E.O. 12866 Meeting
EEOC Pregnant Workers Fairness Act Regulations
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Thank you for the chance to provide comments on OIRA's review of the proposed rule by the Equal Employment Opportunity Commission (EEOC) entitled Pregnant Workers Fairness Act Regulations.

ADF strongly opposes any inclusion of an abortion mandate in the proposed EEOC PWFA regulations.

I. Background

Alliance Defending Freedom (ADF) is an alliance-building legal organization that advocates for the right of all people to freely live out and speak the truth. ADF pursues its mission through litigation, training, strategy, and funding. Since its launch in 1994, ADF has handled many legal matters involving the right to life, religious liberty, federal healthcare and employment laws, constitutional rights, and other legal principles addressed by the proposed rule. ADF recently won its 15th Supreme Court victory in *303 Creative v. Elenis*, No. 19-1413 (U.S.), a landmark decision protecting the free speech rights of all Americans.

My name is Julie Marie Blake. I am Senior Counsel with Alliance Defending Freedom. My work focuses on regulatory litigation. I am counsel in several cases against the federal government, including *Alliance for Hippocratic Medicine v. FDA*, *Christian Employers Alliance v. EEOC*, *State of Texas v. Becerra*, and more. I regularly file comments encouraging federal agencies not to disregard fundamental freedoms in their rulemakings.

II. No need for rulemaking

The PWFA does not address abortion, and so there is no need for any EEOC PWFA regulations to address abortion.

EEOC regulations should protect the rights of pregnant women to have reasonable accommodations in the workplace. But EEOC regulations should not highjack a pro-life law to impose an abortion mandate on employers across the country, especially not on pro-life and religious employers.

- In the Pregnant Workers Fairness Act (PWFA), Congress took a transformational, bipartisan pro-life step to protect pregnant women by requiring employers to accommodate pregnancies, childbirth, and related conditions.

• But activists have been calling on EEOC to read into this law an abortion mandate on employers across the country, requiring employers to "accommodate" an elective abortion, regardless of state laws protecting unborn life and regardless of employers' pro-life positions or religious beliefs.

• EEOC should reject these activists' effort to highjack the Pregnant Workers Fairness Act and should refuse to smuggle in an abortion mandate into a transformational pro-life, pro-woman law.

The bottom line is that Congress sought to help pregnant women, not to force employers to facilitate abortions.

A. Including an abortion mandate in PWFA regulations is contrary to the PWFA's policy goals.

The PWFA seeks to help women going through pregnancy, and ultimately encourage life. Women and children deserve real healthcare, not to be pressured by their employer into abortions for economic reasons.

Fifty years of scientific advancement since *Roe* leaves no doubt that states have a compelling interest in protecting unborn children at every stage of development. Life begins at conception. At just six weeks, an unborn baby's hearts begin to beat. At eight weeks, they have fingers and toes. And at 10 weeks their unique fingerprints begin to form. States are recognizing their humanity and protecting life at its earliest stages. Every unborn child is worthy of protection.

Pro-life laws affirm women's dignity and prioritize their physical and emotional health and well-being. Women deserve real healthcare, not dangerous and unnecessary procedures. Pro-life laws ensure that women aren't put at the heightened risk of death, illness, and psychological trauma caused by abortion. Women are fully capable of being moms and living successful, happy lives. It's demeaning to say otherwise. Surveys show that most women who have abortions say that they would choose life if they had support, which is why Congress passed the PWFA.

We must ensure that every pregnant woman who needs support has access to the resources she needs and to a community ready to come alongside her and her child. No woman should be pressured or coerced by her employer to have an abortion. And employers should not have any financial incentives to encourage abortion over life.

Should the EEOC seek to highjack PWFA language to further abortion or abortion-related purposes, the rules suddenly shift from accommodating the development of life to accommodating the termination of life. This bivariant purpose in potential rulemaking is not only counterintuitive, but inherently contradictory. Employers should support pregnant women, not be forced to support abortion.

B. EEOC has no authority to include an abortion mandate in PWFA regulations.

1. The Pregnant Workers Fairness Act seeks to protect women, not to facilitate abortion.

The Pregnant Workers Fairness Act is designed to protect pregnant women in the workplace. This legislation requires accommodations for pregnant women relating to pregnancy, childbirth, and related medical conditions, such as morning sickness or gestational diabetes. The PWFA provides a defense for employers that work with employees in good faith to identify alternative accommodations that are equally effective to the accommodation requested by the employee, and do not cause an undue hardship. But the PWFA contains no exemptions, and any religious accommodation appears limited to the right to hire co-religionists.

The EEOC's rulemaking powers conferred by the Pregnant Workers Fairness Act are intended to clarify commonsense ways that employers can help pregnant mothers and their families. This Act allows support for related medical conditions such as gestational diabetes—without compelling employers to sponsor abortions.

The final PWFA category of protections concerns "related conditions," and activists have been calling on the EEOC to read into this category abortion. They thus ask EEOC to impose an abortion mandate on employers across the country, requiring employers to "accommodate" or facilitate elective abortions, regardless of state laws protecting unborn life and regardless of employers' pro-life positions or religious beliefs. Under these activists' view of the Act, the EEOC could issue regulations that mandate that employers provide accommodations, such as leave, for abortion on demand, including for interstate abortion travel.

Any PWFA abortion mandate would create immediate problems for all employers, especially pro-life and religious employers. While the PWFA precludes mandates on employers to cover any specific item or service in the context of "an employer-sponsored health plan," it does not exempt from the duty to accommodate any other employment practices or benefits. An abortion mandate thus could subject employers to crippling lawsuits if they decline to facilitate abortion. Similarly, there is also concern that employers could be sued for anything that would be construed under the Act to "interfere" with a woman seeking leave for an abortion. These concerns are particularly acute for religious organizations and certain secular entities, like closely-held or small businesses, and secular pro-life organizations.

EEOC's forthcoming regulations thus should not be used to smuggle abortion into the definition of "related medical conditions."

2. Congress did not authorize the EEOC to impose an abortion mandate on employers nationwide.

Congress spoke clearly when it referred to pregnancy, childbirth, and related conditions, and when it did not include abortion in this list of protected conditions.

Protections for workers experiencing "pregnancy, childbirth, and related medical conditions" are protections for like things: they work in context together as pro-life protections. The PWFA thus only concerns related medical conditions within a pregnancy to support and bring forth life, rather than externally related procedures to terminate life, e.g., abortion.

This pro-life understanding is confirmed by the legislative history. The very sponsor of the bill is quoted saying, "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."

If the EEOC seeks to smuggle abortion into the PWFA, it would create a major questions doctrine case. For Congress to impose an abortion mandate on every employer in America, Congress must speak clearly. A mandate to facilitate abortion is a major question of vast political and economic significance, involving serious controversy and inevitably conflicting with laws protecting unborn life. When such a major issue is involved, it is not enough for Congress to use vague text or to use language that has been misinterpreted in another context in controversial lower-court decisions. Congress would not do something so big without speaking to and addressing that issue clearly. And because Congress did not address that issue clearly, EEOC has no power to compel an abortion mandate.

For the same reason, any purported lack of clarity or ambiguity does not empower EEOC to assert *Chevron* deference in support of any abortion-related interpretation. Silence weighs against EEOC's authority, not in favor of it, when a major question is involved.

The PWFA also does not require paid or unpaid leave for abortion travel through the operation of its other provisions—a point that EEOC should recognize in its rulemaking. Because the PWFA creates a right to an accommodation, it requires a fact-specific, case-by-case determination. It does not require the adoption of any across-the-board policy. The question is whether there would be a reasonable accommodation (it does not have to be the employee's preferred accommodation) that does not pose an undue hardship to the employer. But a pro-abortion accommodation of any kind would impose a per se undue hardship on any employer, especially a pro-life or religious employer that opposes abortion, and so any abortion mandate would lack statutory authority as applied.

EEOC must also consider that employer-paid travel and leave for abortions can constitute employment discrimination under Title VII and state laws—factors that counsel in favor of a limited reading of the PWFA not to include abortion. Paid leave is not commonly a reasonable accommodation. At most, unpaid leave should be required for abortions, barring special circumstances. Paid leave should only be considered a reasonable accommodation in special circumstances, such as where a woman seeks to use accrued sick leave, where the sick leave is not otherwise available for this purpose. If paid leave is considered a reasonable accommodation for abortion, it puts employers at risk of claims that they are discriminating against other employees by not providing the same accommodations to other workers. (Relatedly, as discussed below, EEOC thus must

quantify and consider: (1) for employers to have to extend similar benefits to other employees in other situations, to avoid discrimination claims or (2) defending such claims in court.)

3. Any abortion mandate would have a plethora of legal vulnerabilities.

If the EEOC seeks to smuggle abortion into these regulations, it will run headlong into a host of legal problems.

First, it will be acting in excess of its statutory authority, properly understood by the law's plain text and by the traditional tools of statutory interpretation, such as the major questions doctrine.

Second, it will have adopted a mandate that displaces traditional areas of state law, contrary to the clear-notice federalism canon and the structural principles of federalism. The federalism canon is another tool confirming that Congress did not address abortion in this act. And this canon also provides important guardrails to ensure that the agency does not violate the structural principles of federalism and the Tenth Amendment. Any abortion mandate's displacement of state law would be unconstitutional, as it seeks to regulate a traditional area of state authority, and it would exceed Congress's enumerated powers. Congress has no power to impose an abortion mandate on all employers nationwide, either under the Commerce Clause or under the Fourteenth Amendment. As the Supreme Court held in *Dobbs v. Jackson's Women's Health Organization*, there is no federal right to an abortion and the states are free to regulate and proscribe abortion.

Third, any abortion mandate would create serious problems for free speech and religious liberty. The Act seeks to protect pregnant women in the workplace–but the agency, should it pursue this line of rulemaking, would require employers to give contradictory messages to their employees, saying that they support women and unborn children, but also communicating that abortion is healthcare and that unborn children lack any right to life.

If a law requires an employer to enact a particular policy, and that policy is conveyed to employees, it will create First Amendment problems. It would force employers to say that abortion is a medically legitimate option, equivalent to pregnancy and childbirth—contrary to protections for pro-life speech in *NIFLA v. Becerra. National Institute of Family and Life Advocates v. Becerra*, 585 U. S. ___ (2018). It also injures their pro-life or religious expressive identity under *Hurley*. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). EEOC may argue that it is speech incidental to conduct, but this speech would not be factual and non-controversial as *Zauderer* would require. *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626 (1985). In addition, the forced inclusion of accommodations for abortion burdens religious liberty.

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb,[1] subjects any abortion mandate to strict scrutiny, and so it would provide a defense for religious employers. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.,* 573 US 682 (2014), *Zubik v. Burwell*, 578 US ___ (2016). The Free Exercise Clause likely would require the same. Exempting all small employers from the scope of the act suggests that the law is not neutral or generally applicable, and thus would subject the law to strict scrutiny. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

The Administrative Procedure Act requires EEOC to consider these issues up front. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). EEOC must explain, consequently, how the application of the rules to particular private groups with pro-life convictions or religious concerns is not only necessary to achieve the agency's stated policy goals, but additionally how religious concerns can be duly accommodated by the agency, in keeping with current statutory law and Supreme Court precedent. EEOC thus needs to explain why this mandate would not be unconstitutional under *Hurley*, *303 Creative*, *NIFLA*, and many other Supreme Court cases.

EEOC also should recognize the application of these protections in rulemaking, by providing direct exemptions for pro-life and religious employers in the regulatory text, and it should ensure that protections for pro-life and religious employers extend to the Act in full.

In particular, EEOC must ensure that no abortion mandate is smuggled in through an incorrect application of the PWFA's retaliation provisions. Retaliation claims would put pro-life employers in the crosshairs of litigation. Consider one example: A woman asks religious employer for an accommodation for abortion (such as unpaid leave). The pro-life employer discovers the abortion via the accommodation request. The employer does not provide the accommodation and no longer employers the woman who getting an abortion, as her abortion contradicts the employer's religious mission and identity. Even if the law exempts the employer from facilitating the abortion, the woman or EEOC may still claim retaliation against the woman for making the accommodation request, which is a backdoor way of protecting employees who seek abortions. This is all the more reason not to seek to unlawfully include abortion in the first place.

III. EEOC must accurately quantify the costs of the rulemaking if it includes abortion.

EEOC should conduct a rulemaking process that accurately identifies the rule's costs and benefits, free from political bias.

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[1] RFRA prohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Any cost-benefit analysis must consider the effect on unborn life from an abortion mandate. The EEOC cannot ignore these costs and merely assume that abortion only provides benefits.

A. Market and Social Costs

The agency needs to consider each of a host of alternative approaches that could be utilized instead of whatever one might be determined for policy reasons. If any of those approaches mitigate the costs sufficiently or magnify any potential benefits, this particular adoption of rules would not be necessary to avoid those excessive costs.

The agency must account for the disparate costs both immediate and future upon the implementation of policy-based rules. The agency should especially consider costs that the implementation of these rules should affect upon the religious employers or those with conscientious objections to any policy outlined, although general costs to all employers should certainly be prevenient. The agency's rule promulgation should also include provisions preventing the employer from pressuring the pregnant woman into an abortion as a cost-saving mechanism.

We expect that the agency will determine any rule concerning abortion or abortion-related issues to be economically significant, according to the process established by Section 3(f)(1) Significance, even after EO 14094. Agency analysis should presume maximum costs given reasonable conditions in order to account for the greatest range of possible outcomes from rule promulgation.

B. Supply and Material Costs

The first initial cost that the agency should consider in rule promulgation are supply and material costs. Each region or geography will obviously have variable costs, and the agency cannot merely average costs for employers across these regions because not only do different geographies bring with them separate costs, but (considering the macro) various states have their own regulations and laws. That is, California will have a different cost structure than Wyoming. Nonetheless, the agency must consider this especially should the rules concern abortion or abortion-related issues. EEOC also would need to consider comparable cost analysis of various types of abortifacients and types of side effects and their effects on worker productivity. If, for instance, the abortifacient risks incapacitating the formerly pregnant woman beyond a standard recovery time, this should be seen as a burdensome cost. Burdensome costs should also include state law liability, or any action the employer might incur liability from, among others.

The agency must provide analysis for both the general recovery time associate with abortion procedures and procedure-specific recovery time, as well as demographic (age, race, socioeconomic status) variances in these data fields. The agency must also perform a market analysis and determine how demographic data varies across industry and locality, thus applying a full-recovery analysis from various abortion procedures *in toto*; this then should lead to a discrete analysis of expected time-off related to recovery by the woman. A two-fold analysis should utilize this information to account for the opportunity costs incurred by the company's inability to hire another worker in lieu of the woman during this

recovery process, as well as the expected decrease in efficiency in the division of the firm overall. Benchmarks should be set to determine various average losses or costs based on demographic data. Furthermore, the agency should be able to provide a risk analysis in the event that the abortion procedure's risks are realized in a more severe recovery time or incapacitation of the female employee. Additionally, the agency should consider the emotional and psychological recovery time from the abortion among women using the best psychiatric and statistical information available.

C. Environmental Costs

The cost structure related to environmental costs should consider not only the employer, but the larger firm, if applicable, related firms, and the market holistically. This analysis should also consider the prevalence of pregnant women in certain markets, and prepare analysis as to which markets will be the most effected by any rule promulgation.

Initial environmental costs focus specifically on the departmental setting of the pregnant woman and her co-workers. Should agency rules include abortion mandates, the agency must consider several countervailing costs. If workers are adjusted to cover abortion-related absences, cost analysis should include not only the surface-level costs of coverage costs (viz. overtime, schedule changes, etc.), but the efficiency and advantage costs, as well. Especially in specialized work where the person (the pregnant woman) in the role has the comparative advantage compared to her co-workers in other positions (although this analysis should run the gamut of employment environments, not just specialized labor), cost analysis should consider the costs associated with transferring employees temporarily into different positions. Cost analysis should also determine what current and expected personnel shortages would mean for employers and firms of various size.

With these related costs, analysis should consider competitive benefits incurred by rival firms and employers based on decrease in efficiency, higher variable costs in the short run, and anticipated long run costs relating to the status of pregnant women. Analysis relating to rulemaking should also consider if promulgation has the potential to allow certain markets to tend towards monopoly, as a result of competitive forces.

There is also potential for employer-sponsored travel and leave for abortions would be discrimination under Title VII and state laws. This can amount to further litigation costs for employers. So EEOC must quantify and consider costs: (1) for employers to have to extend similar benefits to other employees in other situations, to avoid discrimination claims or (2) defending such claims in court.

The cost to the ecological environment should also not be discounted. If firms and employers in states with restrictions on abortions should be mandated to cover travel expenses, the employer will be subsidizing various forms of environmental pollution and energy usage.

D. General Costs

The agency should also account for general market costs that arise because of any potential rule promulgation with respect to abortion.

The largest market cost to be inferred from potential rule promulgation concerning abortion is the effect upon employers and firms who object to abortion and related issues, yet for whom the PWFA does not provide an exemption. Should the agency adopt a position which places Christians (or any group, secular or religious) at odds with their beliefs, an abortion mandate would force these firms to capitulate or exit the market. Either way, the firms will suffer costs. If the agency compels the employers to exit the market, there will be less competition for the remaining firms in particular markets, tending toward monopoly, and firms will be prevented from entering the market if they possess those values which would be precluded by a potential rule on abortion by the agency. Whatever agency rules are promulgated, therefore, should be to include exemptions. Notwithstanding any potential exemptions, the economic costs of both barriers to entry and expulsion by firms who might have any reservations, concerns, or objections to such rulemaking by the agency ought to be calculated.

Forcibly creating a market vacuum in the short run at least is a significant economic undertaking, and runs contradictory of the purposes of the PWFA, which only seeks to provide protections for pregnant women in the workforce. This alone is a credible basis for economic significance analysis according to Section 3(f)(1), irrespective of the costs highlighted above and below.

The sheer magnitude of a market vacuum across multiple industries must be fully analyzed before the agency can properly understand other costs. Yet other costs abound on top of a vacuum. There mere economic cost of abortion is also significant for the economy ($6.9 trillion), and the agency should also consider externalities (such as labor shortages, less social support for welfare programs, a decrease in innovation, and information costs) with both Pigouvian and Coasian analysis.

Information costs also bear a curious centrality to any future rulemaking by the agency. The PWFA has been billed as protecting and supporting women, however, if the agency reads an abortion mandate into the Act, a countervailing message will dominate. The public and private employers must properly understand the Act in order to comply, and employees must be able to understand it in order to utilize. Analysis must model the damages and costs done to both employers and employees as a result of misapprehension, underutilization, or inapposite litigation.

The agency should also perform analysis to demonstrate what racial disparities might occur among pregnant women who utilize any such rule, both for the pregnant women and the firms and employers required to comply.

Finally, the agency should consider the cost distribution of any burdens imposed on employers. The agency should calculate how firms will offload costs onto consumers and how this will affect consumer surpluses in various markets as case-studies. If the costs

concatenate, the agency should approximate what that will do to prices in various consumer and productive markets.

Ultimately, the degree of significant costs, determined by agency analysis, should indicate that rulemaking concerning abortion is not only outside the purview of what the EEOC is empowered by the PWFA to decide, but that it is too much an economic burden, as well. As a systematic review of abortion's economic impact concludes:

> Despite the variation in methodologies and considered cost components in studies reviewed, there is a consensus which can be drawn that abortion and post-abortion cares impose a substantial economic burden on society. Understanding the magnitude of the costs of abortion or pregnancy termination among policymakers provides vital information for identifying areas of need for future research and enables informed decisions to be made to establish health care priorities and allocating scarce resources.

In short, EEOC must consider the costs of promoting abortion, if it seeks to impose an abortion mandate.[2]

IV. Analytical Approaches

Both a benefit-cost analysis and a cost-effectiveness analysis must be provided for these rules, given that this is major rulemaking for which issues of otherwise strict scrutiny are subject. Furthermore, this has significant import for federal-state regulations. The civil rights goals of these rules make it particularly apposite to perform a cost-effectiveness analysis.

A valid effectiveness measure must be identified apriori to represent the expected social, legal, and economic outcomes. The agency needs to identify what measure of its goals are and how reasonable they are. The need to identify the need for the rule to prevent civil rights abuses also presumes the need and possibility of identifying such an effectiveness measure. That is to say, if an effectiveness measure is not identified and an explanation given of how the rules are tailored to achieve that measure, the rules will fail to establish clear need for the rules.

The cost-effectiveness analysis needs to explain how the civil rights goals will be achieved based on likely behavior in response to the regulation. For example, if imposition of the requirements causes private religious firms to vacate the markets where they are imposed, rather than to stay in that market and change their behavior, the agency needs to explain how the rule still meets its civil rights effectiveness measure.

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[2] See also https://www.jec.senate.gov/public/_cache/files/b8807501-210c-4554-9d72-31de4e939578/the-economic-cost-of-abortion.pdf; https://www.jec.senate.gov/public/index.cfm/republicans/2022/6/lee-abortion-carries-6-9-trillion-economic-cost-each-year.

Distributional effects are especially likely from this rule, since they are likely to cascade into effects on whole regions and markets, such as where more concentrated firm population is prevalent and private employers seeking to not support abortion generally operate (e.g., non-profit markets).

The agency must further identify metrics by which religious or secular entities can qualify for exemption. Otherwise, the agency must justify imposing the rule for a set period without exemption, given the current state of statutory and case law.

V. Identifying and Measuring Benefits and Costs

The agency should assess the baseline properly. The agency should consider the anticipatory costs that covered entities have incurred since the June 27 announcement.

The agency should calculate various costs on covered entities for complying with the final rule, including but not limited to the following:

o Costs for time spent reading and understanding how to comply with the rule need to be calculated.

o Costs for companies to obtain legal advice on how to comply with the rule must be factored in.

o Costs for time spent developing a compliance policy and plan must be calculated.

o Costs for training employees to implement and maintain the compliance policy.

o Implementing a regime of ongoing compliance with rule requirements including both the costs of carrying out the information collection, retention, and security to protect the information, and costs on morale for the employees.

o The costs of severance packages or retirements, including a calculation of the number of employees who decide to retire rather than comply with the rules.

o The agency must calculate the stresses that will be placed on the nation's infrastructure of testing because of the likely decline in private firms' participation in market activities across all 50 states.

o The cost of the rule in exacerbating existing labor shortages, and the negative effects on the economy overall, should also be calculated.

VI. Specialized Analytical Requirements

Small businesses and non-profits

The agency needs to assess the impact on small businesses. For the most part, firms with 100 employees are small businesses under the Regulatory Flexibility Act ("RFA").

Moreover, nonprofit entities are small businesses under the RFA, even if they have more than 100 employees.

Non-profit religious entities have rights under the Religious Freedom Restoration Act ("RFRA"). Any substantial burden on their religious exercise cannot be imposed absent a compelling interest imposed by the least restrictive means of regulation. 42 U.S.C. § 2000bb-1. Failure to exempt non-profit religious entities as entities needs to be justified under RFRA specifically.

Federalism

The rule has significant impacts on federalism and preemption of state and local law.

Tribal Consultation

The agency should consult and coordinate with Tribal governments concerning the impacts of this rule under Executive Order 13,175. President Biden also required tribal consultation in his January 26, 2021, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships.

Thank you for considering these important issues.

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