Dear Ms. Burrows:

This letter comments on the Equal Employment Opportunity Commission's proposed rule "Regulations to Implement the Pregnant Workers Fairness Act" (the "proposals") published in the Federal Register on August 11, 2024, at 88 Fed. Reg. 54714 through 54794.

I write as the former head of rulemaking for the U.S. Department of Labor, on behalf of pro-life women legal scholars committed to the rights of women and the flourishing of families. Helen Alvaré is the Robert A. Levy Endowed Chair in Law and Liberty at Antonin Scalia Law School, George Mason University, where she teaches Family Law, Law and Religion, and Property Law. Erika Bachiochi is a Fellow at the Ethics and Public Policy Center and a legal scholar specializing in Equal Protection jurisprudence, feminist legal theory, Catholic social teaching, and sexual ethics. And Ivana Greco is an attorney with expertise in employee benefits and ERISA, whose scholarly research is focused on family policy issues, particularly those impacting mothers and children.

The proposals include much that we celebrate as pro-women and pro-family, proposals that protect women and their unborn children when they are at their most economically vulnerable. But the proposals also threaten religious liberty, free speech, and advocacy for the unborn. We urge the Commission to reconsider its inclusion of abortion as a "related medical condition," to clarify what qualifies as "coercion" under the Act, and to adopt a rule of construction consistent with RFRA and the First Amendment.

We provide more specific comments on the proposals in the following discussion.

1. Protecting women beyond Title VII and ADA requirements empowers women to make the right choices for their families.

A bipartisan Congress passed the PWFA because the need for mothers to be protected in the workplace was very real. Although the Pregnancy Discrimination Act protected women from overt discrimination in the workplace, it did not affirmatively obligate employers to provide workplace accommodations to them.[1] And while the Americans with Disabilities Act of 1990 did cover some complications from pregnancy, it did not recognize as disabilities the physical challenges involved in any uncomplicated pregnancy.[2] This left women in need of workplace protections, which the PWFA provides in the explicit grant of EEOC rulemaking authority.[3]

The proposals that implement these protections as they hew to the text and purpose of the PWFA—protecting the health of pregnant women and their unborn children—are a welcome advance for the duties employers properly owe their pregnant employees in the workplace.

[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (as amended by the Pregnancy Discrimination Act).

[2] The Americans with Disabilities Act of 1990, 42 U.S.C. 12111 *et seq.*

[3] 42 U.S.C. 2000gg–3.

2. The four "predictable assessments" protect women's health and the health of their unborn children.

Many women experience common health changes during pregnancy, such as need to drink more water, stay off their feet, keep their blood sugar steady, and use the bathroom more often. Yet requests to accommodate these everyday needs are often denied, despite the minor inconvenience they pose most employers. When Congress enacted the PWFA, a committee report noted these common accommodations as a basic standard for pregnant women's health in the workplace and pointed to their routine denial as the reason the PWFA was necessary.[4] By identifying these four accommodations, the Commission sets clear guidance for pregnant women and their employers.

3. Protecting pregnant women's jobs and careers is good for families.

The PWFA expanded the definition of "qualified" to include an employee who cannot perform one or more essential functions of her job, if: (1) the inability to perform an essential job function is for a temporary period; (2) the essential job function(s) could be performed in the near future; and (3) the inability to perform the essential function(s) can be reasonably accommodated.[5] The proposed regulation interprets "near future" as 40 weeks – the full term of pregnancy – an appropriate measure that will help women keep their jobs.[6] This proposal is in keeping with the purpose of the PWFA. In addition to removing the economic threat of job loss during pregnancy, the proposal also means women will be better able to continue work if they wish to do so when they become pregnant. Having a family and a job should not be mutually exclusive. This proposal will end that dichotomy for some women.

4. By including abortion as a condition related to pregnancy, the proposal nullifies the intent of the PWFA.

The PWFA was meant to protect pregnant women and their families. Although many of the Commission's proposals do just that, those that broaden "medical conditions related to pregnancy" to include abortion is an addition unwarranted by the text of the statute. It is also a betrayal of the bipartisan consensus that passed the PWFA.[7]

In a polarized society that rarely agrees, the PWFA was noteworthy bipartisan legislation that attracted significant support across the aisle. That bipartisan support was only possible because of the mutual understanding across party lines that the federal government must do more to support pregnant mothers and their unborn children. The Commission's interpretation undermines that bipartisan push by inserting language through regulatory interpretation that was

[4] H.R. Rep.117–27, pt. 1, at 11, 22, 29, 113.

[5] 42 U.S.C. 2000gg(g).

[6] 88 Fed. Reg. 54724.

[7] *See, e.g.*, Erika Bachiochi, Reva Siegel, Daniel Williams and Mary Ziegler, "We Disagree About Abortion But With One Voice Support This Urgently-Needed Law," *CNN.com* (Dec. 14, 2022), https://www.cnn.com/2022/12/14/opinions/abortion-pregnant-workers-fairness-act-discrimination-bachiochi-siegel-williams-ziegler/index.html.

not possible to pass through our current Congress. This threatens not only the separation of powers, but also any possibility of future bipartisan legislation on behalf of pregnant mothers. The inevitable legal challenge to any interpretation adding abortion will also delay the PWFA's full enactment, potentially leaving pregnant mothers unprotected in the workplace.

Including abortion as covered by the PWFA infringes the rights of everyone who disagrees with abortion, not just the religious employer. Such a rule requires any pro-life employer to accommodate an employee's abortion. This proposal affects not only religious employers, but those without religious beliefs who acknowledge that the unborn are human lives that abortion terminates. Consider a crisis pregnancy center run by pro-life atheists.[8] Must they act against their firmly held beliefs merely because those beliefs are grounded in a view of what is properly due vulnerable and dependent human beings, by virtue of their being human, without any reference to religion?

It's not just the employer whose rights are violated: the proposal notes that "harassment may be a method to coerce a worker into not availing themselves of their PWFA rights." 88 Fed. Reg. 54743. This expansive definition of "harassment" means that a colleague could be punished for sharing a hope-after-abortion flyer, or for encouraging a co-worker to consider adoption. An employer might be charged with creating a hostile environment by publicly supporting the March for Life.

Forty-four percent of Americans consider themselves pro-life according to a recent survey.[9] From time to time this percentage exceeds 50%.[10] A good number of them are employers, and many more are supervisors and store managers, colleagues and teammates. We urge the Commission to reconsider the inclusion of abortion covered by the PWFA.

5. The rule of construction must clearly protect religious liberty.

In addition to abortion, many religious people object to the use of in vitro fertilization, contraception, and other treatments contemplated in the proposed rule. Accommodations for these medical interventions will require companies, supervisors, and colleagues to act in contravention of their religious beliefs. The Commission has set forth two possible "Rule[s] of Construction" in an effort to protect these rights. Such protection is necessary, but not sufficient to protect the rights of all who conscientiously object to abortion. As we note above, many people object to abortion on non-religious grounds, and their rights must be protected as well.

The Commission 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." 88 Fed. Reg. 54746. If the

[8] *See, e.g.*, Secular Pro-Life, https://secularprolife.org.

[9] Gallup poll, May 1-24, 2023.

[10] Gallup polls, May 7, 2009; May 3, 2012.

Commission chooses (a), this exemption is narrowed to claims of religious discrimination, which are not covered by the Act.

Religious employers are only protected when the rule of construction is the "rule that construes the PWFA as not requiring a religious entity to make any accommodation that would conflict with the entity's religion." 88 Fed. Reg. 54746 (Proposed 1636.7(b)(5)(b)). Even then, such a rule leaves nonreligious entities owned and operated by religious employers outside the protection guaranteed by the Religious Freedom Restoration Act (RFRA).[11] The Commission claims that RFRA does not apply to lawsuits involving only private parties. 88 Fed. Reg. 54746. Such an interpretation has yet to be tested at the Supreme Court and would mean the religious rights of employers are contingent on whether the Commission files a lawsuit. It is doubtful that courts will agree with the Commission's excessively narrow interpretation.

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We are grateful for the opportunity to comment on the regulation and appreciate your consideration of our comments. Please let us know if we can provide further information with respect to our comments.

Very truly yours,

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On behalf of Helen Alvaré, Erika Bachiochi, and Ivana Greco

[11] *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).