 188 that, unlike Title VII's religious organization exemption, the ministerial exception applies regardless of whether the challenged employment decision was for "religious" reasons.

Inexplicably, the proposed rule quotes only from *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*; the Commission fails to include the Supreme Court's clarifying and broader language in *Our Lady of Guadalupe v. Morrissey-Berru* identified in its Religion Guidance (and quoted, in part, above).[109] We ask that the EEOC include key language from *Our Lady* in its final regulations as the language quoted from *Hosanna-Tabor* does not provide the full picture of the scope of application of the ministerial exception.

We also ask the Commission to recognize that the ministerial exemption bars *all* PWFA claims for qualifying "ministerial" employees. If, however, the EEOC does not think that the ministerial exception bars *all* claims under the PWFA, we ask that the EEOC identify which claims it believes the exemption does not apply.

A vast majority of courts of appeals have held that the First Amendment protects religious groups from the burdens of litigation, not merely the imposition of liability, regarding their ministerial employment decisions.[110] EEOC Religion Guidance also directs its staff to "resolve[]" the ministerial

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[104] EEOC Religion Guidance, § 12-I-C-1.

[105] *Id*.

[106] 88 Fed. Reg. at 54,746.

[107] *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

[108] *Id*. at 2060, 2066.

[109] 88 Fed. Reg. at 54,746.

[110] *See Natal v. Christian & Missionary All*., 878 F.2d 1575, 1577-78 (1st Cir. 1989); *Lee* v. *Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018); *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015); *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 980–982 (7th Cir. 2021) (en banc); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991); *EEOC v. Cath. U. of Am.*, 83 F.3d 455, 466-467 (D.C. Cir. 1996).

exception "at the earliest possible stage before reaching [an] underlying discrimination claim."[111] The guidance explains the exception is "not just a legal defense . . . , but a constitutionally-based guarantee that obligates the government and the courts to refrain from interfering or entangling themselves with religion."[112]

Concerningly, and in contrast to the EEOC guidance, EEOC recently filed an amicus brief in *Garrick v. Moody Bible Institute* urging the Seventh Circuit to dismiss Moody's appeal of the denial of its religious defenses to a Title VII sex discrimination claim, arguing that Moody's religious defenses should not get appellate review until *after* all the other underlying claims are litigated in the district court.[113] As a taxpayer-funded government agency, the EEOC should favor, or at least it should not deliberately frustrate, litigation economy.

We ask that EEOC recognize, as in its Religion Guidance, that ministerial exception defenses should be resolved at the earliest possible stage. As explained more fully in an amicus brief filed on behalf of EPPC Fellow Rachel Morrison and former EEOC General Counsel Sharon Fast Gustafson, "If not required to resolve the ministerial exception at the outset, EEOC staff will have free rein to launch long and onerous investigations into religious organizations, with all of their attendant costs."[114]

Religious organizations have a right to make their own internal faith-related decisions without intrusive, entangling second-guessing by courts and the EEOC. Many employers, especially nonprofit religious organizations, do not have the resources to fight prolonged litigation. Every minute and dollar spent on attorneys' fees is a minute and a dollar less that the organization can spend on its religious mission.

As such, the EEOC should favor quick resolutions of religious defenses. When a religious organization is acting within its religious purview, the EEOC should be glad to avoid entangling itself in religious matters that are none of its business. If the religious organization's religious defenses were vindicated only *after* a lengthy litigation process, both the religious organization *and* the employee would lose financially, and court resources would be expended. And not only would the religious organization lose a crucial part of the liberty that the First Amendment guarantees, but the government itself would violate its constitutional obligation to avoid entanglement in religious disputes.

These First Amendment protections for religious organizations and constraints on the federal government, including the EEOC, extend beyond the ministerial exception and include broader protections for religious autonomy. We ask that in its final regulations, EEOC explicitly recognize its duty to uphold the First Amendment's protection for religious autonomy, as well as the ministerial exception.

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[111] EEOC Religion Guidance § 12-I, C.2.

[112] *Id*.

[113] *See* Sharon Fast Gustafson & Rachel N. Morrison, *EEOC's 'Gender Discrimination' Campaign and Crusade against Religious Employers*, Nat'l Rev. (Sept. 27, 2023, 1:00 PM), https://www.nationalreview.com/bench-memos/eeocs-gender-discrimination-campaign-and-crusade-against-religious-employers/ (discussing concerns of EEOC's *Garrick* amicus brief).

[114] Brief for Former EEOC General Counsel and Religious Nondiscrimination Expert as Amicus Curiae in Support of Petitioner, *Faith Bible Chapel v. Gregory Tucker*, No. 22-741 (U.S. Mar. 10, 2023), *available at* https://eppc.org/wp-content/uploads/2023/03/FINAL-Faith-Bible-Former-EEOC-Amici-Brief-c.pdf.

VII. EEOC should fully recognize RFRA's protections for religious exercise.

A. RFRA should be available as a defense to all PWFA cases, regardless of whether EEOC is a party.

The EEOC correctly recognizes that "religious entities may have a defense to a PWFA claim under … the Religious Freedom Restoration Act (RFRA)."[115] RFRA was passed in 1993 with overwhelming bipartisan support and signed into law by President Bill Clinton in the wake of the Supreme Court's 1990 *Employment Division v. Smith* case because Congress judged that the Supreme Court's opinion had improperly interpreted the First Amendment Free Exercise Clause. Under RFRA, the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[116]

The proposed rule states that the Commission "carefully considers assertions of a defense under RFRA on a case-by-case basis."[117] Yet the EEOC is quick to point out that "most courts to consider the issue" have held that RFRA does not apply to lawsuits involving only private parties. By "most courts," the EEOC means two out of three circuit courts. Significantly, the Supreme Court has never ruled on this issue. Indeed, in *Bostock v. Clayton County*, the Supreme Court specifically described RFRA as a "super statute" that "might supersede Title VII's commands in appropriate cases."[118] This pronouncement calls into question the pre-*Bostock* RFRA cases EEOC cites; EEOC ought to take this statement into account in determining RFRA's applicability.

RFRA's language is sweeping. It "applies to all Federal law, and the implementation of that law." RFRA defines "government" to include any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." The Act's stated purposes are "to provide a claim or defense to persons whose religious exercise is substantially burdened by government" and to apply "in all cases." Notably, defenses do not provide relief against the government (or otherwise). They merely defeat liability or the application of the law to the defendant. In an employment discrimination case, it is the government in the form of potential court enforcement of liability that burdens religious exercise.

Consider three different scenarios, all of which involve the same claim of employment discrimination against a religious employer.

1. EEOC sues an employer on an aggrieved party's behalf;
2. EEOC sues *and* the employee intervenes as a private-party plaintiff; and
3. EEOC issues a notice of right to sue, and the employee sues as a private-party plaintiff.

According to two courts EEOC cites, the religious employer could raise an RFRA defense in the first two scenarios but not the third.[119] Under this interpretation of RFRA, an employer's rights to

[115] 88 Fed. Reg. at 54,746.

[116] 42 U.S.C. § 2000bb-1(a)-(b).

[117] 88 Fed. Reg. at 54,747.

[118] 140 S. Ct. 1731, 1754 (2020).

[119] Nothing in the cases EEOC cites suggest that a RFRA defense would apply unequally in mixed-party suits, such that RFRA would apply only to the federal government and not to the private-party plaintiff.

religious freedom and an employee's rights to nondiscrimination are a function of *which* party sues on behalf of the alleged injured employee. Or, more specifically, whether the EEOC sues.

For example, if the EEOC brings or intervenes in a lawsuit on behalf of an employee, the court would recognize a RFRA defense, and the employer's rights under RFRA would be upheld. But if the EEOC declines to bring a lawsuit where the religious employer could have brought a successful RFRA defense, then the employer would lose its rights to religious exercise. *That can't be right.* Otherwise, the EEOC could put its thumb on the scales and purposely avoid becoming a party in lawsuits against religious employers to deprive them of a potentially winning RFRA defense. Nothing in RFRA suggests that Congress intended to give EEOC such broad power to pick winners and losers among religious employers.

Instead, RFRA should be available "in all cases" as a defense whenever the government substantially burdens religious exercise through "all Federal law, and the implementation of that law," regardless of whether the government is a party to the lawsuit. After all, it is the federal courts themselves that would ultimately impose the substantial burdens on religion—here, in the form of liability and damages. The EEOC should honor the text of RFRA and Congress' intent in passing this law by adopting the position that RFRA applies to all PWFA claims, regardless of whether the Commission is a party to the case.

In light of the above, we ask EEOC to state clearly in its final rule:

- Is it the EEOC's position that a defense under RFRA to a PWFA claim is only available if the government is a party to the lawsuit?
- If so, what steps will the EEOC take to ensure that it does not intentionally avoid involving itself in litigation so that RFRA cannot be raised as a defense to a PWFA claim?

B. RFRA's broad protections for religious liberty apply in full to religious organization's employment decisions.

We have argued above that the EEOC's proposed rule has offered an improper and atextual interpretation of Title VII's religious organization exemption. For the reasons stated above, EEOC should interpret Title VII properly.

However, even if EEOC persists in its offered interpretation of Title VII's religious organization exemption, it should recognize that RFRA's broad protections for religious liberty apply in full to religious organization's employment decisions. The Fifth Circuit recently applied RFRA to religious organization's employment decisions in *Braidwood v. EEOC*.[120] This lawsuit was 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.[121]

The Fifth Circuit held that Braidwood had satisfied its burden to show that the EEOC's aggressive interpretation of Title VII "substantially burdens [Braidwood's] ability to practice its religious faith."[122] "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

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[120] *Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n*, 70 F.4th 914 (5th Cir. 2023).

[121] *Id*. at 919.

[122] *Id*. at 938.

beliefs."[123] The court then found that EEOC had failed to show that it had a compelling interest in forcing Braidwood to violate its religious beliefs. 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" and even assuming a compelling interest, "refusing to exempt Braidwood, and forcing it to hire and endorse the views of employees with opposing religious and moral views is not the least restrictive means of promoting that interest."[124] As such, the court affirmed the district court's ruling "that Braidwood is statutorily entitled [under RFRA] to a Title VII exemption."[125]

EEOC should acknowledge and engage with the Fifth Circuit in *Braidwood v. EEOC* in its final rule. *Braidwood* recognized that EEOC interpreting Title VII to advance the administration's interests in LGBTQ+ rights substantially burdens the religious exercise of religious organizations that adhere to traditional teachings on human sexuality. The same is certainly true here about EEOC's efforts to twist the PWFA to advance its interests in abortion. Under *Braidwood*, EEOC's proffered interpretation of RFRA would substantially burden religious exercise. As such, it would be illegal under RFRA for EEOC to enforce its interpretation of PWFA against objection religious organizations unless EEOC demonstrates that it can pass strict scrutiny.

In light of the above, we request that EEOC offer its analysis of *Braidwood* in its final rule. To the extent that EEOC disagrees with the Fifth Circuit's interpretation of RFRA, the APA requires that EEOC state with specificity why it disagrees with *Braidwood* and cites caselaw in support of its own interpretation. Simply stating that EEOC would determine if an employer is entitled to an exemption under RFRA on a case-by-case basis is not good enough. At the outstart, EEOC should state whether it believes it could *ever* have a compelling interest in forcing an objecting religious employer to violate its religious convictions regarding abortion.

Given that Congress has never expressed *any interest—let alone a compelling interest*—in protecting access to abortion, we submit that we do not believe that an EEOC effort to force a religious employer to comply with its abortion mandate could ever pass strict scrutiny.

VIII. EEOC should recognize undue hardship for religious and pro-life organizations to provide accommodations contrary to their religious or pro-life beliefs.

The PWFA adopts the ADA's definition of "undue hardship." "Undue hardship" means "significant difficulty or expense" on the employer, which is to be considered in light of various factors, including: the nature and cost of the accommodation, the overall financial resources of the employer, the type of operation of the employer, and the impact of the accommodation on the employer's operation.[126] The EEOC proposes additional factors that may be considered when determining whether the temporary suspension of an essential function causes an undue hardship.[127]

While undue hardship determinations must be made on a "case-by-case basis," the EEOC proposes "predictable assessments" of four reasonable accommodations that do not create an undue hardship in "virtually all cases": "(1) allowing an employee to carry water and drink, as needed, in the employee's work area; (2) allowing an employee additional restroom breaks; (3) allowing an employee

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[123] *Id*.

[124] *Id*. at 940.

[125] *Id*.

[126] 88 Fed. Reg. at 54,769.

[127] *Id*.

whose work requires standing to sit and whose work requires sitting to stand, and (4) allowing an employee breaks, as needed, to eat and drink."[128]

Because of the vast differences in workplaces, we think it best that the EEOC does not make these "predictable assessments." We are concerned that even if these four accommodations do not pose an undue hardship in most cases, in the cases when they do, it will add an extra layer degree of scrutiny on an employer outside the statutory undue hardship determination. If such situations do, in fact, generally not post an undue hardship, then they should usually be provided as reasonable accommodations for the employer.

While we oppose making predictable assessments of accommodations that generally do not pose an undue hardship, we support making predictable assessments of two situations when an accommodation request will pose an undue hardship in all circumstances. First, when a pro-life organization is asked to provide an accommodation that violates the pro-life beliefs, such as accommodating an employee's abortion. Second, when a religious organization is asked to provide an accommodation that violates their religion (as defined in Title VII as broadly encompassing "all aspects of religious observance and practice, as well as belief"). As currently proposed, there are several conditions identified in the regulations that would violate many religious organizations' religion, including abortion, fertility treatments such as IVF, use of contraception, as well as surrogacy if that is a covered condition. While the agency proposes predictable assessments for situations it thinks are true for "virtually all cases," these two predictable assessments will actually be true in all cases.

We ask that the EEOC clarify in its final rule that it would be a per se undue hardship for a pro-life organization to provide an accommodation that violates its pro-life beliefs and a per se undue hardship for a religious organization to provide an accommodation that violates its religious beliefs.

IX. EEOC's proposed retaliation and coercion regulations raise First Amendment concerns.

Addition of Harassment. The PWFA prohibits retaliation and also makes it unlawful to "coerce, intimidate, threaten, or interfere" with "the exercise or enjoyment of[] any right granted or protected by [the PWFA]."[129] The EEOC proposes adding "harass" to this list.[130] We believe it is inappropriate for EEOC to add to the list of prohibited activities that Congress provided in the text of the statute. While we agree that harassment could be a form of coercion,[131] harassment can also be broader than coercion, and thus, harassment should only be prohibited to the extent that it is coercive, intimidating, threatening, or interfering with a worker's PWFA rights.

The EEOC recently proposed updated harassment regulations. Those regulations do not mention the PWFA.[132] We ask that the EEOC clarify whether the harassment regulations will apply to PWFA claims if harassment is added to PWFA regulations. If so, we ask that EEOC reopen its proposed harassment regulations for public comment, with that application identified for the public's input.

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[128] *Id.* at 54,734.

[129] 42 U.S.C. § 2000gg-2.

[130] 88 Fed. Reg. at 54,743.

[131] *Id.*

[132] EEOC, PROPOSED Enforcement Guidance on Harassment in the Workplace, https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace (unsigned draft for public input).

First Amendment Concerns. EEOC's proposed coercion and harassment provisions raise potential First Amendment free speech, free exercise, and freedom of association concerns, especially as it relates to employers' religious and pro-life speech and policies.

- Will employers' pro-life policies violate the PWFA?
- Can employers speak out against the harms of abortion, contraception, IVF, or surrogacy without violating the PWFA?
- Under the PWFA, can employers promote and encourage adoption over abortion?
- Can employers say that only women can get pregnant, or would that violate EEOC's PWFA regulations?
- If a religious employer learns via an accommodation request that an employee no longer abides by the employer's religion (e.g., request for an abortion accommodation), would it be considered retaliation for that employer to fire the employee who no longer aligns with its religious mission?

Forcing employers to adopt policies that treat abortions the same as childbirth coerces speech in violation of the First Amendment's Free Speech Clause. Further, without clarity on what speech is permitted, the PWFA regulations will impermissibly chill protected speech.

In *NIFLA v. Becerra*, the Court considered whether pro-life pregnancy centers were required to refer expecting mothers to abortion services in violation of the centers' consciences. The Court held that such compelled speech, even on so-called professional speech, is a violation of the First Amendment.[133] The free speech analysis in *NIFLA* applies here in full force. EEOC's final rule should take *NIFLA* into account. The final rule should speak with clarity so that EEOC does not cast a cloud that could intimidate religious organizations from exercising their First Amendment rights.

And just this year, in *303 Creative v. Elenis*, the Supreme Court reaffirmed that under the First Amendment's free speech clause, "the government may not compel a person to speak its own preferred messages."[134] This right includes not only the right to control one's speech; it also controls the right to exclude unwanted messages.[135]

Many religious and pro-life employers are opposed 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 a pregnant woman and her unborn child.

While many employers who would object to a federal abortion accommodation mandate would do so on religious grounds, not all pro-life employers qualify as religious, and not all objections to abortion on based on religion. Indeed, in a recent proposal by the Department of Health and Human Services regarding sex discrimination under Section 1557 of the Affordable Care Act, the Department acknowledged a secular organization that won a lawsuit 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 restore health.[136] For non-religious pro-life groups like March for Life, whose very identity is bound up

[133] *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

[134] *303 Creative LLC v. Elenis*, No. 21-476 (U.S. Jun. 30, 2023) (slip op. at 8).

[135] *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)).

[136] 88 Fed. Reg. 7236, 7239 (Feb. 2, 2023) (citing *March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015)).

with the pro-life message, an abortion accommodation mandate violates their "acts of expressive association."[137]

The proposed regulations do not give ample scope to principles of religious freedom, speech, and expressive association, which will set the stage for unnecessary, time-consuming, and expensive litigation.

The PWFA Is Subject to Strict Scrutiny. Under the Free Exercise Clause, the PWFA will be subject to strict scrutiny. Under the 1990 case, *Employment Division v. Smith*, non-neutral and non-generally applicable government policies or laws are subject to "strict scrutiny" when they burden religious exercise. Strict scrutiny means the policies are unconstitutional unless the government can prove it has a compelling, narrowly tailored interest to justify burdening religious exercise. As the Supreme Court in *Fulton v. Philadelphia* explained, "So long as the government can achieve its interests in a manner that does not burden religion, it must do so."[138]

In that case, because Philadelphia, on paper, allowed for exceptions to its non-discrimination policy (though none had ever been granted), it was not a "generally applicable" policy and thus subject to strict scrutiny.[139] The Court explained that the question "is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS."[140] As Justice Neil Gorsuch wrote in *Mast v. Filmore County*, *Fulton* explains that "strict scrutiny demands 'a more precise analysis'": a government's "*general* interest" in its regulations is not compelling "without reference to the *specific* application of those rules to [the *specific* party]."[141] As such, in determining whether the government has a compelling interest, the question must be framed around the party whose religious beliefs were burdened by the policy.

Like the exceptions Philadelphia permitted in its non-discrimination policy, the PWFA contains a statutory exemption for religious organizations and excludes small employers.[142] Indeed, at least one district court has found that Title VII is not generally applicable as it contains secular exemptions, including its exemption for small employers and for employers on or near Indian reservations.[143] 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."[144] "Since Defendants extend these exemptions to nonreligious decisions, they must treat requests for religious exemptions the same."[145] Under this same analysis, the PWFA is also subject to strict scrutiny, as it likewise exempts certain classes of secular employers. As the Supreme Court has explained, "[G]overnment regulations are

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[137] *303 Creative*, No. 21-476 (slip op. at 8).

[138] *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1881 (2021).

[139] *Id.* at 1878.

[140] *Id*. at 1881.

[141] 141 S. Ct. 2430, 2432 (2021) (Gorsuch, J., concurring in the decision to grant, vacate, and remand).

[142] 42 U.S.C. § 2000gg(2) (defining "covered entity" under the PWFA).

[143] *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571, 613 (N.D. Tex. 2021).

[144] *Id*.

[145] *Id*.

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."[146]

Consistent with *Fulton*, the question will be whether the government has a compelling interest "in denying an exception" under the PWFA to a religious employer. And consistent with the First Amendment's promise of free exercise, the government does not have a compelling interest in forcing religious parties to violate their sincerely held religious beliefs.

Application to Third Parties. The EEOC's expansive application of PWFA protections well beyond pregnant women, coupled with its non-exhaustive list of conditions an employer must accommodate, would make the application of the coercion prohibition breathtakingly broad. The Commission also proposes that "the individual need not be an employee, applicant, or former employee and need not establish that they have a known limitation or that they are qualified (as those terms are defined in the PWFA) to bring a claim for coercion under the PWFA."[147] As proposed, the coercion provision could be applied to *any* person, not just the pregnant employees that Congress clearly intended to protect. For instance, it could prevent the Catholic Church from taking employment action against an employee who intentionally subverts church doctrine by advocating for pro-abortion policies or who facilitates another in obtaining an abortion. Further, it could even be read to allow claims by *non-employees* who object to a church's position on abortion. Such third-party application is outside the bounds of the statute that Congress passed, and the Commission cannot justify this expansion. We ask the EEOC to clarify that the PWFA does not protect third-party abortion assistance or abortion advocacy.

Constitutional Avoidance. Finally, because EEOC's proposed abortion mandate raises serious constitutional concerns, under the cannon of constitutional avoidance, it counsels against interpreting the PWFA to mandate abortion accommodations and associated pro-abortion speech.

X. EEOC should clarify that to be a qualified employee, there must be an actual pregnancy or childbirth.

To be entitled to an accommodation, an employee must be "qualified." Under the PWFA, there are two ways an employee could qualify.[148] First, when the employee "can perform the essential functions of the employment position" with or without a reasonable accommodation.[149] Second, when an employee cannot perform an essential function of the job if (a) the inability to perform the essential function is "temporary," (b) the employee could perform the essential function "in the near future," and (c) the inability to perform the essential function "can be reasonably accommodated."[150]

The EEOC proposes defining "temporary" as "lasting for a limited time, not permanent, and may extend beyond 'in the near future'" and "in the near future" as "generally forty weeks."[151] Under these proposed definitions, a broad scope of employees would qualify as eligible for accommodations for extensive periods of time. A qualified employee determination must be made for each condition, allowing

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[146] *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

[147] 88 Fed. Reg. at 54,743.

[148] 42 U.S.C. § 2000gg(6).

[149] *Id*.

[150] *Id*.

[151] 88 Fed. Reg. at 54,724.

employees to seek additional accommodations for different conditions during or after an accommodation's forty-week period.

The Commission asks "whether there are alternative approaches that would more effectively ensure that workers are able to seek the accommodations they need while limiting the burden on covered entities."[152] In response, we propose the following alternative approach. Because accommodations for the PWFA should be centered around an actual pregnancy and childbirth, there is no reason to determine a generic period of time divorced from the pregnancy or childbirth itself. As such, the agency could consider a woman qualified for the duration of her pregnancy, as well as for a short period of time following childbirth or pregnancy loss, such as six or twelve weeks. We think this better reflects the intent of the statute by tying the definition of "temporary" directly to pregnancy and childbirth. It also provides the added benefits of limiting the burden on covered entities and not subsuming the leave requirements under the FMLA or PUMP Act. Under such an approach, the Commission or women may be concerned about receiving reasonable accommodations for lactation. But in addition to the PWFA, Congress passed the PUMP Act to address breaks and leave for pumping. The PUMP Act shows that Congress knows how to speak to lactation and breastfeeding when it so chooses.

XI. EEOC should abandon its proposed expansive definition of known limitation.

Definition of "known limitation." "Known limitation" is defined in the PWFA as a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions" that is communicated to the employer.[153] The EEOC points out that, unlike the ADA, there is no severity requirement for a condition to qualify as a limitation, so it can apply to conditions that are "modest, minor, and/or episodic" and should be "construed broadly to the maximum extent permitted by the PWFA."[154] This is correct.

The EEOC, however, proposes expanding the definition of "limitation" to include when the worker "has a need or problem related to maintaining their health or the health of their pregnancy" and "when a worker is seeking health care related to pregnancy, childbirth, or a related medical condition itself."[155] The EEOC notes that maintaining health includes "avoiding risk to the employee's or applicant's health or to the health of their pregnancy."[156]

We reject these extratextual additions to the definition of known limitation. Congress provided a definition for the term, and it is inappropriate for EEOC to add to it.

Definition of "health" and "risk." Further, EEOC does not provide definitions for "health" or "risk." The term "health" can have varying definitions and has been interpreted as physical health only or much more broadly. For example, in the now overruled companion case to *Roe v. Wade*, the Supreme Court said that health included all factors—"physical, emotional, psychological, familial, and the woman's age."[157]

- At what level of risk is an employer required to provide an accommodation?

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[152] *Id.* at 54,726.

[153] 42 U.S.C. § 2000gg(4).

[154] 88 Fed. Reg. at 547,17, 54,720.

[155] *Id*. at 54,718.

[156] *Id*. at 54,719.

[157] *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

- Since all pregnancies, even uncomplicated ones, have inherent risks to the health of the mother, would an employer be required to accommodate all actions to terminate that pregnancy?
- If an employee asks for an accommodation to maintain their health broadly defined that would negatively impact the health of her pregnancy, i.e., an elective abortion, does the employer have to provide an accommodation that negatively impacts the health of the pregnancy?

If the EEOC retains its requirement that employers provide accommodations to maintain employees' health, we ask the EEOC to clarify how it is defining "health" and "risk."

We also ask that EEOC recognize that abortion is not health care. Pregnancy is not something to be remedied or cured; it is not a disease; thus, abortion is not health care. In fact, abortion imposes fatal risks to the unborn child (i.e., the pregnancy) and also risks to the mother's health. Every abortion ends the life of an innocent child and often harms the very women abortion aims to "benefit." Indeed, "as demonstrated by hundreds of studies and years of data collection, abortive procedures carry several deleterious effects for women, with a statistically greater impact on minority populations."[158] These "effects" include "a myriad of fertility and health issues for women across demographics and social strata."[159]

To clarify, lifesaving care is *not* abortion. Medical interventions to save a pregnant mother's life without the intent to kill the child are not abortions. We know this because an abortion where a child survives is called a failed abortion. Thankfully "OB/GYNs are able to offer lifesaving medical care to pregnant women" without performing an abortion.[160]

Supporting Documentation. Under the proposed regulations, an employer is permitted to require supporting documentation only if "it is reasonable" to do so under the circumstances to determine whether to grant an accommodation. The Department of Health and Human Services recently proposed a rule to create additional HIPAA privacy requirements for "reproductive health care" information.[161] HHS proposes limitations on the use and disclosure of information related to reproductive health care, defined broadly as "care, services, or supplies related to the reproductive health of the individual."[162] Certainly, most, if not every, medical condition eligible for accommodations under the PWFA would qualify as reproductive health care. We ask the Commission to consider the impact, if any, HHS's proposed HIPAA reproductive health care privacy rule will have on accommodation documentation requests and retention.

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[158] AAPLOG, Policy Statement, The Women's Health Protection Act of 2021, https://aaplog.org/wp-content/uploads/2021/06/AAPLOG-Position-Statement-WHPA.pdf.

[159] *Id*.

[160] AAPLOG, Myth vs. Fact: Correcting Misinformation on Maternal Medical Care, https://aaplog.org/myth-vs-fact-correcting-misinformation-on-maternal-medical-care/.

[161] 88 Fed. Reg. 23,506, HIPAA Privacy Rule To Support Reproductive Health Care Privacy (April 17, 2023), https://www.federalregister.gov/documents/2023/04/17/2023-07517/hipaa-privacy-rule-to-support-reproductive-health-care-privacy; *see also* Rachel N. Morrison, *HHS Proposes Special HIPAA Privacy Rules for "Reproductive Health Care" Information*, FedSoc Blog (May 23, 2023), https://fedsoc.org/commentary/fedsoc-blog/hhs-proposes-special-hipaa-privacy-rules-for-reproductive-health-care-information (summarizing HHS's proposed HIPAA privacy rule for "reproductive health care" information).

[162] 88 Fed. Reg. at 23,552.

The Commission also seeks comment "about whether there are situations in which an employer should be permitted to require [] an examination" by a health care provider of its choosing.[163] We believe that there will be such situations, such as when job requirements are technical, and it is important that the health care provider understand the nuances of the job functions and the specific health requirements necessary to perform those functions. This could be especially important in a job context involving worker, coworker, and third-party safety, such as operating machinery, flying a plane, or driving a train.

XII. EEOC's regulatory impact analysis is flawed.

The Commission seeks comment on its proposed benefits and costs.[164] Below we respond to many of those requests.

Benefits. The EEOC claims that its proposed regulations will "benefit covered entities and the U.S. economy and society as a whole," including the unquantifiable benefits of "improved maternal and infant health; improved economic security for pregnant workers; increased equity, human dignity, and fairness; improved clarity of enforcement standards; and efficiencies in litigation."

It is outrageous that EEOC claims its regulations, which mandate abortion accommodations, improve infant health and human dignity. Nothing is more detrimental to the health of a child than ending its life, which abortion does. By failing to recognize the inherent worth and value of children in the women, EEOC is denying those children the human dignity they deserve.

The EEOC also fails to consider how abortion, which is promoted by its proposed abortion mandate, negatively impacts the health of mothers. As discussed above, there are numerous studies showing the dangers and harms that women who have abortions experience.[165] Some medical professionals even consider that "it is possible that the higher rate of legal induced abortion may account for most of the racial disparity noted in pregnancy mortality."[166] In addition to possible increased mortality, especially among minorities, the dangers of abortion "stretch beyond the short-term risks of the current pregnancy, and into later pregnancies through the rise of pre-term birth in women who have undergone abortive procedures."[167] Studies show that abortion increases the risk of preterm birth (PTB).[168] Another harm of abortion is the mental health strain the mother experiences from killing her unborn child. "From 1993 to 2018, there were 75 studies examining the abortion-mental health link, of which two-thirds showed an increased risk of mental health complications after abortion."[169]

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[163] *Id.* at 54,738.

[164] *See id.* at 54,749.

[165] AAPLOG, Policy Statement, The Women's Health Protection Act of 2021, https://aaplog.org/wp-content/uploads/2021/06/AAPLOG-Position-Statement-WHPA.pdf.

[166] *Id.*

[167] *Id.*

[168] Institute of Medicine (US) Committee on Understanding Premature Birth and Assuring Healthy Outcomes. Preterm Birth: Causes, Consequences, and Prevention. Behrman RE, Butler AS, editors. Washington (DC): National Academies Press (US); 2007. PMID: 20669423.

[169] AAPLOG, Policy Statement, The Women's Health Protection Act of 2021, https://aaplog.org/wp-content/uploads/2021/06/AAPLOG-Position-Statement-WHPA.pdf.

Costs. In its regulatory impact analysis, EEOC fails to consider the extensive costs of its proposal, especially its non-exhaustive expansive list of conditions employers are required to accommodate. These costs include:

- Cost on employers to accommodate abortions.
- Cost of equivalent benefits for pregnancy and disability if employers offer abortion benefits.[170]
- Cost on employers to accommodate (often complex, lengthy, and unsuccessful) fertility treatments.
- Irreparable loss of life for unborn who are killed via abortion as a result of the EEOC's abortion mandate.
- Irreparable harm of the loss of First Amendment free speech right 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 loss of constitutional and statutory free exercise rights of employers whose religion would be substantially burdened by a law that attempts to coerce them into accommodating abortion access.
- Costs on women who may be less likely to be hired as a result of the expansive accommodation requirements EEOC proposes.[171]

The proposed rule states that employers in states or localities with laws "substantially similar" to the PWFA should not undergo additional accommodation-related costs.[172] But EEOC fails to consider how these laws, many of which are in prolife states,[173] do not impose an abortion accommodation mandate, much less the other expansive and non-exhaustive list of conditions eligible for accommodation.

When calculating costs, the proposed rule seems to assume that it must only calculate the number of *pregnant women* in a given year. But the EEOC's proposal appears to require accommodations for those who are not yet pregnant and also for men. If true, the EEOC must consider the vast increase in costs associated with accommodations for non-pregnant and male employees.

The proposed rule also provides its estimate of a one-time administrative cost for employers to evaluate and implement the final PWFA regulations. The Commission seeks comment on whether "90 minutes accurately captures the amount of time compliance activities will take for a covered entity in States that do not already have laws substantially similar to the PWFA and for the Federal Government, and whether 30 minutes accurately captures the amount of time compliance activities will take for a

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[170] Sharon Fast Gustafson & Rachel Morrison, *Amazon, Starbucks Promise Abortion Benefits, But They Should Think Twice*, Fox News (Sept. 21, 2022, 2:00 PM), https://www.foxnews.com/opinion/amazon-starbucks-promise-abortion-benefits-they-should-think-twice ("In short, any abortion-travel benefit must have a corresponding benefit for pregnant employees who do not choose abortion. Abortion travel benefits may constitute not only pregnancy discrimination but also disability discrimination. Under the broad protections of the ADA, an employer that provides healthcare travel benefits to an employee who wants to travel for abortion services may need to provide equivalent benefits to an employee with a disability who wants to travel for healthcare services.").

[171] *See, e.g.*, Teny Sahakian, *How a Law Meant to Protect Pregnant Women Could Hurt Their Chances of Being Hired*, Fox News (Oct. 8, 2023, 8:30 AM), https://www.foxnews.com/media/law-meant-protect-pregnant-women-hurt-chances-being-hired (EEOC PWFA proposed regulations "will have 'serious consequences' like fewer women hired and promoted, expecting mother says").

[172] 88 Fed. Reg. at 54,755.

[173] *See, e.g.*, Tex. Lab. Code Ann § 21.106; Idaho Admin. Code § 15.04.01.243; La. Rev. Stat. §§ 23:341-342; S.C. Code Ann. § 1-13-80(A)(4); S.C. Code Ann. § 1-13-30(T)(2)(b).

covered entity in States that have existing laws similar to the PWFA."[174] We believe that this time period is unrealistic and grossly underestimates the complexity of EEOC's expansive proposed regulations. The proposed rule is 81 pages of triple-column text full of definitions and examples. The text of the regulations is over 25 triple-columned pages. The proposed time period for review also does not consider the additional burden and costs on small employers that do not employ expert employment attorneys who are more capable of quickly assessing the contours of the PWFA regulations. As explained above, there are many points of confusion that, if not clarified, will result in more time for employer review.

Alternatives. EEOC should consider the alternative of not defining "related medical conditions" so broadly and not including an abortion accommodation mandate.

Civil Justice Reform. The Commission also claims its proposed rule "was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system" and "written to minimize litigation." Yet the EEOC's expansive proposal, especially its proposed abortion mandate, will certainly result in litigation. To minimize litigation and not unduly burden the Federal court system, the EEOC should drop its abortion mandate, among its other expansive regulations divorced from the text of the PWFA.

Assessment of Federal Regulations and Policies on Families. The EEOC certifies that "the proposed rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act of 1999. To the contrary, by providing reasonable accommodation to workers with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship, the proposed rule would have a positive effect on the economic well-being and security of families." Yet the EEOC does not discuss how its abortion mandate will negatively impact families. Indeed, killing an unborn child is destroying a family and decreasing the positive economic impact those now-dead children would have on the economy.

Plain Language. The proposed rule states, "The Commission has attempted to draft this NPRM in plain language. The Commission invites comment on any aspect of this NPRM that does not meet this standard." We have provided comments throughout where we believe the NPRM does not use plain language and where more clarity is needed.

Conclusion

In finalizing its regulations implementing the PWFA, we urge the EEOC to (1) clarify the points of confusion we identified, (2) refocus its expansive list of conditions employers are required to accommodate and drop the abortion mandate; (3) fully recognize employers' statutory and constitutional protections for religious freedom, free speech, and expressive association; and (4) keep the PWFA pro-woman, pro-pregnancy, and pro-childbirth.

Sincerely,

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[174] 88 Fed. Reg. at 54,761.

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