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*Filed Electronically*

Mr. Raymond Windmiller  
Executive Officer  
Executive Secretariat  
U.S. Equal Employment Opportunity Commission  
131 M Street, NE  
Washington, DC 20507

Subj: Regulations to Implement the Pregnant Workers Fairness Act,  
RIN 3046-AB30

Dear Mr. Windmiller:

On behalf of the United States Conference of Catholic Bishops (USCCB) and The Catholic University of America (Catholic University), we respectfully submit the following comments on the Equal Employment Opportunity Commission's (EEOC) proposed regulations to implement the Pregnant Workers Fairness Act (PWFA or Act), published at 88 Fed. Reg. 54714 (Aug. 11, 2023). Although the USCCB and Catholic University share the goals of better supporting pregnant women and mothers in the workplace, we are deeply concerned about the EEOC's insertion of a right to abortion-related accommodations into a legal regime where it has no place. We also offer a response to the EEOC's request for comment on how to most effectively implement the Act's religious exemption.

The bipartisan PWFA, which the USCCB supported,<sup>1</sup> has the commendable goal of advancing the well-being of pregnant women and their preborn children and ameliorating challenges associated with having children. Building a society that cares for expectant mothers and their preborn children is a priority for the bishops, who have repeatedly called for circumstances of employment that better support family life, especially challenges associated

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<sup>1</sup> See USCCB Letter of Aug. 9, 2021, to Members of Congress, available at [https://www.usccb.org/resources/PWFA\\_letter.pdf](https://www.usccb.org/resources/PWFA_letter.pdf).

with having children. Like the USCCB, Catholic University, too, is deeply committed to supporting pregnant women and mothers, including mothers on its own staff. The Act furthers our shared goals by removing the unique disadvantages that pregnant women and women giving birth have experienced under pre-existing law when seeking accommodations in the workplace. The EEOC's proposed regulations, to the extent that they advance the same goal, are also commendable. The clarity and specificity provided in the regulations about the myriad types of accommodations that a pregnant worker might reasonably require, as well as about other matters related to implementing the Act, will benefit both employees and employers. The USCCB and Catholic University thank the EEOC for its attention to supporting mothers in the workplace.

Notwithstanding the Act's and its implementing regulations' laudable life-protecting purpose, the proposed regulations are problematic for several reasons.

*First*, the proposed regulations introduce the abortion issue into a law that says nothing about abortion, flatly contradicting legislative history that expressly disclaimed any intention to require accommodations for abortion. The leading authors and sponsors of the PWFA assured their colleagues in no uncertain terms that the Act imposed no requirement with respect to abortion. It is a certainty that the bill would not have had the bipartisan support it received, and would not have passed, had it meant the opposite of what the lead authors and sponsors of the bill said it meant. Not surprisingly, reaction on the Hill to the proposed regulations was immediate and sharply critical. One of the lead sponsors of the Act issued a press release stating that the regulations "completely disregard legislative intent and attempt to rewrite the law by regulation." Statement of Senator Bill Cassidy, *Ranking Member Cassidy Blasts Biden Administration for Illegally Injecting Abortion Politics into Enforcement of Bipartisan PWFA Law* (Aug. 8, 2023), available at [Press Release | Press Releases | Newsroom | U.S. Senator Bill Cassidy of Louisiana \(senate.gov\)](#). The administration, he continues, has an obligation "to enforce the law as passed by Congress, not how they wish it was passed.... The decision to disregard the legislative process to inject a political abortion agenda is illegal and deeply concerning." *Id.*

*Second*, the proposed regulations do not adequately implement language in the Act that exempts religious organizations from any obligation to make an accommodation that conflicts with their religious beliefs. The religious organizations exemption in the PWFA explicitly cross-references an existing exemption in Title VII of the Civil Rights Act of 1964 and should be given the same broad effect in the PWFA context that it has in the Title VII context. Addressing a question posed by the Commission (88 Fed. Reg. at 54746), we conclude that the PWFA does not require a religious employer to make any accommodation that would conflict with its religious beliefs, and we urge the Commission to say so in the final regulations.

*Third*, the proposed regulations do not give ample scope to principles of religious freedom, speech, and expressive association, setting the stage for an unnecessary, time-consuming, and expensive conflict between those principles and the regulations. The final regulations should acknowledge that burdens on such rights create an undue hardship for employers, whether

secular or religious, and that accommodations in such cases are therefore not required under the PWFA. Put another way, even if the Commission *disagrees* with our views regarding the meaning and scope of the religious employer exemption in the PWFA, the regulations should recognize that an accommodation that violates an employer's rights of religious freedom, speech, or expressive association creates an undue hardship, whether the employer is religious or secular, thereby excusing the employer from making that accommodation.

*Fourth*, there are problems with the NPRM's Regulatory Impact Analysis. The proposed rule requires leave for the purposes of obtaining and recovering from an abortion, but the rule explicitly declines to attempt to estimate the costs this requirement would impose on employers. In addition, the Regulatory Impact Analysis does not acknowledge that providing accommodations for abortion could constitute pregnancy discrimination against pregnant employees who do *not* get abortions and are not offered equivalent benefits. The final rule's cost estimate will need to calculate the cost of additional benefits that employers would have to provide to avoid such discrimination charges, and the costs incurred by employers who do not provide such benefits and are sued for discrimination, and include those costs in the Regulatory Impact Assessment. If the Commission were to eliminate the requirement to accommodate abortion, as we believe appropriate, then these problems would be prevented.

## **I. Reasonable Accommodations for Pregnancy, Childbirth, and Related Medical Conditions Do Not Include Abortion-Related Benefits**

### **A. Statutory text and legislative history show that the PWFA does not require any accommodation for abortion.**

The PWFA does not require the provision of any benefit for purposes of facilitating an abortion. The intent of the PWFA is to require accommodations for “pregnancy,” “childbirth,” and “related medical conditions”—in other words, to assist pregnant workers and workers giving birth to a child by providing accommodations that would permit them to continue to remain both gainfully employed and healthily pregnant. The PWFA uses the words “pregnancy,” “childbirth,” and “related” medical conditions for that reason.

Abortion is neither pregnancy nor childbirth. And it is not “related” to pregnancy or childbirth as those terms are used in the PWFA because it intentionally *ends* pregnancy and *prevents* childbirth. Pregnancy and childbirth were the conditions that were *not* being accommodated under pre-existing federal law and that Congress, by passage of the PWFA, now intends employers to accommodate. Because abortion intentionally ends pregnancy and prevents childbirth, it is the conceptual opposite of pregnancy and childbirth and hence not a “related” medical condition. Indeed, it is not a “condition” at all. The PWFA says nothing about abortion and imposes no requirements with respect to abortion.

Members of Congress recognized this. When the Senate Health, Education, Labor and Pensions (HELP) Committee reported the PWFA out of committee, Senator Patty Murray stated:

Too many pregnant workers still face pregnancy discrimination and are denied basic accommodations—like being able to sit or hold a water bottle—to ensure they can stay healthy and keep working to support themselves and their families. No one should be forced to decide between a healthy pregnancy and staying on the job—so we must pass the Pregnant Workers Fairness Act without delay.<sup>2</sup>

These comments do not contemplate an intent to cover abortion. Senator Bob Casey, lead sponsor of the bill in the Senate, more explicitly stated on the Senate floor:

[U]nder 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.<sup>3</sup>

Senator Steve Daines endorsed Senator Casey’s statement and described it as the intent of Congress:

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.<sup>4</sup>

Senator Cassidy, the lead Republican sponsor of the PWFA, said the following in response to the release of the Commission’s draft regulations:

These regulations completely disregard legislative intent and attempt to rewrite the law by regulation... The Biden administration has to enforce the law as passed by Congress, not how they wish it was passed. The Pregnant Workers Fairness Act is aimed at assisting pregnant mothers who remain in the workforce by choice or necessity as they bring their child to term and recover after childbirth. The decision to disregard the legislative process to inject a political abortion agenda is illegal and deeply concerning.<sup>5</sup>

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<sup>2</sup> <https://www.help.senate.gov/chair/newsroom/press/senate-help-committee-advances-bipartisan-bills-to-improve-suicide-prevention-protect-pregnant-workers-and-support-people-with-disabilities>.

<sup>3</sup> 168 CONG. REC. S7050 (daily ed. Dec. 8, 2022) (statement of Sen. Bob Casey), at <https://www.congress.gov/117/crec/2022/12/08/168/191/CREC-2022-12-08-senate.pdf>.

<sup>4</sup> 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>.

<sup>5</sup> [Press Release | Press Releases | Newsroom | U.S. Senator Bill Cassidy of Louisiana \(senate.gov\)](#).

Thus, even if the EEOC were to view the text of the PWFA as ambiguous on whether it includes abortion (in our view there is no ambiguity), legislative history plainly forecloses that interpretation.

The Commission (88 Fed. Reg. at 54721 n.51) cites two court of appeals opinions that concluded—wrongly in our view—that Title VII, as amended by the Pregnancy Discrimination Act, can prohibit discrimination on the basis that a woman has had or is contemplating having an abortion. *Doe v. C.A.R.S. Protection Plus*, 527 F.3d 358 (3d Cir. 2008); *Turic v. Holland Hospitality*, 85 F.3d 1211 (6th Cir. 1996). But those cases do not bear on the meaning of the PWFA. And both cases are distinguishable. *Turic* was about firing only and did not involve questions about accommodations at all. *Doe*, while involving some factual discussions of leave, focused on whether the employee had been terminated for having an abortion. The distinction is material because an accommodation for an abortion may in fact facilitate that abortion.

In drafting the PWFA, Congress conspicuously chose not to amend Title VII but instead to write the PWFA as a freestanding law. This too suggests a desire not to import any abortion-related requirements that have been read into Title VII by the courts, and it provides additional reasons why members of Congress confidently disclaimed any intent that the PWFA include abortion accommodations.

**B. The principle of constitutional avoidance counsels against interpreting the PWFA to require any accommodation for abortion.**

Misconstruing the PWFA to require accommodations for abortion would create significant constitutional problems, as we discuss in Part III of our comments. Even if the Act’s incorporation of Title VII’s exemption for religious employers is appropriately construed, many employers that oppose abortion are not necessarily “religious organizations” within the meaning of that exemption. For example, many organizations whose principal purpose is to advocate on behalf of preborn children would likely not qualify as a religious organization under the multifactor test typically used by courts. And as the Supreme Court has recognized, some for-profit businesses can exercise religion. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014) (mandate that health plans cover contraceptives violated religious liberty of closely-held for-profit company with religious objections to such coverage).

Thus, even an appropriately broad reading of the PWFA’s incorporation of Title VII’s religious exemption would not fully alleviate the conflicts between PWFA and employers’ rights to free speech, expressive association, and free exercise of religion. The simplest application of the principle of constitutional avoidance—a canon of statutory construction that directs statutes to be construed in a way that avoids conflicts with the Constitution—would be to exclude abortion altogether from the scope of PWFA. *See, e.g., NLRB v. Cath. Bishop*, 440 U.S. 490, 501 (1979) (rejecting an interpretation of a federal statute that would give rise to serious constitutional questions in the absence of an “affirmative intention of the Congress clearly expressed”).

If the EEOC rule interprets the PWFA to require accommodations for abortion, then constitutional issues will also arise in the interpretation of the law’s prohibitions on retaliation. Those provisions prohibit employers from discriminating against employees who oppose acts or practices made unlawful by PWFA, and from “interfering with” rights protected under PWFA.

It is common for religious or mission-driven employers to maintain policies about employee conduct that are designed to protect the integrity of the organization’s religious or mission-oriented identity. Those policies often impose discipline on employees who contradict the organization’s religious beliefs or mission,<sup>6</sup> and are constitutionally protected exercises of free speech, expressive association, and/or the free exercise of religion.

Mere maintenance of those policies in relation to employees asserting rights under the PWFA—such as claims to a right to an accommodation for abortion—could be regarded as violations of PWFA’s anti-coercion provisions, in the sense that such policies “threaten” employees with possible disciplinary action should they assert such a right. And enforcement of those policies against employees who do could similarly be regarded as violating the PWFA’s anti-retaliation provisions. In this way, unless abortion is excluded, or the PWFA’s anti-coercion and anti-retaliation provisions are narrowly construed, constitutional conflicts will arise.<sup>7</sup>

### **C. The EEOC’s authority to interpret the PWFA to cover abortion is further limited by the major questions doctrine.**

The proposed regulations, insofar as they require accommodations for abortion, would likely violate the major questions doctrine, a principle of administrative law that holds that a federal agency may not exercise powers of vast economic and political significance unless Congress has clearly assigned the agency with the authority to do so. *See, e.g., Biden v. Nebraska*, 143 S. Ct. 2355 (2023); *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021); *Nat’l Fed. of Indep. Bus. v. Dep’t of Labor*, 142 S. Ct. 661, 665 (2022); *W. Va. v. EPA*, 142 S. Ct. 2587, 2610 (2022).

The issue of abortion is preeminent in American politics, and PWFA’s reach captures a broad swath of the economy. As noted above, the EEOC cannot possibly claim that Congress has spoken clearly *in favor* of including abortion accommodations within PWFA’s scope; if anything, Congress has clearly excluded them. Even assuming for the sake of argument that

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<sup>6</sup> In other words, these policies aim at ensuring that a religious organization’s employees are “of a particular religion,” given the definition of “religion” in Title VII, as discussed in Part II below. *See* 88 Fed. Reg. at 54746 (“[T]he Commission invites the public to provide examples of ... [w]hen the prohibition on retaliatory or coercive actions in PWFA, 42 U.S.C. 2000gg–2(f), may impact a religious organization’s employment of individuals of a particular religion...”).

<sup>7</sup> Given that the Religious Freedom Restoration Act (RFRA), discussed in more detail below, is quasi-constitutional, a “kind of super statute,” the Commission arguably bears a similar obligation to interpret the PWFA in a manner that avoids conflicts with RFRA. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020). However, given that PWFA omits many employers from its reach, it would likely not be regarded as a law of “general applicability” and thus would be subject to the same strict scrutiny analysis under the First Amendment that would apply under RFRA. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (holding that a law was not generally applicable because it allowed for discretionary exemptions).

PWFA's text is ambiguous on the matter, the major questions doctrine prevents the EEOC from exploiting that ambiguity to impose an obligation to facilitate abortions on a vast number of employers.

**D. Interpreting the PWFA to require accommodations for abortion is in tension with state laws forbidding abortion.**

Just as there is no indication in the text or legislative history of the PWFA that Congress intended to require accommodations for abortion, there is no evidence that it intended to preempt state laws regulating abortion. Many states prohibit abortion. Providing a workplace accommodation for an abortion in instances where the abortion violates state law may create a risk of liability, including criminal liability, on the part of the employer for facilitating the abortion. There is nothing in the PWFA's text or legislative history to suggest that Congress, when it enacted the PWFA, intended to trump state criminal abortion laws. All the evidence, as we have argued, points in the opposite direction, namely, that the PWFA has nothing to do with abortion.

**E. Interpreting the PWFA to require accommodations for abortion is in tension with the requirements to keep medical information private and confidential.**

Under the prevailing understanding of the process for identifying a reasonable accommodation, employers are required to engage in an interactive process with the employee in order to enable the employer to obtain relevant information. For instance, the EEOC's guidance on the ADA suggests that employers may, with employees' permission, request medical records regarding a disability giving rise to a request for an accommodation.

As applied to abortion, however, it seems that this interactive process would encourage employers to seek sensitive information about an employee's anticipated or actual abortion. This is another reason that PWFA should not be construed to relate to abortion. Indeed, in other quarters the administration, through the Department of Health and Human Services (HHS), has proposed rules that, under the Health Insurance Portability and Accountability Act (HIPAA), would heighten the confidentiality of information about abortion. An interpretation of PWFA that now requires or permits such disclosure would tack in the opposite direction. We note this not because we agree with the proposed HIPAA rules (we have filed comments opposing them<sup>8</sup>), but to underscore that the proposed EEOC regulations would create an internal inconsistency with HHS's proposed privacy regulations.

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For the above reasons, the final regulations should eliminate any requirement that employers provide an accommodation for abortion.

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<sup>8</sup> See [https://www.usccb.org/sites/default/files/about/general-counsel/rulemaking/upload/2023.6.12.hipaa\\_privacy.comments.pdf](https://www.usccb.org/sites/default/files/about/general-counsel/rulemaking/upload/2023.6.12.hipaa_privacy.comments.pdf).

## **II. The Regulations Should Acknowledge that the PWFA Does Not Require a Religious Employer to Make Any Accommodation that Would Conflict with Its Religious Beliefs.**

The PWFA provides that “[t]his chapter is subject to the applicability to religious employment set forth in section 2000e-1(a) of this title [section 702(a) of the Civil Rights Act of 1964].” The meaning of this cross-reference depends on the meaning of section 702(a), so we begin with the text of section 702(a). *See* Part II.A. *infra*. We then discuss case law that supports our reading of section 702(a) and explain why contrary court decisions are in error. *See* Part II.B *infra*. Finally, we take up the PWFA’s cross-reference to section 702(a) and, addressing a question posed by the Commission (88 Fed. Reg. at 54746), we explain why, by virtue of that cross-reference, the PWFA does not require a religious employer to make any accommodation that would conflict with its religious beliefs. *See* Part III.D *infra*.

### **A. The Text of Section 702(a)**

Section 702(a) states:

This title shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.<sup>9</sup>

The phrase “*This title shall not apply*”<sup>10</sup> means that when a religious employer makes an employment decision “with respect to the employment of individuals of a particular religion,” then that employer is exempt from *all of Title VII*, including claims arising from allegations of

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<sup>9</sup> Prior to its amendment in 1972, section 702(a) referred to the employment of individuals of a particular religion to perform work for an organization connected with the carrying on of the organization’s “*religious activities*.” In 1972, Congress amended section 702 to drop the word “religious” before “activities.” As a result, the current version of section 702(a) applies to *all* employees of a religious employer, not just those employees engaged in religious activities. *See, e.g., Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (applying the section 702(a) exemption to a building engineer); *Kennedy v. St. Joseph’s Ministries*, 657 F.3d 189, 192 (4th Cir. 2011) (noting that in 1972, Congress broadened section 702(a) “to include any activities of religious organizations, regardless of whether those activities are religious or secular in nature”); *Little v. Wuerl*, 929 F.2d 944, 950-51 (3d Cir. 1991) (noting that the current religious exemptions cover all employees, not just those engaged in religious activities); *Newbrough v. Bishop Heelan Catholic Schools*, No. C13-4114, 2015 WL 759478 (N.D. Iowa Feb. 23, 2015) (applying the section 702(a) exemption to a religious school system’s director of finance).

<sup>10</sup> As enacted by Congress, sections 702(a) and 703(e) of the Civil Rights Act use the word “title” (referring to all of Title VII) rather than “subchapter.” Pub. L. 88-352, tit. VII, § 702, 78 Stat. 241, 253 (July 2, 1964). The codifiers of the United States Code changed the word “title” to “subchapter” because Title VII of the Act comprises a single subchapter of the U.S. Code. *See* Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 J. of L. & Religion (Oxford) 368, 375 n.26 (2015) (explaining these changes).

discrimination based on protected classes other than religion.<sup>11</sup> Use of the term “title” in each exemption requires that result.

As used in section 702(a), what does “religion” mean? Section 701 of the Civil Rights Act, 42 U.S.C. § 2000e, provides the answer. It states:

For the purposes of *this title [subchapter]* ... [t]he term “*religion*” includes *all* aspects of religious *observance and practice*, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business. [Emphasis added.]

The reference to “observance” and “practice” in section 701 makes clear that “religion” includes conduct in conformance with religious mores, a conclusion reinforced by the use in section 2000e of the expansive terms “*all aspects*” and “*includes.*”<sup>12</sup> Because the definition of religion expressly applies to the entire title, it applies to the religion of employers as well as that of employees.<sup>13</sup>

Read together, the text of section 702(a) and of the definition of religion in Title VII has two important consequences. First, religious employers have a right to employ not just their co-religionists, but persons *whose beliefs and conduct are consistent with the employer’s own religious beliefs*. 42 U.S.C. § 2000e (“religion” includes “*all aspects of religious observance and practice, as well as belief*”) (emphasis added). Second, when religious employers exercise this right, none of the rest of Title VII (including Title VII’s prohibition on sex discrimination) applies. 42 U.S.C. § 2000e-1(a) (“*This title [subchapter] shall not apply ...*”) (emphasis added); 42 U.S.C. § 2000e-2(e) (“Notwithstanding *any other provision of this title [subchapter]* ... it *shall not* be an unlawful employment practice...”) (emphasis added).

Thus, section 702(a) is not limited in its application to the employment of co-religionists,

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<sup>11</sup> Stephanie N. Phillips, *A Text-Based Interpretation of Title VII’s Religious-Employer Exemption*, 20 Tex. Rev. L. & Pol. 295, 302 (2016) (noting that, under the text of the exemptions, when a religious employer makes an employment decision on the basis of an employee’s “particular religion,” “the employer is exempt from all of Title VII”); Esbeck *supra* note 8, at 375 (noting that the religious exemptions provide a “sweeping override of everything else in all of Title VII”).

<sup>12</sup> Use of the term “includes” in a federal statute is an indication that what follows is illustrative, not exhaustive. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012). Thus, the meaning of the term “religion” in section 2000e is not exhausted by the definitional phrase that follows the word “includes.”

<sup>13</sup> Had Congress intended the definition of “religion” in section 701 to apply only to the use of that term in the prohibition against discrimination on the basis of religion, Congress would have defined the term for purposes of the sections in which that prohibition is set out instead of the entire title. See *Larsen v. Kirkham*, 499 F. Supp. 960, 966 (D. Utah 1980) (correctly noting that the definition of “religion” in section 701 applies to the section 703(e) religious exemption), *aff’d*, 1982 WL 20024 (10th Cir. 1982), *cert. denied*, 464 U.S. 849 (1983); Esbeck *supra* note 8, at 377 n.32 (“If Congress had intended the definition [of religion] to not apply to 702(a) and 703(e)(2), it would have been very easy to have said so.”).

and that section, when applicable, creates an exemption to *all of Title VII* (not just religious discrimination claims). This conclusion follows from the very words of the statute, as demonstrated above.

## **B. Case Law on Section 702(a)**

That the section 702(a) exemption is not limited to claims of religious discrimination is supported by at least four federal court decisions—two issued by courts of appeals and two by district courts—which have applied the Title VII exemptions as a defense to Title VII claims of sex discrimination when the religious employer asserted a sincerely-held theological or doctrinal basis for its challenged employment decision. *Curay-Cramer v. Ursuline Acad.*, 450 F.3d 130 (3d Cir. 2006); *EEOC v. Mississippi Coll.*, 626 F.2d 477 (5th Cir. 1980); *Maguire v. Marquette Univ.*, 627 F. Supp. 1499 (E.D. Wis. 1986), *aff'd in part on other grounds, vacated in part*, 814 F.2d 1213 (7th Cir. 1987); *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571 (N.D. Tex. 2021), *aff'd in part, vacated in part on other grounds*, 70 F.4th 914 (5th Cir. 2023). A fifth and sixth federal court opinion—in each case by a concurring circuit judge—expressly endorses the view that section 702(a) shields a religious employer from *any* claim under Title VII when that employer has made an employment decision on the basis of religion. *Starkey v. Roman Cath. Archdiocese of Indianapolis*, 41 F.4th 931 (7th Cir. 2022) (Easterbrook, J., concurring); *Fitzgerald v. Roncalli High Sch.*, 73 F.4th 529 (7th Cir. 2023) (Brennan, J., concurring).

In the first of these decisions, *Curay-Cramer*, a Catholic school fired a teacher after she signed her name to a pro-choice ad in a local newspaper. The teacher sued for sex discrimination under Title VII. She claimed that the school had treated her more harshly than male colleagues who had also violated Church teaching. Resolution of that claim, the Third Circuit concluded, would raise serious constitutional questions because it would require the court to evaluate the relative seriousness of various violations of Church teaching. The court (450 F.3d at 139) drew upon *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991):

While it is true that the plaintiff in *Little* styled her allegation as one of religious discrimination whereas *Curay-Cramer*'s third Count alleges gender discrimination, we do not believe the difference is significant in terms of whether serious constitutional questions are raised by applying Title VII.

In the absence of a clearly expressed affirmative intent on the part of Congress to render such employment decisions subject to Title VII, the court construed Title VII to not apply when its application would involve evaluating violations of religious teaching. *Id.* at 141 (“Even assuming such a result is not expressly barred by 42 U.S.C. § 2000e-2(e)(2), the existence of that provision and our interpretation of its scope prevent us from finding a clear expression of an affirmative intention on the part of Congress to have Title VII apply when its application would involve the court in evaluating violations of Church doctrine.”).

In the second decision, *Mississippi College*, Patricia Summers alleged that a Baptist college's failure to hire her for a full-time teaching position in the college's psychology department was a result of sex and race discrimination. The Fifth Circuit held that if the college presented convincing evidence that it preferred a Baptist candidate over Summers (the person the

college hired was Baptist, while Summers was not), then the Title VII religious exemption “would preclude any investigation by the EEOC to determine whether the College used the preference policy as a guise to hide some other form of discrimination.” 626 F.2d at 486.

In other words, the Title VII exemption would bar investigation of Summers’ sex and race discrimination claims if the college had religious reasons for its decision not to hire her. The court (*id.* at 485-86) elaborated:

... [Section] 702 may bar investigation of [Summers’] individual claim [for sex and race discrimination]. The district court did not make clear whether the individual employment decision complained of by Summers was based on [her] religion. Thus, we cannot determine whether the exemption of § 702 applies. If the district court determines on remand that the College applied its policy of preferring Baptists over non-Baptists in granting the faculty position to Bailey rather than Summers, *then § 702 exempts that decision from the application of Title VII and would preclude any investigation by the EEOC to determine whether the College used the preference policy as a guise to hide some other form of discrimination...* [Emphasis added.]

In the third decision, *Maguire*, Marquette University refused to hire Marjorie Maguire as a theology professor because she rejected Catholic teaching on abortion. The district court concluded that the adjudication of Maguire’s Title VII sex discrimination claim would raise free exercise and establishment clause problems. To avoid such problems, the court construed the Title VII exemption to bar her claim. 627 F. Supp. at 1506-07.<sup>14</sup>

In a fourth and more recent decision, *Bear Creek*, a church sought a declaratory judgment that it was exempt under section 702(a) from a claim of sex discrimination based on its refusal to employ individuals who engage in homosexual or transgender conduct. The district court agreed that the church was exempt under section 702(a). The court wrote (*id.* at 591):

The plain text of this exemption ... is not limited to religious discrimination claims; rather, it also exempts religious employers from other forms of discrimination under Title VII, so long as the employment decision was rooted in religious belief. *See* 42 U.S.C. § 2000e-1(a) (“[Title VII] shall not apply to” ... a religious organization). In other words, Title VII’s prohibition “shall not apply” to religious employers who desire to “employ only persons whose beliefs and conduct are consistent with the employer’s religious precepts.” *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991). Thus, a religious employer is not liable under Title VII when it refuses to employ an individual because of sexual orientation or gender expression, based on religious observance, practice, or belief.

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<sup>14</sup> The court of appeals affirmed on other grounds, finding that Maguire had failed to establish a prima facie case of sex discrimination because, by her own admission, her beliefs about abortion, not her sex, were the but-for cause of the university’s decision not to hire her. 814 F.2d at 1217-18.

In addition to the plain reading of this provision, the structure of the Title VII religious exemption supports this interpretation. The religious exemption in § 2000e-1(a) does not stand alone. A second exemption covers those with “alien” employees: “This subchapter shall not apply to an employer with respect to the employment of aliens outside any State...” 42 U.S.C. § 2000e-1(a). Title VII provides no limitation to the alien exemption. Accordingly, “[i]f the religious exemption were somehow limited only to certain types of Title VII claims (i.e., of religious discrimination), one would expect the alien exemption to have a parallel limitation (i.e., claims of race or national-origin discrimination).” Br. of Becket Fund for Religious Liberty as Amicus Curiae Supp. Pls. 4; ECF No. 14. Without such limitations, the exemption for religious employers must be read equally broadly.

In a fifth case, *Starkey*, Circuit Judge Frank Easterbrook, in a concurring opinion, noted that when the Title VII religious employer exemptions apply, they shield the employer from all claims under Title VII, not just claims of religious discrimination. Judge Easterbrook observed that some courts have mistakenly interpreted section 702(a) to apply only to claims of discrimination based on religion. He notes correctly that religious organizations are not *categorically* exempt from Title VII. He emphasizes, however, that “when the [adverse employment] decision is founded on [the religious employer’s] religious beliefs, *then all of Title VII drops out.*” 41 F.4th at 946 (concurring opinion) (emphasis added).

In a sixth case, also out of the Seventh Circuit, Judge Michael Brennan filed a concurring opinion in *Fitzgerald* that mirrors the comments made by his colleague, Judge Easterbrook, in *Starkey*. Like Judge Easterbrook, Judge Brennan concludes that section 702(a) provides a defense not just to religious discrimination claims under Title VII, but to all Title VII claims when the religious employer has acted on the basis of its religious beliefs. This result, Judge Brennan explains—again tracking the reasoning of Judge Easterbrook—is required by the text of the Title VII religious exemptions. *Fitzgerald*, 73 F.4th at 534-37 (Brennan, J., concurring).

Further buttressing our point that section 702(a) does more than simply bar religious discrimination claims, courts have consistently held that the Title VII religious exemptions shield religious employers from retaliation claims. *Kennedy*, 657 F.3d at 193-94 (“[T]he ‘subchapter’ referred to in § 2000e-1(a) includes both § 2000e-2(a)(1), which covers harassment and discriminatory discharge claims, and § 2000e-3(a), which covers retaliation claims.... Thus, [plaintiff’s] three claims—discharge, harassment, and retaliation—all arise from the ‘subchapter’ covered by the religious organization exemption, and they all arise from her ‘employment’ by [the defendant].”); *Curay-Cramer*, 450 F.3d 130 (Title VII religious exemptions barred retaliation claim against religious employer); *Saeemodarae v. Mercy Health Services*, 456 F. Supp. 2d 1021, 1041 (N.D. Iowa 2006) (section 702(a) exemption barred employee’s retaliation claim against religious employer), citing *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 254 (S.D.N.Y. 2005) (“Plaintiff’s Title VII retaliation claim must be dismissed because the broad language of Section 702 provides that ‘[t]his subchapter shall not apply ... to a religious ... institution ... with respect to the employment of individuals of a particular religion’ .... Title VII’s anti-retaliation provision ... is contained in the same subchapter as Section 702. Accordingly, it does not apply here.”); see also *Garcia v. Salvation Army*, 918 F.3d 997, 1004-06

(9th Cir. 2019) (Section 702(a) barred retaliation claim against religious employer).

Contrary authority exists but, in our view, is flawed. The most common error involves neglecting the text of Title VII, or reading into the statute conditions or requirements that simply are not to be found there.

For example, some courts have stated that section 702(a) only enshrines a right to employ one's co-religionists. *Boyd v. Harding Acad. of Memphis*, 88 F.3d 410, 413 (6th Cir. 1996) (stating that section 702(a) “merely indicates that [religious] institutions may choose to employ members of their own religion”); *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982) (“Title VII provides only a limited exemption enabling [a religious employer] to discriminate in favor of co-religionists.”). This assertion, usually made without careful attention to the language of the statute, is contradicted by the text of Title VII and other case law, discussed above.

Another example: some courts assert, based on the “plain language” of Title VII, that the religious exemptions only bar religious discrimination claims. *E.g.*, *Starkey v. Roman Cath. Archdiocese of Indianapolis*, 496 F. Supp. 3d 1195, 1202 (S.D. Ind. 2020) (stating that “[t]he plain language of Title VII indicates that the [section 702(a)] exception for religious institutions applies to one specific reason for an employment decision—one based upon religious preference.”). These courts, however, tend to focus on the phrase “particular religion” in isolation, without taking into account the statutory definition of religion or Congress's use of the phrase “*This title shall not apply*” in section 702(a).

In considering what sorts of claims are barred by the religious exemptions, many courts fail to consider, or to consider carefully, the relevant statutory text in their analysis. *Herx v. Diocese of Fort Wayne-South Bend*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014), is illustrative. In that case, the district court considered whether the Title VII exemptions barred a sex discrimination claim against a Catholic school brought by a teacher who, in violation of Church teaching, had undergone in vitro fertilization. In its opinion, the court says nothing about the statutory definition of “religion.” The court does *quote* the text of the exemptions (*id.* at 1174), but then fails to *discuss* that portion of the specific statutory text providing that the exemptions apply to all of Title VII, relying instead on case law. *Id.* at 1175-76 (beginning by saying that “The court doesn't read the case law the same way the Diocese does,” and then discussing those decisions without reference to the text of the statute).

From the fact that Title VII does not create a *categorical* exemption for religious employers, some courts illogically conclude that Title VII does not exempt the religious employer from discrimination claims in the *specific case* under review. This involves the logical fallacy of arguing that a trait, if not universally present, must be universally absent, as when one argues that because it does not rain *every* Wednesday, it does not rain on *any* Wednesday. From the fact that a particular legal defense cannot be asserted in *every* case within a particular universe of cases, it does not follow that that defense cannot be asserted in *any* such case. Yet some courts continue to make this basic error when considering whether the Title VII exemptions apply. *See, e.g.*, *Boyd*, 88 F.3d at 413 (stating that Section 702(a) does not “exempt religious educational institutions with respect to *all* discrimination,” as if this answered the question whether the

exemptions applied in the case under review) (emphasis added).

Everyone agrees that Title VII does not categorically exempt religious employers from liability under Title VII. If Congress had intended a categorical exemption for religious employers, it would have enacted an exemption saying that no Title VII claims apply to religious organizations. But from the absence of such a total or complete exemption, it does not follow that the section 702(a) exemption that Congress enacted does not apply in a specific case, nor does it mean the exemption may *only* be invoked as a defense to claims of *religious* discrimination. No such limitation is expressed anywhere in the text of Title VII—not in the exemptions themselves, nor in the definition of religion, or anywhere else in Title VII. Esbeck at 374-80 (underscoring this point); Phillips at 298-315 (same). Most importantly, the text of section 702(a) and the definition of “religion” in Title VII affirmatively *contradict* the claim that the religious exemptions in Title VII are so limited, as explained above. And since the text is the leading guide to the meaning of Title VII, a point emphasized in *Bostock*,<sup>15</sup> it is the text of the statute that must govern.<sup>16</sup>

Some courts rely on legislative history for the proposition that religious employers “remain subject to the provisions of Title VII with regard to race, color, sex or national origin.” *Rayburn v. General Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1167 (4th Cir. 1985) (quoting Section-by-Section Analysis of H.R. 1746, the Equal Employment Opportunity Act of 1972); *Pacific Press*, 676 F.2d at 1276-77 (same); *Starkey*, 496 F. Supp.3d at 1202 (same). It is often true that religious employers are subject to Title VII, but as noted above, it is not always true because of the religious exemption. Moreover, if statutory text and legislative history give different answers to a question about the meaning of a statute, then legislative history must yield to statutory text. *Bostock*, 140 S. Ct. at 1737 (indicating that the express terms of a statute control over extratextual considerations).

### **C. EEOC Guidance on the Title VII Religious Exemption**

Current EEOC guidance on the meaning of the Title VII religious exemption reflects the above courts’ conclusions that Title VII permits religious employers to make employment decisions consistent with their religious beliefs:

Religious organizations are subject to the Title VII prohibitions against discrimination on the basis of race, color, sex, national origin ... and may not engage in related retaliation. However, sections 702(a) and 703(e)(2) allow a qualifying religious organization to assert as a defense to a Title VII claim of

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<sup>15</sup> *Bostock*, 140 S. Ct. at 1737 (“When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.”).

<sup>16</sup> Some courts seem to make the reverse argument, i.e., that if the religious exemption in section 702(a) can sometimes apply to claims of discrimination on bases other than religion, then those exemption will always apply, rendering Title VII a dead letter as to religious organizations altogether. *E.g.*, *Starkey*, 496 F. Supp. 3d at 1203 (“The exemption under Section 702 should not be read to swallow Title VII’s rules.”). This too is mistaken. The fact that section 702(a) applies in some cases does not demonstrate that it applies in all cases.

discrimination or retaliation that it made the challenged employment decision on the basis of religion. The definition of “religion” found in section 701(j) is applicable to the use of the term in sections 702(a) and 703(e)(2)...<sup>17</sup>

If the EEOC intends to adopt a contrary interpretation of the Title VII religious exemption in the context of the PWFA, it needs to explain why.

Having discussed the text of section 702(a) and related case law, we turn next to the provision of the PWFA that cross-references section 702(a).

#### **D. The PWFA’s Religious Exemption**

The PWFA states: “This chapter is subject to the applicability to religious employment set forth in section 2000e-1(a) of this title [section 702(a) of the Civil Rights Act of 1964].” Thus, the PWFA expressly adopts section 702(a) and applies it to the PWFA.

And that is precisely how Congress understood it. Senator Bill Cassidy explained that the exemption, as the preamble paraphrases (88 Fed. Reg. at 54746 n.185), “addresses the *same* issue as a rejected amendment to the PWFA from Senator James Lankford” (emphasis added). Senator Lankford’s amendment stated that “[t]his division shall not be construed to require a religious entity described in Section 702(a) of the Civil Rights Act of 1964 *to make an accommodation that would violate the entity’s religion.*” *Id.* (emphasis added).<sup>18</sup>

As Senator Cassidy had previously elaborated:

Is it possible that this law would permit someone to impose their will upon a pastor, upon a church, upon a synagogue, if they have religious exemptions? The answer is, absolutely no... The title VII exemption, which is in Federal law, remains in place. *It allows employers to make employment decisions based on firmly held religious beliefs. This bill does not change this.* [Emphasis added.]<sup>19</sup>

One relevant difference between Title VII and the PWFA is that Title VII forbids religious discrimination, whereas the PWFA does not. It would therefore make even less sense to interpret the PWFA’s incorporation of the Title VII religious exemption to merely protect against claims of religious discrimination, since nothing in the PWFA prohibits that.

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<sup>17</sup> U.S. Equal Employment Opportunity Commission Compliance Manual, Section 12, *available at* <https://www.eeoc.gov/religious-discrimination> (citations omitted).

<sup>18</sup> 168 Cong. Rec. S10069-70 (Dec. 22, 2022), at [www.congress.gov/117/crec/2022/12/22/168/200/CREC-2022-12-22-pt1-PgS10065-2.pdf](https://www.congress.gov/117/crec/2022/12/22/168/200/CREC-2022-12-22-pt1-PgS10065-2.pdf).

<sup>19</sup> 168 Cong. Rec. S7050 (Dec. 8, 2022), at <https://www.congress.gov/117/crec/2022/12/08/168/191/CREC-2022-12-08-senate.pdf>.

Thus, the religious exemption in the PWFA and section 702(a) of the Civil Rights Act are of one piece. Congress passed the PWFA with a correct understanding of section 702(a), aware that it does not merely exempt religious employers from claims of religious discrimination, or simply protect the right of religious employers to hire their co-religionists. It also protects religious employers from claims arising out of employment decisions motivated by the employer's religious beliefs, even if such claims are cast as discrimination on bases other than religion.<sup>20</sup>

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The Commission asks (88 Fed. Reg. at 54746) if the proposed rule should be revised to state that the PWFA *does not require a religious employer to make any accommodation that would conflict with its religious beliefs*. In light of the discussion above, the answer is *yes*.

### **III. The Proposed Regulations Will Create Burdens on Religious Liberty, Speech, and Expressive Association**

Earlier in our comments (Part I *supra*) we discussed the problem that the proposed regulations create with respect to abortion. In addition, the proposed regulations would require workplace accommodations for *other* items or procedures that may violate an employer's religious beliefs. We offer the following in response to the question posed by the Commission (88 Fed. Reg. at 54746) of "[w]hat accommodations provided under [the] PWFA ... may impact a religious organization's employment of individuals of a particular religion."

Among other things, the proposed regulations would require accommodations for in vitro fertilization (IVF). Even if infertility is a related medical condition.<sup>21</sup> IVF may be objectionable to many employers for multiple reasons: first, it contemplates the destruction of some live embryos (i.e., preborn human beings) and, second, it disassociates procreation from the integrally personal context of the conjugal act. *See* Congregation for the Doctrine of the Faith, Instruction *Dignitas Personae* on Certain Bioethical Questions, ¶¶ (2008), available at [https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20081208\\_dignitas-personae\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html).

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<sup>20</sup> Reading the religious exemption in the PWFA as simply restating the ministerial exception or other existing law would render the exemption superfluous, thus violating the canon of construction that requires that all the words of a statute be given effect.

<sup>21</sup> *But see Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996) (holding that infertility is not a related medical condition under the Pregnancy Discrimination Act (PDA)). Earlier we argued that the PDA is not an appropriate guide to interpreting the PWFA because the latter is a freestanding statute, not an amendment to Title VII. *See* Part I.A. *supra*. If, however, the Commission decides otherwise, then it must take into account cases such as *Krauel*. *See also* note 23 *infra* (citing authority for the proposition that contraceptives are not related to pregnancy under the PDA).

The expansive language of the NPRM might also give rise to claims for accommodation for surrogacy either by an employee using a surrogate, or by an employee acting as a surrogate, which may also elicit religious and moral objections on the part of employers, contrary to the unity of marriage and religious teaching on procreation. This could be compounded with other issues, such as children’s rights to a mother and a father (rights that Pope Francis has affirmed<sup>22</sup>) in the case of commercialized surrogacy for a same-sex couple. Both IVF and surrogacy also unjustly commodify human persons.

The Commission also lists birth control as among the items or procedures “related” to pregnancy, raising an issue that, as the Commission is aware, has triggered protracted religious liberty litigation since passage of the Affordable Care Act (ACA).<sup>23</sup> In the context of the ACA, birth control has been interpreted to include sterilization procedures, so the proposed regulations could be construed to require employers to grant leave for such procedures.

For all these procedures—abortion, IVF, surrogacy, artificial contraception, and sterilization—the accommodation that the NPRM would require would pose conflicts with employers’ religious beliefs in the provision of leave.<sup>24</sup> Sometimes an employer may not require an employee to specify the purpose of the requested leave, and without knowing the purpose, the employer may not have a religious basis for denying the request. However, when a religious employer is aware that leave is being requested for the purpose of obtaining a morally illicit procedure, granting that request may conflict with the employer’s religious beliefs.

In addition to the burdens they would impose on religious liberty, the proposed regulations also implicate the First Amendment right of free speech. If the EEOC interprets the PWFA to require accommodations for abortion or other objectionable procedures, employers would necessarily have to engage in some form of speech in connection with compliance with that requirement. *See, e.g., 303 Creative v. Elenis*, 143 S. Ct. 2298 (2023), which raises new constitutional concerns about compelled speech in a commercial setting.

The constitutional right of expressive association is also implicated. When applicable, this right can trump a law forbidding discrimination. *See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995); *Boy Scouts v. Dale*, 530 U.S. 640 (2000). Many organizations—especially nonprofits, whether religious or secular—exist precisely in order to express and advance particular ideas.

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<sup>22</sup> *See* Pope Francis, Colloquium on “The Complementarity of Man and Woman” (Nov. 17, 2014); Pope Francis, Audience with International Catholic Child Bureau (Apr. 11, 2014).

<sup>23</sup> The contraception issue also arose under the PDA. The only federal court of appeals to consider the issue has held that contraceptives are not “related” to pregnancy and that their exclusion from an employer-sponsored plan does not violate the PDA. *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936 (8th Cir. 2007). Likewise, the point of the PWFA is to accommodate women who are pregnant, not to prevent pregnancy.

<sup>24</sup> *See* 88 Fed. Reg. at 54746 (“[T]he Commission invites the public to provide examples of ... [w]hat accommodations provided under PWFA, 42 U.S.C. 2000gg-1, may impact a religious organization’s employment of individuals of a particular religion...”).

There is no indication that Congress, in enacting the PWFA, intended to override freedom of religious exercise, free speech, or of expressive association. Thus, one way to address and solve these potential conflicts is to construe the PWFA to not require accommodation for these procedures in the first place, as we have argued above with respect to abortion. Yet another way is to acknowledge in the text of the regulations that an accommodation for an abortion, or any procedure to which the employer has a conscientious objection, creates a per se undue hardship for any employer opposed to those procedures (whether or not the employer is a religious organization. Just last Term, the Supreme Court construed the phrase “undue hardship” as used in Title VII to mean a “substantial” burden on the employer, *Groff v. DeJoy*, 143 S. Ct. 2279 (2023), and that would necessarily include any workplace requirement that substantially burdens an employer’s religious beliefs and practices, speech, or expressive association. A similar logic applies to the PWFA which, by cross reference to the Americans with Disabilities Act, defines undue hardship as an action requiring significant difficulty or expense.

A similar framing is required under the federal Religious Freedom Restoration Act (RFRA). The Supreme Court has acknowledged that RFRA can operate as a defense to a federal workplace requirement that substantially burdens the employer’s religious belief, whether the employer is for-profit or nonprofit. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014) (for-profit); *Zubik v. Burwell*, 578 U.S. 403 (2016) (nonprofit); *see also Braidwood Mgmt. v. EEOC*, 70 F.4th 914 (5th Cir. 2023) (upholding lower court order that enjoins EEOC from enforcing its workplace guidance against business owner with religious objection).<sup>25</sup>

For all these reasons, the final regulations should recognize that an employer, whether secular or religious, is not required to provide an accommodation that conflicts with its constitutional right of free exercise, speech, or expressive association, or RFRA, and that such an accommodation, by virtue of such a conflict, would impose an undue hardship on the employer.

#### **IV. Regulatory Impact Issues**

The NPRM’s Regulatory Impact Analysis fails to offer estimates of at least two costs that the rule imposes.

First, the rule requires leave for the purposes of obtaining and recovering from an abortion, but the rule explicitly declines to attempt to estimate the costs this requirement would impose on

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<sup>25</sup> Proceeding with the RFRA analysis, once an employer makes its prima facie case that accommodating abortion would substantially burden its religious exercise, the government must prove that it has a compelling government interest in forcing that particular employer to make those particular accommodations, and that doing so is the means of furthering that interest is the least restrictive of the employer’s religious exercise. 42 U.S.C. § 2000bb-1(b). The EEOC would likely lose on the compelling interest prong. With respect to abortion specifically, there is no cognizable legal or policy interest in facilitating the killing of preborn children. *Cf. Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022) (deciding that there is no constitutional right to abortion). Nor could the EEOC point to any Act of Congress that expressly promotes abortion as the basis for asserting such an interest.

employers.<sup>26</sup> To be sure, the calculation of this cost would be complex. Time of travel for abortion may vary from jurisdiction to jurisdiction. Time of recovery may vary based on the method of abortion, the stage of pregnancy at the time of the abortion, and the incidence of complications from the abortion. A functional estimate of the impact of an abortion leave requirement would need to account for each of these factors. But this complexity is no excuse for declining to estimate the cost imposed by the requirement of the rule to which employers are most likely to object.

Second, the Regulatory Impact Analysis does not acknowledge that providing accommodations for abortion could constitute pregnancy discrimination against pregnant employees who do *not* get abortions and are not offered equivalent benefits. For instance, consider an employer that offers leave for travel to see an out-of-state abortionist, but declines to offer leave for travel to see an out-of-state obstetrician on the grounds that there are local obstetricians, so leave for travel to an out-of-state obstetrician is not reasonable. Such a decision would expose the employer to a claim that it is discriminating against women who do not get abortions. So the final rule's cost estimate will need to calculate the cost of additional benefits that employers would have to provide to avoid such discrimination charges, and the costs incurred by employers who do not provide such benefits and are sued for discrimination, and include those costs in the Regulatory Impact Assessment. This incoherence—construing a law meant to prevent sex discrimination in a way that results in sex discrimination—would also likely render the rule arbitrary and capricious and contrary to law.

If the Commission were to eliminate the requirement to accommodate abortion, as we believe appropriate, then these problems would be prevented.

## **V. Conclusion**

The PWFA became law because of the willingness of members of Congress on both sides of the aisle to keep the bill focused on the wellbeing of pregnant women and their preborn children, rather than treading into the divisive area of abortion. In passing the PWFA, Congress had no intention to create conscience problems for employers. For the reasons presented in this comment letter, the final regulations (a) should not require an accommodation for abortion, (b) should state that, under the PWFA's religious exemption, religious employers are not required to provide accommodations that conflict with their religious beliefs, and (c) should further state that any employer, whether secular or religious, is not required to provide an accommodation that infringes upon its right to religious liberty, speech, or expressive association, and that such an accommodation would impose an undue hardship on the employer, thereby excusing it from having to make that accommodation.

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<sup>26</sup> 88 Fed. Reg. at 54763 (“the estimates do not attempt to account specifically for the cost of accommodations related to childbirth (such as leave for recovery) or related medical conditions”).

Thank you for the opportunity to comment on the proposed regulations.

Respectfully submitted,

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