ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

October 2, 2023

Chair Charlotte A. Burrows
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507
Via Regulations.gov

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

Dear Chair Burrows,

Pregnant women should have their employers' full support. Surveys show that most women who have abortions say that they would choose life if they had support. That's why Congress passed the bipartisan Pregnant Workers Fairness Act (PWFA)—to ensure that employers provide reasonable accommodations for pregnancy, childbirth, and related medical conditions. But the Biden administration's new rule jeopardizes supportive work cultures for pregnant women by introducing abortion into the law.[1] Alliance Defending Freedom (ADF) opposes this effort to hijack the pro-woman, pro-life PWFA. EEOC should stick to protecting pregnant women and unborn children—rather than promote abortion.

I. EEOC should clarify whether the rule prohibits a pro-woman, pro-life work culture.

Pregnant women deserve support, and not to be pressured into abortion. In the PWFA, Congress took a transformational, pro-life step to ensure employer support for pregnant women and unborn children. But in some ways, EEOC's new rule introduces serious uncertainties and threatens to prevent employers from fully and unconditionally supporting pregnant women and new life.

First, the rule's inclusion of abortion threatens to chill the *free speech* of employers expressing pro-life messages, such as messages supporting *Dobbs* or encouraging adoption over abortion. The rule vaguely makes it a violation to "intimidate," "harass," or "retaliate" against employees because of their "right" to an abortion accommodation.[2] Employer speech and conduct need not be severe,

[1] Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54,714 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. 1636).

[2] *Id.* at 54,743–44, 54,771–72, 54,792–93 (proposed 29 C.F.R. § 1636.5(f)). In addition to prohibiting employer retaliation, the rule makes it "unlawful to coerce, intimidate, threaten, harass, or interfere

pervasive, adverse, or hostile to be "intimidation" or "harassment." So even if an employer grants abortion accommodations and does not deter employees from having an abortion, an employer could be accused of "intimidation" or "harassment" for taking a public or intra-office pro-life stance—such favoring adoption over abortion[3]—if the stance could make women feel unwelcome for seeking an abortion accommodation. This vague standard could be used to stifle pro-life workplaces.

Worse, the rule lacks any conscience and free-speech exemptions, and EEOC seems intent on forcing religious employers to go to court to be able to assert any religious liberty protections. The rule nebulously incorporates Title VII's religious exemption, but EEOC reads this exemption only to cover religious discrimination claims for hiring co-religionists. EEOC does not clearly state this exemption encompasses the entire employment relationship, nor that it will encompass PWFA claims. EEOC also takes a narrow view of the ministerial exception.[4] EEOC even says that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, may be no defense at all in some cases and is no defense to private suits.[5]

EEOC needs to clarify how the religious exemption will operate in each of those aspects. EEOC should also clarify how exactly the rule's intimidation, harassment, and retaliation provisions apply. Can employers have pro-life work cultures? Can they explain that abortion harms women and takes a human life? Can employers provide pro-life advice, counsel, or recommendations to abortion-minded employees, or employees who have decided to have abortions, including by promoting adoption over abortion? Can employers say they support *Dobbs*? Or will those statements be deemed a violation of the PWFA under this rule, or possibly a violation so that the employers will be subjected to onerous investigations and complaints? Likewise, will pro-life speech by employers be deemed harassment under EEOC's forthcoming harassment guidelines?[6] Such prospects chill speech,

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with any individual in the exercise or enjoyment of . . . any right granted or protected by the PWFA." *Id.* The anti-retaliation provision "protects an individual from conduct, whether related to employment or not, that a reasonable person would have found 'materially adverse,' meaning that the action 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 54,743. But PWFA's "broader" coercion provision "reaches those instances 'when conduct does not meet the materially adverse standard required for retaliation.'" *Id.* (internal quotation marks omitted). "Coercion" includes, for example, requesting medical documentation when it is not reasonable, *id.* at 54,738, or telling a worker that requesting an accommodation would be a "black mark," *id.* at 54,744.

[3] *E.g.*, Peter Rex, *Companies Should Support Adoption, Not Abortion*, Newsweek, July 13, 2022, https://www.newsweek.com/companies-should-support-adoption-not-abortion-opinion-1723563.

[4] Regulations to Implement the Pregnant Women's Fairness Act, 88 Fed. Reg. at 54,746–47, 54,749, 54,794.

[5] *Id.* at 54,747.

[6] *See* EEOC, "Proposed Enforcement Guidance on Harassment in the Workplace," Federal Register (Sept. 29, 2023), on public inspection at https://public-inspection.federalregister.gov/2023-21644.pdf.

and therefore run afoul of the First Amendment, as well as being impermissibly vague under constitutional due process protections.

And how will EEOC ensure that women do not feel unwelcome asking for pregnancy accommodations from employers forced to support abortion? Isn't stifling pro-life speech prohibited under *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018)? If the PWFA exempts all small employers, wouldn't the PWFA be subject to (and fail) strict scrutiny after *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021)? Courts will not accept or defer to EEOC's extreme positions, so EEOC should provide categorical exemptions for the freedoms of speech, association, and religion now.

Second, the rule could make *pro-life and religious organizations* keep on staff employees who unapologetically have abortions, even if their behavior violates the organizations' pro-life or religious beliefs and even if a primary reason the organization exists is to protect life. The rule prohibits an employer from considering an accommodation request when making employment decisions, which suggests that employers who learn of an employee's abortion through an accommodation request cannot discipline that employee for violating the organization's beliefs.[7] The rule also considers it "intimidation" for an employer to say that requesting an accommodation will result in the applicant not being employed.[8] And EEOC says directly that under the Pregnancy Discrimination Act (PDA) in Title VII, 42 U.S.C. § 2000e-2(k) employers cannot consider an employee's abortion in hiring, firing, and promotion decisions.[9]

EEOC thus should clarify whether under its rule pro-life and religious organizations must keep on staff employees who unapologetically have abortions, even if doing so violates the organizations' pro-life or religious beliefs. What pro-life employment decisions can employers make? For instance, if a pro-life pregnancy care center's director requests special privileges to take time off to obtain an elective abortion, may the center remove the director? How do the First Amendment, RFRA, and Title VII's religious exemption provide any defenses to a PWFA or PDA claim?

Third, the rule introduces confusion by not requiring a worker to have a present or recent pregnancy to get PWFA protections. Moreover, the rule seemingly includes non-female employees, such as males who identify as female, since the rule uses plural "they/their" pronouns to refer to a singular pregnant worker.[10] Of course, every woman, regardless of whether she identifies as a woman, should be

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[7] *Id.* at 54,766 (proposed 29 C.F.R. § 1636.1), 54,770 (proposed 29 C.F.R. § 1636.4), 54,771–54,772 (proposed 29 C.F.R. § 1636.5(f)), 54,791 (proposed 29 C.F.R. 1636.4(c)).

[8] The rule prohibits "intimidating an applicant from requesting an accommodation for the application process by indicating that such a request will result in the applicant not being hired," and saying that requesting an accommodation would be a "black mark." *Id.* at 54,744.

[9] *Id.* at 54,714–15, 54,721, 54,774.

[10] *E.g.*, *id.* at 54,731, 54,735, 54,774–75.

protected in her pregnancy, childbirth, or related medical conditions. But does EEOC take the position that male employees—with male anatomy—have limitations arising from pregnancy, childbirth, and related medical conditions? Does EEOC's inclusion of low milk supply as a "related medical condition" include "chest-feeding" by men taking estrogen? If no pregnancy is necessary, does EEOC's inclusion of "changes in hormone levels" mean that the rule protects the act of seeking gender interventions, such as cross-sex hormone treatments, puberty blockers, and sterilizing surgeries? Does EEOC's inclusion of infertility require employers to provide IVF leave for men who want time off for a surrogacy? Does EEOC's inclusion of birth control mean that employers must accommodate all employee efforts to avoid pregnancy? Does the rule support adoptive parents, within or outside of the context of infertility or surrogacy?

EEOC should state that only women can get pregnant, give birth, and have related medical conditions. And EEOC should use she/her pronouns for women.

II. EEOC lacks textual authority for any abortion mandate.

The PWFA ensures that employers will support pregnant women and their unborn children, and EEOC lacks any authority to interfere with these protections by adding into the PWFA protections the act of obtaining an elective abortion.

The PWFA requires employers 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.[11] 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).[12] But EEOC defines "pregnancy" to mean current, past, *potential or intended* pregnancy; EEOC defines "related medical conditions" more broadly than the statute to mean "medical conditions which relate to, are affected by, or arise out of pregnancy or childbirth"; and EEOC provides that "related medical conditions" include "*termination of pregnancy, including via* miscarriage, stillbirth, or *abortion*" as well as infertility, fertility treatment, antenatal depression or anxiety, changes in hormone levels, menstrual cycles, use of birth control, lactation, and much more.[13]

EEOC's interpretation conflicts with the PWFA's text in at least five ways. *First*, under the PWFA, an employee's limitation to be accommodated must be a physical or mental condition that relates to, is affected by, or arises out of pregnancy, childbirth, or related medical conditions—meaning a medical condition

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[11] 42 U.S.C. §2000gg–1.

[12] *Id.* at §2000gg(4).

[13] 88 Fed. Reg. at 54,721, 54,767, 54,774 (proposed 29 C.F.R. § 1636.3(b)) (emphasis added).

related to a present or recent pregnancy and childbirth, not any aspect of sexual or reproductive health.[14] EEOC acknowledges that related medical conditions mean "medical conditions which relate to, are affected by, or arise out of pregnancy or childbirth," but EEOC then deems apparently every aspect of female sexual function or reproductive health related to pregnancy. EEOC even says that medical conditions related to pregnancy include acts for avoiding pregnancy (using birth control), acts for achieving pregnancy (through IVF), and bodily functions not necessarily connected to pregnancy (such as menstrual cycles or hormone level changes).[15] But EEOC's anything-and-everything definition of "related medical conditions" would render the term childbirth superfluous, as childbirth is of course "related" to pregnancy. Plus, when Congress wants to address all aspects of female sexual function or reproductive health, or deem abortion to be healthcare, it knows how to do so. For instance, under 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."[16] Yet, in the PWFA, Congress referred only to pregnancy, childbirth, or related medical conditions—a narrower category. *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.'"). EEOC thus fails to recognize that there thus must be a present or recent pregnancy or childbirth for the Act to apply. Without a present or recent pregnancy, there is no pregnancy, childbirth, or related medical condition to accommodate.

Second, under the PWFA, a limitation is not an *action*, such as the act of seeking healthcare or obtaining an abortion, but a "*physical or mental condition* related to, affected by, or arising out of *pregnancy, childbirth, or related medical conditions* . . . ."[17] The PWFA's physical, mental, and medical conditions, as in the PDA, refer to "involuntary, detrimental impacts of pregnancy, childbirth, and related medical conditions on female workers."[18] Acts to obtain products or services are not medical conditions, let alone physical or mental conditions, and the PWFA covers only "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions."[19] Under similar language in the PDA, a "medical condition" related to pregnancy and childbirth means a "physiological result of being pregnant and bearing a child." *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 428–29 (5th Cir. 2013). But actions, such as seeking

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[14] 42 U.S.C. §2000gg(4).

[15] 88 Fed. Reg. at 54,721, 54,767, 54,774 (proposed 29 C.F.R. § 1636.3(b)).

[16] 18 U.S.C. § 248(e)(5).

[17] 42 U.S.C. § 2000gg(4) (emphasis added).

[18] Zachary G. Garrett, *The Ghost of* Gilbert*: Title VII Abortion Discrimination Actions After* Dobbs, 20 U. St. Thomas L.J. (forthcoming 2024) (manuscript at 22–23), https://ssrn.com/abstract=4432358.

[19] 42 U.S.C. § 2000gg(4).

or using products or services, are not conditions, even if accommodations for medical conditions can require allowing employees to take actions to attend to their condition. Consider lactation. Lactation is a *medical condition* that relates to, is affected by, or arises out of pregnancy or childbirth. *Id. See also Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1259 (11th Cir. 2017) ("We agree with the Fifth Circuit's determination that lactation is a related medical condition and therefore covered under the PDA."). At the same time, even if lactation-related *actions* are not themselves a medical condition, because lactation itself is a physical or mental medical condition related to, affected by, or arising out of pregnancy and childbirth, under the PWFA the need to lactate would be a known limitation that must be reasonably accommodated by allowing breaks to lactate or time off to attend lactation-related healthcare appointments. EEOC thus incorrectly defines actions or other non-conditions, such as abortion, as medical conditions. Unlike the physical and mental process of recovery from a miscarriage or abortion, the *act* of obtaining products or services—including the act of obtaining an elective abortion—is not a medical, physical, or mental condition, or a known limitation.

Third, employers must *accommodate* pregnant working women by enabling them to keep their jobs and their babies, but accommodating the act of seeking an elective abortion seeks to *avoid, rather than to accommodate*, pregnant women and unborn children.[20] The PWFA requires reasonable accommodations for physical or mental conditions from pregnancy, childbirth, and related medical conditions, like time off for prenatal appointments, so that pregnant women can keep their jobs and their children. But accommodating the act of seeking an elective abortion does not accommodate a pregnancy or childbirth, or pregnancy-related medical conditions, such as prenatal depression or anxiety. It does not help pregnant women keep their jobs *and* their babies. It is not healthcare, and it does nothing to make a workplace accessible for women with pregnancies. Moreover, forcing employers to facilitate elective abortions is never reasonable and is per se an undue hardship for any employer, especially pro-life and religious employers.

In sum, nothing in the PWFA's text directly or indirectly covers the act of obtaining an elective abortion. Even EEOC does not contend that a reasonable accommodation for the limitations of pregnancy, childbirth, or related medical conditions is an accommodation for the act of seeking an elective abortion. And for good reason. To adopt a contrary atextual interpretation would lead to perverse incentives. Employers theoretically could offer only abortion leave to women who seek to bring their pregnancies to term. Under the PWFA, a woman is not entitled to the accommodation of her choice, merely a reasonable accommodation that accommodates her pregnancy as well as her requested accommodation. 42 U.S.C. § 2000gg–2(g) (immunizing employers from liability if they "identify and make a reasonable accommodation that would provide such employee with an equally

[20] 42 U.S.C. §§ 2000gg(4), 2000gg–1.

effective opportunity.").[21] If an accommodation for the act of seeking an elective abortion is a reasonable accommodation for the limitations of pregnancy, childbirth, or related medical conditions, an employer could take the position that special time off to get an abortion is an equal or superior accommodation to any other accommodation, and it could withhold the very job-related pregnancy accommodations that the PWFA seeks to provide. This absurd consequence underscores why the PWFA's text must be carefully parsed rather than jumbled loosely together. No woman should be pressured by her employer to have an abortion by denying her support for her pregnancy.

Fourth, introducing abortion expressly or implicitly into the PWFA wreaks havoc with the Act's structure and text by putting employers to inconsistent obligations. Pregnancy and abortion cannot exist side by side anywhere in the Act, but especially not when employers factor in the PWFA's intimidation, harassment, and retaliation provisions. These provisions seek to protect pregnant and post-partum women from being made to feel that their accommodation requests are or would be unwelcome.[22] But making employers offer special privileges for the act of seeking an elective abortion could make many pregnant women feel unwelcome for seeking more expensive pregnancy accommodations and would chill pro-life workplace cultures and speech.

Fifth and finally, Congress added a safeguard provision to make doubly sure that the PWFA did not displace state pro-life protections for women and unborn children. The PWFA shall not be construed "to invalidate or limit the powers, remedies, and procedures under any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions."[23] This provision makes clear that the PWFA's terms should not be interpreted in a way that would preempt laws that protect women and unborn children from the harms of abortion, such as state laws that prohibit facilitating elective abortion. State pro-life laws provide greater protection than the PWFA for individuals affected by pregnancy, childbirth, or related medical conditions because state pro-life laws do more than just provide workplace accommodations for pregnancy; they shield pregnant women and unborn children from the harms of elective abortion. Women and unborn children are "individuals" protected under these state and local laws, and Congress did not exclude either women or unborn children from the PWFA term "individuals."

Yet, in the rule, EEOC ignores each of the PWFA's textual limits. Instead, EEOC says in passing that the PWFA must address abortion because the EEOC

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[21] *Accord* 88 Fed. Reg. at 54,740–41 (proposed 29 C.F.R. § 1636.4(a)(4)).

[22] *Id.* at 54,743–44, 54,771–54,772, 54,792–93 (proposed 29 C.F.R. § 1636.5(f)).

[23] 42 U.S.C. § 2000gg–5(a)(1).

guidelines and two circuit courts have defined abortion as a "related medical condition" under the PDA in Title VII, 42 U.S.C. § 2000e-2(k).[24] But this argument does not hold water for many reasons. *First*, Congress did not amend Title VII or the PDA with the PWFA, nor did it incorporate Title VII or the PDA into the PWFA. Congress instead wrote the PWFA as a freestanding law on a clean slate. *Second*, these cases do not rest on good law: both abortion decisions involved "substantial reliance on the constitutional right to abortion now undone by *Dobbs*."[25] And, once *Roe*'s rationale is set aside, Title VII and the PDA are subject to the same textual limits as the PWFA—addressing medical *conditions*, not voluntary *actions*.[26] *Third*, EEOC does not show a consistent and widespread judicial consensus about the meaning of the term "related medical conditions." The Supreme Court, other circuit courts, and Congress never blessed these two extreme pro-abortion decisions, and EEOC ignores how other courts have defined a related medical condition in ways that would exclude abortion. *E.g.*, *Hicks*, 870 F.3d at 1259; *Houston Funding II, Ltd.*, 717 F.3d at 428–29; *Krauel*, 95 F.3d at 679. *Fourth*, pro-life states like West Virginia and Louisiana adopted local versions of the PWFA, and no court appears to have interpreted state or local PWFAs to include abortion. *Fifth*, under Title VII and the ADA, providing travel or leave for abortions can in fact constitute prohibited employment discrimination.[27] *Sixth*, EEOC's PDA guidelines likewise fail to analyze the PDA's text, and in any event agency guidelines about a statute's meaning do not receive binding *Chevron* or *Auer* deference. *Christenson v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

III. The PWFA's limited textual scope is confirmed by the PWFA's bipartisan history and the canons of statutory interpretation.

The PWFA's text does not include abortion, but if there were any doubt, the legislative history of the PWFA confirms it. The nation's "sharp debates" over abortion and Congress's refusal to advance any post-*Dobbs* abortion legislation "stand in stark contrast" to the bipartisan PWFA. *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023). The PWFA's lead sponsor, Democrat Senator Bob Casey, said: "I want to say for the record [that] 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."[28] The lead

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[24] 88 Fed. Reg. at 54,721, 54,767 (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)).

[25] Garrett, *supra* note 17, at 2–3, 11–12.

[26] *Id.* at 2–3, 17–26.

[27] *See, e.g.*, Sharon Fast Gustafson & Rachel Morrison, *Amazon, Starbucks promise abortion benefits, but they should think twice*, Fox News, Sept. 21, 2022, https://www.foxnews.com/opinion/amazon-starbucks-promise-abortion-benefits-they-should-think-twice.

[28] 168 Cong. Rec. S7050 (Dec. 8, 2022).

Republican cosponsor, Senator Bill Cassidy, likewise said: "I reject the characterization that this would do anything to promote abortion."[29] Senator Steve Daines concurred: "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. . . . 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."[30] No Democrat member of Congress contradicted them.

Nevertheless, in this rule EEOC purports to arrogate to itself the decision of whether the PWFA includes abortion, a decision of "magnitude and consequence on a matter of earnest and profound debate across the country," *Biden v. Nebraska*, 143 S. Ct. at 2374 (cleaned up). Yet a decision of this magnitude—to take away the status of personhood from an entire class of human beings protected under state law—is not committed to EEOC's discretion. It is especially inapposite in a law protecting pregnant women and their children. To prevail, EEOC must show much more than the PWFA is silent or ambiguous on abortion. Under the major questions doctrine, the clear-notice federalism canon, and the canon of constitutional avoidance, EEOC must show that an abortion mandate was unmistakably clear in the text of the PWFA at the time of enactment. *E.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022). But it would be "odd indeed" if Congress had tucked the power to negate the enforcement of state abortion laws in such "a relatively obscure provision" of the PWFA. *Sackett v. EPA*, 143 S. Ct. 1322, 1340 (2023).

Respectfully Submitted,

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[29] *Id.*

[30] 168 Cong. Rec. S10081 (Dec. 22, 2022).