

February 1, 2024

**EO 12866 Meeting
“Regulations To Implement the Pregnant Workers Fairness Act”
RIN: 3046–AB30**

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Thank you for the opportunity¹ to provide comments on OIRA’s review of the EEOC’s Regulations to implement the Pregnant Workers Fairness Act (PWFA).² I (Rachel Morrison) am a former attorney advisor at the EEOC and currently direct the HHS Accountability Project at the Ethics and Public Policy Center (EPPC). Also attending is my EPPC colleague Natalie Dodson.

The PWFA fills a longstanding gap in employment law and provides important accommodation protections for women in the workplace experiencing pregnancy, childbirth, and related medical conditions. Scholars at EPPC are deeply committed to supporting pregnant women, mothers, and their unborn children, including in the workplace.³

EEOC’s proposed regulations, however, are expansive and contrary to law. They go far beyond the text of the law, raises the major questions doctrine and federalism concerns, and fail to adequately address other concerns. Today, we will share seven points of interest with OIRA and EEOC.

¹ As OMB cancelled a previous EO 12866 meeting it scheduled with EPPC on another rule, we are glad you are willing to hear EPPC scholars’ input on this rule. See Rachel N. Morrison, “Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion,” *National Review*, Oct. 8, 2021, <https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/>.

² 88 Fed. Reg. 54,714 (Aug. 11, 2023), <https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act>.

³ 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/S-CC-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>.

1. **EEOC’s proposed definition of “pregnancy, childbirth, and related medical conditions is contrary to law.**

- **PWFA text.** Under the PWFA, employers are required to make “reasonable accommodations to the *known limitations* related to the pregnancy, childbirth, or related medical *conditions* of a qualified employee,” absent undue hardship to the employer.⁴ Congress defined the term “known limitation” to mean a “physical or mental *condition* related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions,” “whether or not such condition meets the definition of disability” in the Americans with Disabilities Act (ADA).⁵
- **EEOC’s expansive list.** The phrase “pregnancy, childbirth, and related medical conditions” is not defined in the PWFA.⁶ EEOC proposes defining “related medical conditions” as “medical conditions which relate to, are affected by, or arise out of pregnancy or childbirth.”⁷ It 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.”⁸
- **EEOC’s list covers non-medical conditions.** The phrase “related medical *conditions*” appears ten times in the PFWA, yet EEOC’s list of covered “conditions” expands well beyond actual medical *conditions* as required by the Act⁹ to cover medical *interventions* and *actions* such as the use of birth control, fertility treatments, and abortion. Acts to obtain medical products or services are not medical conditions, let alone physical or mental conditions, as required for accommodation under the PWFA.
- **EEOC’s list covers anti-pregnancy and anti-childbirth interventions.** The PWFA is pro-pregnancy and pro-childbirth, yet the EEOC proposes requiring accommodations when an

⁴ 42 U.S.C. §2000gg-1 (emphasis added).

⁵ 42 U.S.C. §2000gg(4) (emphasis added).

⁶ See 42 U.S.C. § 2000gg, Definitions.

⁷ 88 Fed. Reg. at 54,767.

⁸ *Id.* at 54,774. The text of the proposed regulations would explicitly include even more examples:

“Pregnancy” and “childbirth” include, but are not limited to, current pregnancy; past pregnancy; potential or intended pregnancy; labor; and childbirth (including vaginal and cesarean delivery). “Related medical conditions” are medical conditions which relate to, are affected by, or arise out of pregnancy or childbirth, as applied to the specific employee or applicant in question, including, but not limited to, termination of pregnancy, including via miscarriage, stillbirth, or abortion; infertility; fertility treatment; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstrual cycles; use of birth control; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections.

Id. at 54,767.

⁹ See 42 U.S.C. § 2000gg-1 (repeatedly limiting the PWFA to issues “related to pregnancy, childbirth, or related medical conditions”).

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.

- **EEOC's list covers conditions not related to pregnancy or childbirth.** While many of the conditions identified in the proposed regulations are or can be related to pregnancy and childbirth, EEOC's list is more aptly described as "related to reproductive health" generally. For example, potential or intended pregnancy, menstruation, infertility, and fertility treatments relate to reproduction but may never relate to an actual pregnancy. EEOC's expansive definition of "related medical conditions" would render the term childbirth superfluous, as childbirth is of course "related" to pregnancy. Significantly, when Congress wants to address all aspects of reproductive health or include abortion, it knows how to do so. For example, in the FACE Act, Congress defined "reproductive health services" to include "services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy."¹⁰ In contrast, in the PWFA, Congress referred only to pregnancy, childbirth, or related medical conditions—a narrower category.¹¹
- **No pregnancy or childbirth is required for an accommodation.** Under EEOC's list, employers could be required to accommodate workers when there is no actual pregnancy or childbirth and, indeed, accommodate workers who will never be pregnant.
- The important question is not what would be nice for employers to accommodate in the view of the Commission, but what did Congress direct employers to accommodate via the PWFA.

2. EEOC's reliance on Title VII to define "related medical conditions" is arbitrary and capricious.

- The EEOC says it gives the phrase "related medical conditions" "the same meaning under the PWFA as under Title VII."¹² But there are key differences between Title VII and the PWFA.
- **PWFA uses different language than Title VII.** Title VII prohibits discrimination in the workplace based on sex (including pregnancy, childbirth, and related medical conditions). At the same time, the PWFA requires accommodation of "*known limitations* related to [] pregnancy, childbirth, or related medical conditions." "Known limitation" is an important qualifier.
- **PWFA is an accommodation law; Title VII is a nondiscrimination law.** Unlike Title VII, the PWFA is only an accommodation statute; it does not otherwise address discrimination. 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.
- **PWFA, as an accommodation law, requires the existence of an actual pregnancy, childbirth, or related medical condition.** Accommodation, unlike nondiscrimination, requires the actual existence of a protected trait. 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

¹⁰ 18 U.S.C. § 248(e)(5).

¹¹ See *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996) ("The plain language of the PDA does not suggest that 'related medical conditions' should be extended to apply outside the context of 'pregnancy' and 'childbirth.'").

¹² 88 Fed. Reg. at 54,721.

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.

- 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.
- 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.

3. EEOC’s reliance on federal courts to define “related medical conditions” is arbitrary and capricious.

- The EEOC also says its definition of “related medical conditions” relies on federal courts, but courts don’t always agree. EEOC’s supposed reliance on some federal courts while rejecting other federal courts without explanation is arbitrary and capricious.
- 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 Pregnancy Discrimination Act (PDA), much less the PWFA.
 - *Lactation*. Some courts, including the Fourth and Sixth Circuits, have found that breastfeeding does not fall within the scope of the PDA,¹³ while other courts, including

¹³ 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).

the Fifth and Eleventh Circuits, have found that lactation is a related medical condition of pregnancy, childbirth, or both.¹⁴

- *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.”¹⁵
- *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.¹⁶
- *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.”¹⁷ The Supreme Court in *United Automobile Workers v. Johnson Controls* 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.”¹⁸ In contrast, a few district courts have found that infertility is a pregnancy-related condition.¹⁹ And the

¹⁴ 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).

¹⁵ *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”).

¹⁶ 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”).

¹⁷ 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 “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).

¹⁸ 499 U.S. 187, 198 (1991).

¹⁹ 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).

Seventh Circuit found that the PDA does not apply to infertility but does apply to IVF surgical procedures.²⁰

4. EEOC's proposed application to abortion is contrary to law.

- **Abortion accommodations are not supported by the PWFA's text.**
 - *Abortion is not mentioned in the PWFA.* Significantly, the PWFA's text does not mention abortion once.
 - *Abortion is not a medical condition.* As noted above, the PWFA only requires accommodations for pregnancy, childbirth, or related medical conditions. 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.
 - *Abortion is not a "known limitation" related to pregnancy or childbirth.* The PWFA clarifies 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.²¹ Again, abortion is a medical *intervention*; it is not a physical or mental *condition*.

- **Abortion accommodations are contrary to Congressional intent.**
 - *PWFA passed with broad bipartisan support.* The PWFA passed with broad bipartisan support. It was cosponsored by Democrats *and* Republicans.
 - *PWFA was supported by groups on the left and the right.* The PWFA received from widespread support from Republicans, religious organizations, and pro-life groups. Both Planned Parenthood *and* the United States Conference of Catholic Bishops supported the Act.
 - *PWFA received widespread support because it was about helping pregnant women and their unborn children in the workplace.* 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." In short, the PWFA was broadly supported because of its purpose to accommodate pregnant women and mothers in the workplace.

²⁰See *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).

²¹ 42 U.S.C. § 2000gg(4).

- *Abortion accommodations would not receive widespread bipartisan support.* As Senator Patty Murray (D-WA), the HELP committee chair, said, “I can’t think of a more common-sense, less controversial bill.” Abortion, on the other hand, is one of the most polarizing and politically contentious issues of our day. It’s hard to think of anything *more* controversial than abortion. It defies reason to believe that a bill mandating American employers accommodate their employees’ abortions would garner widespread bipartisan support. It would have garnered a congressional fight that would have resulted in its demise.
- *Senate bill sponsors repeatedly and consistently rejected concerns that the PFWA would cover abortion.*
 - When abortion concerns in the PFWA 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), lead Republican co-sponsor Senator Cassidy responded, “I reject the characterization that [the PFWA] would do anything to promote abortion.”²²
 - 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.”²³
 - Revealingly, the bill sponsors’ statements were never contradicted by any Democrat member of Congress.
 - During the passage of the Act, Senator Steve Daines (R-MT) stated:

[T]he purpose of the [PFWA] is to help pregnant mothers in the workplace receive accommodations so that they can maintain a healthy pregnancy and childbirth. Therefore, I want to make clear for the record that the terms “pregnancy” and “related medical conditions,” for which accommodations to their known limitations are required under the legislation, do not include abortion. On December 8, the sponsor of this legislation, Senator Bob Casey stated on the Senate floor as follows: “I want to say for the record, however, that under the act, under the Pregnant Workers Fairness Act, the Equal Opportunity Employment Commission, the EEOC, could not—could not—issue any regulation that requires abortion leave, nor does the act permit the EEOC to require employers to provide abortions in violation of State law.” Senator Casey’s 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.²⁴

²² Congressional Record (2023), <https://www.congress.gov/congressional-record/volume-168/issue-191/senate-section/article/S7049-2>.

²³ *Id.*

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

- After the EEOC issued its proposed regulations, Senator Cassidy called out the EEOC for “go[ing] rogue” and “completely disregard[ing] legislative intent and attempt[ing] to rewrite the law by regulation.”²⁵
- **Abortion accommodations were not acknowledged, and were even disavowed, by pro-abortion groups.**
 - *Pro-abortion groups did not mention abortion in statements supporting the bill.* Pro-abortion and left-wing groups were mum about abortion in their letters and press statements supporting the bill.²⁶
 - *Pro-abortion media dismissed abortion concerns as “inaccurate” and “misinformation.”* Pro-abortion and left-wing media blasted Senator Tillis for even thinking the PWFA could require abortion accommodations. For example, in response to his abortion accommodation concerns, the *HuffPost* stated such claims were “inaccurate” because “the bill would do no such thing”;²⁷ the *Washington Press* claimed it was “misinformation” and “an assertion that can’t be further from the truth”;²⁸ 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*.”²⁹
- **Abortion accommodations are not mandated by Title VII or Title VII caselaw.**
 - 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.
 - *Title VII is a different law.* Significantly, the PWFA did not amend Title VII. While the PWFA cites Title VII in various places, it does not incorporate Title VII or caselaw interpreting Title VII wholesale. This makes good sense, as the PWFA is a separate law

²⁵ 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>.

²⁶ 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>.

²⁷ 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

²⁸ 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/>

²⁹ 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/>

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 only requires accommodations for a protected basis. Furthermore, 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.
- 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
- *Title VII caselaw does not control the PWFA.* 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.³²
 - 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.
 - 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. Those decisions were issued under *Roe* and do not rely on good law. Two involved a substantial reliance on a constitutional right to abortion. Today, there is no Supreme Court precedent holding that there is a federal constitutional right to abortion.
- *EEOC’s Title VII pregnancy guidance does not address abortion accommodations.* EEOC’s pregnancy guidance does not discuss abortion accommodations because Title VII is not a pregnancy accommodation statute.
- 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

³⁰ 42 U.S.C. § 2000e.

³¹ 42 U.S.C. § 2000gg-5.

³² 88 Fed. Reg. at 54,721 n.51(citing *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008); *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996); *Ducharme v. Crescent City Déjà Vu, L.L.C.*, 406 F. Supp. 3d 548, 556 (E.D. La. 2019)).

substitute a couple of lower court Title VII cases and its nonbinding Title VII guidance for the text and legislative history of the PWFA.

5. EEOC’s proposed expansive regulations, especially its abortion accommodation mandate, raise serious questions under the major questions doctrine.

- *EEOC’s proposed expansive regulations, particularly its abortion accommodation mandate, raise serious questions under the major questions doctrine.* We address the major questions doctrine at length in our comment, pages 12-17.³³ In short, it is absurd to think a bipartisan 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 the Court’s decision to return the issue of abortion “to the people and their elected representatives,”³⁴ and in light of vastly different 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.
- *If the EEOC is relying on Chevron deference for its interpretation, it should wait for the Supreme Court’s decisions in Relentless and Loper Bright.* The Supreme Court just heard oral argument on January 17, 2024, in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*. In these cases, the Court will decide whether it should “overrule *Chevron v. Natural Resources Defense Council*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.” Depending on how the Court rules, these cases could have major impact on the deference given to EEOC to impose controversial and nontextual-supported regulations.

6. EEOC must address the federalism implications is proposal will have, including whether its regulations can preempt state prolife laws.

- As you are familiar, EO 13132 from the Clinton Administration establishes certain requirements that an agency must meet when it issues a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications.
 - Section 3(c) of the EO states that “with respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible.”
 - Section 3(d) explains how to implement policies that have federalism implications. Specifically, agencies “shall” (1) “encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States,” (2) “where possible, defer to the States to establish standards,” and (3)/(4) consult with States and officials.
 - Executive Order 12866 (§ 6(a)(3)(B)) also directs that significant regulatory actions avoid undue interference with State, local, or tribal governments, in the exercise of their governmental functions.
- 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

³³ EEOC Scholars’ Public Comment on EEOC Regulations to Implement Pregnant Workers Fairness Act Proposed Rule, RIN 2046–AB30, Docket ID EEOC-2023-0004 (Oct. 10, 2023) [hereinafter “EPPC PWFA Comment”], <https://eppc.org/wp-content/uploads/2023/10/EPPC-Scholar-Comment-EEOC-Regulations-to-Implement-the-Pregnant-Workers-Fairness-Act.pdf>.

³⁴ *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2279 (2022).

implications.”³⁵ In making such a bold statement, it appears the EEOC agrees that its regulations do not preempt any state pro-life laws.

- We are skeptical, however, that this is EEOC’s position because 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.³⁶ DOJ also sued Idaho claiming the Emergency Medical Treatment and Active Labor Act (EMTALA)³⁷ preempts the state’s abortion law, even though EMTALA itself explicitly acknowledges an unborn child. The Supreme Court stayed the preliminary injunction against Idaho’s law and will hear oral arguments in the case in April to determine “whether EMTALA preempts state laws that protect human life and prohibit abortions, like Idaho’s Defense of Life Act.”³⁸
- 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.”³⁹ 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 pro-life 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.

7. EEOC’s proposed regulations fall short in other ways.

- *EEOC’s proposed leave accommodations are contrary to law.* 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 under the Family and Medical Leave Act⁴⁰ and the Providing Urgent Maternal Protections for Nursing Mothers Act (“PUMP Act”).⁴¹ 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.
- *EEOC’s harassment addition is contrary to law.* The PWFA prohibits retaliation and also makes it unlawful to “coerce, intimidate, threaten, or interfere” with “the exercise or enjoyment of[] any

³⁵ 88 Fed. Reg. at 54,765.

³⁶ Rachel N. Morrison, *Department of Veterans Affairs Interim Final Rule on Abortion*, Federalist Soc’y Blog (Oct. 14, 2022), <https://fedsoc.org/commentary/fedsoc-blog/department-of-veterans-affairs-interim-final-rule-on-abortion>.

³⁷ 42 U.S.C. § 1395dd.

³⁸ See Rachel N. Morrison, *Supreme Court to Decide Whether EMTALA Preempts State Abortion Laws: Idaho v. U.S. and Moyle v. U.S.*, Federalist Soc’y Blog (Jan. 25, 2024), <https://fedsoc.org/commentary/fedsoc-blog/supreme-court-to-decide-whether-emtala-preempts-state-abortion-laws>.

³⁹ 42 U.S.C. § 2000gg–5.

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

⁴¹ See FLSA Protections to Pump at Work, <https://www.dol.gov/agencies/whd/pump-at-work>.

right granted or protected by [the PWFA].”⁴² The EEOC proposes adding “harass” to this list.⁴³ Congress did not grant EEOC authority to add to the list of prohibited activities that Congress provided in the text of the statute.⁴⁴ While we agree that harassment could be a form of coercion,⁴⁵ 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. This also has significant implications for EEOC’s recently proposed harassment guidance, which fails to mention the PWFA.⁴⁶ The addition of harassment also raises serious free speech and religious liberty concerns. We direct you to the excellent comment by the Alliance Defending Freedom (pages 1-4), which asks the EEOC to clarify whether the regulations prohibit employers from implementing a pro-woman, pro-life work culture, and discussing free speech and religious liberty concerns with EEOC’s proposal.⁴⁷

- *EEOC’s proposal conflict with civil justice reform considerations.* 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.” This is absurd.
 - The EEOC has proposed expansive regulations, including an abortion mandate. Apart from the APA, EEOC’s proposal raises serious concerns for religious and pro-life groups, and potentially conflicts with the First Amendment and RFRA. 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 and unwarranted by the text of the PWFA.
- *EEOC must consider alternatives.* EEOC should consider the alternative of not defining “related medical conditions” so broadly and not including an abortion accommodation mandate. These changes would still allow the EEOC to develop regulations that advance Congress’ purpose in passing the PWFA: to provide accommodations for pregnant women and mothers in the workplace.
- *EEOC must conduct an 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.”⁴⁸ Yet the EEOC does not discuss how its abortion mandate will negatively impact families. Indeed, killing an unborn child is destroying a family

⁴² 42 U.S.C. § 2000gg-2.

⁴³ 88 Fed. Reg. at 54,743.

⁴⁴ See 42 U.S.C. § 2000gg-3(a) (delineating the scope of EEOC’s rulemaking authority under the PWFA).

⁴⁵ 88 Fed. Reg. at 54,743.

⁴⁶ Proposed Enforcement Guidance on Harassment in the Workplace, 88 Fed. Reg. 67,750 (Oct. 2, 2023).

⁴⁷ Alliance Defending Freedom Public Comment on EEOC Regulations to Implement Pregnant Workers Fairness Act Proposed Rule, RIN 2046–AB30, Docket ID EEOC-2023-0004 (Oct. 2, 2023), <https://adfmmedialegalfiles.blob.core.windows.net/files/ADF-PublicCommentEEOC-PregnantWorkersFairnessAct.pdf>.

⁴⁸ 88 Fed. Reg. at 54,766.

and decreasing the positive economic impact those now-dead children would have on the economy.⁴⁹

- *EEOC should provide asked for clarity.* 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 provided the EEOC detailed comments indicating where we believe the NPRM does not use plain language and where more clarity is needed. For example, EEOC went out of its way to avoid using the term woman, leaving open questions whether PWFA’s accommodation protections apply to men or “conditions” like “chest-feeding.”⁵⁰ We urge OIRA to ensure that the EEOC provided needed clarity.

Conclusion

We urge OIRA to ensure that the statutory and regulatory process is upheld, and that EEOC’s proposed regulations have sufficient legal justification.

⁴⁹ See, e.g., Joint Economic Committee Republicans, U.S. Senate, *The Economic Costs of Abortion* (June 14, 2022), available at <https://www.jec.senate.gov/public/index.cfm/republicans/2022/6/the-economic-cost-of-abortion>.

⁵⁰ See EPPC PWFA Comment, *supra* note 33, at 4.