October 10, 2023

VIA REGULATIONS.GOV

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

Re: RIN 3046–AB30, Regulations To Implement the Pregnant Workers Fairness Act

Dear Mr. Windmiller,

Professors Greer Donley, David S. Cohen, Rachel Rebouche, Kate Shaw, Melissa Murray, and Leah Litman submit these comments in support of the Equal Employment Opportunity Commission's ("EEOC" or "Commission") Notice of Proposed Rulemaking ("NPRM"), RIN 3046–AB30, Regulations To Implement the Pregnant Workers Fairness Act, published in the Federal Register on August 11, 2023. 88 Fed. Reg. 54714 (Aug. 11, 2023).[1]

As scholars with expertise in constitutional and administrative law, we write in response to a concern raised in some comments that the proposed rule's treatment of abortion raises concerns under the "major questions doctrine."

In our view, that is incorrect. The EEOC's proposed inclusion of abortion as a pregnancy- or childbirth- related medical condition for purposes of reasonable workplace accommodations reflects the EEOC's longstanding interpretation of legislation using identical language. It does not implicate the "major questions doctrine"—a recent doctrine the Supreme Court has limited to a narrow category of extraordinary cases that differ in every salient respect from this one. Accordingly, the major questions doctrine should pose no obstacle to the proposed rule.

We begin in Part I with a background of the proposed rule, then turn to the issue that the commentators raised. In Part II we explain why the major questions doctrine does not apply to the EEOC's rule.

[1] We appreciate the assistance of Arnold & Porter Kaye Scholer LLP and Democracy Forward Foundation in the preparation of this comment.

I. Background

A. The Proposed Rule

The Pregnant Workers Fairness Act (PWFA), at 42 U.S.C. § 2000gg–1, prohibits discrimination on the basis of an employee's ''pregnancy, childbirth, or related medical conditions." The EEOC proposes to include "miscarriage, stillbirth, or having or choosing not to have an abortion" as within the scope of "pregnancy, childbirth, or related medical conditions."

As the EEOC explains in the proposed rule: "[t]o assist workers and covered entities, the proposed regulation includes a non-exhaustive list of examples of pregnancy, childbirth, or related medical conditions that the Commission has concluded generally fall within the statutory definition." Proposed Rule: Regulations To Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54,714, 54,721 (Aug. 11, 2023). The list includes "current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions." *Id.*; *see also id.* at 54,774-75 (reiterating agency's rationale for including abortion among pregnancy-related medical conditions); *id.* at 54,767 (showing text of proposed regulation).

B. Major Questions Doctrine Objection

Some commenters have argued that the EEOC cannot include abortion among pregnancy- and childbirth- related medical conditions because including abortion raises concerns under the major questions doctrine.

In a comment on the proposed rule, the Alliance Defending Freedom argues that "in this rule EEOC purports to arrogate to itself the decision of whether the PWFA includes abortion" but "[u]nder the major questions doctrine" a decision of such "magnitude—to take away the status of personhood from an entire class of human beings protected under state law—is not committed to EEOC's discretion." Comment from Alliance Defending Freedom, Comment ID EEOC-2023-0004-49357, https://www.regulations.gov/comment/EEOC-2023-0004-49357 (citing and quoting *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023)).

A comment from the Ethics and Public Policy Center argues that "[t]he inclusion of abortion accommodations within PWFA would surely fall under the [major questions] doctrine" because "[t]he issue of abortion is preeminent in American politics, and PWFA's reach captures a broad swath of the economy." Comment from the Ethics and Public Policy Center, Comment ID EEOC-2023-0004-17260, https://www.regulations.gov/comment/EEOC-2023-0004-17260 (citing, among other cases, *Nebraska*, 143 S. Ct. 2355). Thus, the comment continues, "[e]ven assuming for the sake of argument that 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." *Id.*

A comment from the United States Conference of Catholic Bishops (USCCB) and The Catholic University of America (Catholic University) contends that "[t]he proposed regulations, insofar as they require accommodations for abortion, would likely violate the major questions doctrine" because "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," which Congress has not done in the PWFA. Comment from USCCB and Catholic University, Comment ID EEOC-2023-0004-41058, https://www.regulations.gov/comment/EEOC-2023-0004-41058.

II. Argument

The EEOC's proposal to include "having or choosing not to have an abortion" as a pregnancy- or childbirth- related medical condition reflects the EEOC's longstanding interpretation of identical language in the Pregnancy Discrimination Act (PDA). The agency's reprisal of that interpretation in the PWFA's parallel provision—which Congress drafted to supplement the PDA—does not trigger the major questions doctrine.

The major questions doctrine exists to prevent "one branch of government arrogating to itself power belonging to another." *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023). The doctrine applies only when the "'history and the breadth of the authority that the agency has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *W. Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). To be sure, this relatively novel doctrine is a significant departure from the ordinary rules of statutory construction. Agency action does not trigger the doctrine except in rare circumstances.

None of the indicia of a major question are present here. The EEOC proposes to interpret "medical conditions" "related" to "pregnancy" and "childbirth" exactly as it interpreted those terms under a prior, complementary statute, the Pregnancy Discrimination Act. The proposed rule does not represent an unprecedented change in the prevailing interpretation of longstanding statutory text; it is not outside the EEOC's traditional areas of jurisdiction or administrative expertise; and it does not address a question of such vast economic and political significance—with important ramifications for every facet of American life—that it raises a presumption against delegation to the EEOC to resolve. Along each of these dimensions, the EEOC's rule represents a conventional exercise of an agency's authority to interpret and implement a statute, indeed, engaging in the exact same interpretation that it has in a related statute. The proposed rule is decidedly within the agency's longstanding purview and expertise, and is consistent with prior agency analysis. Indeed, EEOC's interpretation was foreseeable and contemplated by the Congress that passed the statute. The major questions doctrine has no role to play here.

A. The EEOC's Construction of the PWFA Is Not Unprecedented or Even Unexpected

The EEOC's proposed rule is a reasonable and predictable application of the PWFA's text and thus stands in sharp contrast with paradigm cases involving the application of the major

questions doctrine. Indeed, Congress not only could have but in fact did anticipate that the EEOC would interpret "medical conditions" "related" to "pregnancy" and "childbirth" to include abortion, because when Congress enacted the PWFA, the EEOC had already interpreted the same language the same way in the Pregnancy Discrimination Act.

The archetypical case for the application of the major questions doctrine is when an agency "'claim[s] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'" *West Virginia*, 142 S. Ct. at 2610 (quoting *Utility Air Regul. Grp. v. EPA* (*UARG*), 573 U.S. 302, 324 (2014)). The action is virtually always "unprecedented," *Nebraska*, 143 S. Ct. at 2374; *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021), and the interpretation generally works a "'radical or fundamental change' to a statutory scheme," *West Virginia*, 142 S. Ct. at 2609-10 (quoting *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994)).

Each of the Court's recent major questions cases follow this pattern. The EPA triggered the major questions doctrine when it "claimed to discover unheralded" authority in the fifty-year-old Clean Air Act. *W. Virginia*, 142 S. Ct. at 2610. The CDC triggered the doctrine when it promulgated an eviction moratorium under Section 361 of the Public Health Service Act because, "[s]ince that provision's enactment in 1944, no regulation premised on it ha[d] even begun to approach the size or scope of the eviction moratorium." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489. OSHA triggered the doctrine when it mandated a COVID-19 vaccine, because "OSHA, in its half century of existence, ha[d] never before adopted a broad public health regulation" of that kind. *NFIB v. OSHA*, 595 U.S. 109, 119 (2022). And when the FDA in 1996 claimed the authority to ban tobacco products, it triggered the major questions doctrine because it had disavowed such "extraordinary" authority "[i]n the 73 years since the enactment of the original Food and Drug Act, and in the 41 years since the promulgation of the modern Food, Drug, and Cosmetic Act." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 146 (citation omitted).

The EEOC's interpretation of the PWFA—that abortion is "related" to pregnancy and childbirth—is not remotely unheralded, transformative, or unprecedented. To the contrary, in the PWFA, Congress repeated language the EEOC has already interpreted to include abortion in a parallel statute.

The language at issue in the PWFA is identical to the language in the Pregnancy Discrimination Act, which amended Title VII to protect against discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). For almost forty years, the EEOC has interpreted this provision to "protect[] against such practices as being fired" because an employee "has had an abortion." 29 C.F.R. § Pt. 1604, App. (1986); *see* EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* I.A.4.c. (2015) (explaining that this provision "protects women from being fired for having an abortion" and from managerial pressure "to have an abortion, or not to have an abortion"). In its proposed rule interpreting the PWFA, the EEOC has expressly invoked its previous guidance that "related medical conditions" include "abortion." *See* 88 Fed. Reg. 54,714-01 n.51; *see also id.* at 54,721 ("Because Congress chose to write the PWFA using the same language as Title VII, in the proposed

rule the Commission gives the term 'pregnancy, childbirth, or related medical conditions' the same meaning under the PWFA as under Title VII.").

As the agency is aware, courts have upheld its interpretation of the parallel language in the PDA, in light of "the plain language of the statute, together with the legislative history and the EEOC guidelines," which "support a conclusion that an employer may not discriminate against a woman employee because she has exercised her right to have an abortion." *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008); *see Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (concluding that termination of a pregnant employee because she contemplated having an abortion violated the PDA); *Ducharme v. Crescent City Deja Vu, L.L.C.*, 406 F. Supp. 3d 548, 556 (E.D. La. 2019) (concluding that "abortion is encompassed within the statutory text prohibiting adverse employment actions 'because of or on the basis of pregnancy, childbirth, or related medical conditions'").[2]

"When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). And the "consistency of [an agency's] prior position is significant" when it comes to the major questions doctrine, because "[i]t provides important context" about what Congress "understood" the statute to permit. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 157. "Congress must be taken to have been familiar with the existing administrative interpretation." *McFeely v. Comm'r of Internal Revenue*, 296 U.S. 102, 110 (1935).

Congress was "familiar with the existing administrative interpretation" of the relevant language when it enacted the PWFA. *Id.* And it chose to repeat that language in a statute empowering the exact same agency with interpretive authority in a virtually identical context. In fact, Congressmembers recognized the PWFA as "an opportunity for Congress to finally fulfill the promise of the Pregnancy Discrimination Act." Long Over Due: Exploring the Pregnant Workers Fairness Act (H.R. 2694), Hearing Before the Subcomm. on Civ. Rts. & Hum. Servs. of the H. Comm. on Educ. & Lab., 116th Cong. 142, 3 (2019) (statement of Rep. Suzanne Bonamici). Given Congress's choice to "use[] the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005); *see Northcross v. Bd. of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam) (noting that "similarity of language" between statutes "is a strong indication that the two statutes should be interpreted pari passu"). There can be no doubt about the authority that Congress "meant to confer." *W. Virginia*, 142 S. Ct. at 2608.

Congress not only had reason to anticipate that the EEOC would interpret the PWFA to cover abortion, Congressmembers expressly predicted that the EEOC would construe the text as it had construed the PDA. *See, e.g.*, 168 Cong. Rec. H. 10528 (2022) (statement of Rep. Nadler) ("The Pregnant Workers Fairness Act aligns with Title VII in providing

[2] To our knowledge, no court has applied the major questions doctrine to the interpretation of the PDA's identical text.

protections and reasonable accommodations for 'pregnancy, childbirth, and related medical conditions', like lactation."). Congressmembers who opposed the law shared this view. *See, e.g.*, H.R. 1065 117th Cong. 60 (Minority Views) ("[I]f an employee working for a religious organization requests time off to have an abortion procedure, H.R. 1065 could require the organization to comply with this request as a reasonable accommodation of known limitations related to pregnancy, childbirth, or related medical conditions."); 167 Cong. Rec. H2321, H2325 (2021) (statement of Rep. Letlow) (opposing the bill because an "employer could be deemed in violation of this bill if it does not accommodate an employee's request for paid time off to undergo an abortion"); *id.* at H2330 (statement of Rep. Good) (opposing the bill because it would require employers "to help[] their employees get an abortion"); *id.* at H2332 (statement of Rep. Miller) (opposing the bill because "[p]assing the PWFA means that a small business or religious organization could be forced to provide paid time off for an employee to have an abortion"). The same is true of the PDA, which Congress designed the PWFA to complement. *See* H.R. Rep. No. 95-1786, at 4 (1978) ("Because [the PDA] applies to all situations in which women are 'affected by pregnancy, childbirth, and related medical conditions,' its basic language covers decisions by women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion."). The EEOC's interpretation was foreseeable to Congress, and it did not alter the bill to foreclose this interpretation.

Put simply, Congress enacted the PWFA knowing full well that the EEOC would, as it did in the context of the PDA, interpret "medical conditions" "related" to "pregnancy" and "childbirth" to include abortion. There can be no "'radical or fundamental change' to a statutory scheme," *West Virginia*, 142 S. Ct. at 2609-10 (quoting *MCI*, 512 U.S. at 229), when an agency interpreting the statute for the first time does so in such a foreseeable and expected way. And the separation of powers concerns underlying the doctrine dissipate when the executive branch implements an interpretation that Congress expected. The EEOC's proposed rule thus lacks the most telltale sign of a major questions case: it is not an "unprecedented" attempt to derive "unheralded" power from a "long-extant" statute. *Nebraska*, 143 S. Ct. at 2374 ("unprecedented"); *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489 ("unprecedented"); *W. Virginia*, 142 S. Ct. at 2610 ("long-extant statute"; "unheralded power"); *Utility Air Regul. Grp.*, 573 U.S. at 324 ("long-extant statute"; "unheralded power"). Indeed, the PWFA is a brand-new law, so the EEOC has not "'claim[ed] to discover" *anything* "in a long-extant statute," much less "an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'" *W. Virginia*, 142 S. Ct. at 2610 (quoting *Utility Air Regul. Grp.*, 573 U.S. at 324).

B. The EEOC's Construction of the PWFA is a Routine Exercise of EEOC's Regulatory Mandate

Not only did Congress anticipate that the EEOC would interpret the PWFA to cover abortion, the EEOC's interpretation falls squarely within its purview—again, as Congress was well aware when it enacted the PWFA, and as was clear from the EEOC's interpretation of identical text in a sister provision.

The major questions doctrine is especially likely to apply where the agency "'has no comparative expertise' in making certain policy judgments," such that "'Congress presumably would not' task it with doing so." *W. Virginia*, 142 S. Ct. at 2613 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019)). In other words, the doctrine is invoked predominately in cases where there is a "mismatch between [the] agency's challenged action and its congressionally assigned mission and expertise." *Id.* at 2623 (Gorsuch, J., concurring).

For example, the CDC triggered the major questions doctrine when it intervened nationwide to transform the relationship between landlords and tenants by prohibiting evictions. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. And OSHA triggered the doctrine when it mandated novel vaccinations for every workplace—no matter the unique conditions relating to the spread of airborne illness—where the vaccination was permanent and irreversible, and by nature extended beyond the workplace. *NFIB v. OSHA*, 595 U.S. at 120. By contrast, when HHS mandated vaccinations for healthcare workers, the action did not trigger the major questions doctrine. *See Biden v. Missouri*, 595 U.S. 87, 94 (2022) (upholding HHS's vaccine mandate because "the Secretary routinely imposes conditions of participation" on healthcare workers and "has always justified" such requirements by reference to the statutory provisions in question).

There is not even an arguable "mismatch" between the EEOC's regulation and its regulatory jurisdiction and expertise here. Congress vested the EEOC with the authority to define types of workplace conduct that are prohibited under federal antidiscrimination laws. The proposed rule is exactly that, resembling the types of rules the EEOC "has typically imposed." *Id.* at 118. It requires employers to "make reasonable accommodations" for employees in certain circumstances. In this case, those circumstances are "known limitations related to . . . pregnancy, childbirth, or related medical conditions," 42 U.S.C. § 2000gg-1(1), just as, in other cases, the EEOC has regulated workplace disability accommodations, workplace discrimination based on protected characteristics, and much more. And again, the EEOC has already interpreted the PDA's identical language to include abortion.

Agencies acting at the core of their jurisdiction and expertise typically do not act in a way that will surprise Congress such that major questions doctrine concerns would be implicated. The reason for this is that Congress can predict how an existing agency—with observable prior practice and known personnel—will interpret particular language. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (deference to agency construction adopted within a year after the statute's enactment). The agency can even contribute to Congress's legislative process. *E.g.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, 285 (1974) (deference to agency construction offered before a statute was enacted). And where, as here, the agency has already construed identical language in a parallel statute, *see supra* II.A, Congress is especially able to anticipate how that same agency will interpret that language in the later, complementary statute. Thus, as the Supreme Court held in *Edwards' Lessee v. Darby*, in the interpretation of a law "the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." 25 U.S. 206, 210 (1827); *Fulman v. United States*, 434 U.S. 528, 533 (1978) (similar); *Udall v.*

Tallman, 380 U.S. 1, 16 (1965) (similar); *Power Reactor Dev. Co. v. Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO*, 367 U.S. 396, 408 (1961) (similar); *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 315 (1933) (similar); *Fawcus Mach. Co. v. United States*, 282 U.S. 375, 378 (1931) (similar); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 84 (1932) (similar).

There is no reasonable argument that Congress would be surprised by the proposed rule. There is no chance that Congress somehow failed to consider how EEOC would interpret the relevant PWFA provision here. The language requiring "reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions," 42 U.S.C. § 2000gg-1(1), is not an "ancillary provision" of the PWFA "designed to function as a gap filler." *W. Virginia*, 142 S. Ct. at 2610. Nor is it some "previously little-used backwater" of a broader statute. *Id.* at 2613; *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress "does not . . . hide elephants in mouseholes."). Rather, it is the heart of a statute designed to empower the EEOC to regulate workplace discrimination related to pregnancy and childbirth. Again, there can be no doubt about the authority that Congress "meant to confer." *W. Virginia*, 142 S. Ct. at 2608.

C. The EEOC's Construction of the PWFA is Not an Issue of Vast Economic and Political Significance

As explained, the hallmark of a major questions case is an agency's exercise of unheralded, transformative power. The EEOC's proposed regulation is neither. But the major questions doctrine also requires that the regulatory authority involved be of vast economic and political significance to the entire United States. Regulations implicating the doctrine affect numerous sectors and industries and substantially influence the economy as a whole. They generate far-reaching consequences for the daily lives of Americans.

The Supreme Court has made clear that the doctrine applies only when the "agency decision[] [is] of vast economic and political significance." *W. Virginia v. EPA*, 142 S. Ct. 2587, 2623 (2022). An agency rule thus triggers the major questions doctrine when it significantly affects the economic *and* political life of the nation. *See Mayes v. Biden*, 67 F.4th 921, 934 (9th Cir. 2023) (treating conditions as necessary but independently insufficient to trigger the major questions doctrine); *see also* A. Scalia & B. Garner, Reading Law 116 (2012) (When "and" connects two or more requirements, it "combines" them into a "conjunctive list," meaning every requirement must be met). The interpretation at issue—which requires employers to accommodate one more "related medical condition" among over fifty others—is neither economically nor politically significant, and it certainly is not both.

First, as to economic significance, the Supreme Court has applied the major questions doctrine in cases where the economic effects were "vast" and "extraordinary." In *West Virginia*, the EPA claimed that the Clean Air Act authorized it to impose a nationwide cap on carbon dioxide emissions. In *NFIB*, OSHA claimed that its power to regulate workplaces permitted it to mandate vaccinations for every employee in the United States. In *Alabama Realtors*, the CDC claimed its authority to stem contagious disease gave it the power to impose a nationwide eviction moratorium. In *Nebraska*, the Department of

Education claimed that its authority to modify student loan obligations permitted it to cancel half a trillion dollars in student debts. In *Brown & Williamson Tobacco Corp.*, the FDA claimed that its authority to regulate medical drugs and devices permitted it to regulate the entire American tobacco industry. The economic impact of those regulatory programs would have been "staggering by any measure." *Nebraska*, 143 S. Ct. at 2373.

The EEOC's proposal to include abortion on the list of "medical conditions" "related" to "pregnancy" and "childbirth" does not rise to that level. Including "abortion" on that list—which is the purported "major question"—is economically negligible, no matter the economic impact of the proposed rule overall. Indeed, the proposed rule lists over fifty conditions that qualify as "pregnancy, childbirth, or related medical conditions." *Id.* at 54,767.[3] The miniscule economic impact of accommodating one more—abortion—pales in comparison to, say, cancelling half-a-trillion dollars in student debt.

In any event, the EEOC estimates that "[t]he annual costs associated with the main requirement of the [EEOC's proposed] rule—to give reasonable accommodations to individuals who need them because of pregnancy, childbirth, or related medical conditions—are not 'economically significant' under E.O. 12866." 88 Fed. Reg. 54,714-01, 54,764. "[A]lthough the aggregate one-time compliance costs are in excess of $200 million, and therefore 'economically significant,' the estimated cost on a per-establishment basis is very low—$56.76 and $170.27." *Id.* Again, the incremental cost of including having or choosing not to have an abortion in the scope of associated medical conditions for which accommodations are required is a miniscule component of these low compliance costs.

Second, neither the PWFA nor the EEOC's proposed rule has any impact whatsoever on the "politically significant" issue of the legality of abortion in any state or in the country. 88 Fed. Reg. 54714-01, 54,765 (Aug. 11, 2023). It does not purport to address outright the legal status of abortion. *Cf. Gonzales v. Oregon*, 546 U.S. 243, 261 (2006) ("[T]he Interpretive Rule thus purports to declare that using controlled substances for physician-assisted suicide is a crime, an authority that goes well beyond the Attorney General's statutory power to register or deregister."). It merely does what the EEOC has always done: requires employers to "make reasonable accommodations" for employees in certain circumstances. This distinction is critical for purposes of the major questions doctrine. The mere fact that a rule implicates abortion does not imbue that rule with "vast" political

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

significance. *Id.* at 54,767.[4] If it did, then certainly the EEOC's nearly identical interpretation in the context of Title VII would have been invalid. Abortion has been politically polarizing for decades, but an interpretation that merely touches on the subject is not enough to trigger the doctrine. The fact that the issue of accommodations for abortion was raised during the legislative debate but did not become an all-consuming discussion is further proof that its relevance in this statutory scheme lacks the political salience associated with the application of the major questions doctrine.

The PWFA complements the PDA—a statute that EEOC has already construed to prohibit abortion-related discrimination—and mirrors the PDA's key text. The relevant statutory language—"pregnancy, childbirth, or related medical conditions"—is broad, and the EEOC's mandate to implement that statutory language is equally broad. Where, as here, the EEOC has long exercised authority to guard against discrimination in the workplace, an ordinary exercise of that authority hardly rises to the level of unprecedented, vast economic and political significance necessary to trigger the major questions doctrine.

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

Respectfully Submitted,

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[4] Further, the proposed rule is subject to the same limits to which such workplace accommodations are always subject; the accommodation requirement cannot inflict "undue hardship" on an employer or conflict with the employer's constitutionally and statutorily protected religious beliefs.