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**United States Senate**  
COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS  
WASHINGTON, DC 20510-6300

September 29, 2023

**VIA ELECTRONIC TRANSMISSION**

The Honorable Charlotte A. Burrows  
Chair  
Equal Employment Opportunity Commission  
131 M Street, NE  
Washington, D.C. 20507

Dear Chair Burrows:

As an original cosponsor of the bipartisan Pregnant Workers Fairness Act (PWFA or the Act) (P.L. 117-328), I care deeply about this law being implemented properly to ensure that pregnant and postpartum women have the workplace accommodations they need. However, in its recent Notice of Proposed Rulemaking (NPRM or Proposed Rule) to implement the PWFA, the Equal Employment Opportunity Commission (EEOC or Commission) has ignored the statute and substituted its views on abortion for those of Congress. I am gravely concerned by the Commission's decision to inject abortion politics into the definition of "pregnancy, childbirth, or related medical conditions," rather than implement the Act consistent with the bipartisan goal to provide reasonable accommodations to pregnant and postpartum workers.<sup>1</sup>

*The Commission's Proposed Rule Flouts Congressional Intent*

The expressed intent and text of the law are clear: to ensure healthy pregnancies by supporting women for pregnancy-related medical conditions both during and after their pregnancies. The Commission recognizes this by outlining logical pregnancy-related conditions that may warrant a request for a reasonable accommodation, such as morning sickness, back problems, or incontinence. Sample scenarios provided in the NPRM reinforce the importance of workplace accommodations that protect the health of the mother and unborn baby, consistent with Congress' intent.<sup>2</sup> Further, the EEOC acknowledges congressional intent that the PWFA does not require or forbid any employer – religious or otherwise – to pay for health insurance benefits for abortion services.<sup>3</sup>

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<sup>1</sup> Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54721 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

<sup>2</sup> *E.g., id.* at 54740-41.

<sup>3</sup> *See id.* at 54745-46 ("For example, nothing in the PWFA requires or forbids an employer to pay for health insurance for an abortion.").

However, for the definition of “pregnancy, childbirth, or related medical conditions,” the Commission’s proposed rule blatantly ignores the bipartisan congressional intent that the PWFA does not require abortion-related accommodations. Senator Bob Casey (D-PA) stated the following on the Senate floor prior to passage:

I want to say for the record, however, that under the act, under the Pregnant Workers Fairness Act, the Equal Opportunity Employment Commission [sic], 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>4</sup>

My remarks are also clear regarding the intent for this bill. In the same debate, I stated specifically, “I reject the characterization that this would do anything to promote abortion.”<sup>5</sup> Further, my remarks reiterated that the intention of this bill is “to make an accommodation for that woman who has those needs [for an accommodation] so she can safely carry the baby to term.”<sup>6</sup>

### *The Commission Relies on Flawed Assumptions and Out-of-Date Case Law to Support the Proposed Rule*

Because Congress wrote provisions of the PWFA using the same language as Title VII of the Civil Rights Act of 1964 (as amended by the Pregnancy Discrimination Act of 1978), the Commission proposes to give the same meaning to language in the PWFA that appears in the Civil Rights Act of 1964.<sup>7</sup> However, the PWFA does not reference these provisions of the Civil Rights Act of 1964. In fact, while the PWFA contains eleven explicit references to the Civil Rights Act of 1964, Congress deliberately did *not* cross-reference the provisions related to “pregnancy, childbirth, or related medical conditions,” and evinced no intent that those provisions of the PWFA be interpreted in the same way. Indeed, while there is legislative history to support arguments that Congress intended the Pregnancy Discrimination Act of 1978 to include abortion,<sup>8</sup> as described above, the history for the PWFA is the opposite.

To support its flawed definition, the Commission uses decades-old decisions that interpret another statute entirely. Instead of heeding Congress, the Commission proposes to include abortion in this definition on the basis that three courts interpreted the Civil Rights Act of 1964 to include abortion, all in decisions that predate the Supreme Court’s ruling in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022). In each case, these courts were interpreting another statute, and thus their decisions are of limited—if any—relevance. Three decisions interpreting another statute do not *compel* the Commission to include abortion in its enacting regulations for the PWFA. Moreover, since these decisions were issued, the Supreme Court has reversed *Roe v. Wade*, 410 U.S. 113 (1973), which was a key part of the reasoning behind the decisions that the Commission cites. In *Dobbs*, the Supreme Court held that “the Constitution does not confer a right to abortion” and that “*Roe* . . . [is] overruled.”<sup>9</sup> The earliest decision cited by the Commission, and which is

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<sup>4</sup> 168 CONG. REC. S7050 (daily ed. Dec. 8, 2022) (statement of Sen. Bob Casey).

<sup>5</sup> 168 CONG. REC. S7050 (daily ed. Dec. 8, 2022) (statement of Sen. Bill Cassidy).

<sup>6</sup> *Id.*

<sup>7</sup> Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54774 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

<sup>8</sup> See H.R. REP. NO. 95-1786 (1978) (Conf. Rep.).

<sup>9</sup> *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2279 (2022).

cited by the other two decisions, relies on the since-overruled “*right to have an abortion*” established by *Roe v. Wade*.<sup>10</sup> The Supreme Court’s *Dobbs* ruling is yet another reason for the Commission to re-assess its proposed definition and exclude abortion from its regulations.

### *Abortion is Not Health Care, and the Proposed Rule Should Not Treat It as Such*

Nothing in the text of the PWFA requires employers to provide accommodations for abortion. The plain wording of the statute makes clear that the Act does not include abortion. Obtaining an elective abortion through a surgical procedure or chemical abortion pills intentionally ends the life of an unborn child and does not constitute a “medical condition.”<sup>11</sup> A procedure or medication is entirely distinct from the underlying condition it aims to treat—heart surgery and statins are not synonymous with a heart condition. Likewise, an abortion is not a pregnancy-related medical condition, but rather an action that a woman chooses to take in response to a pregnancy. The Commission has tried to shoehorn abortion into the definition of “medical conditions” that are related to pregnancy or childbirth, but it does not fit.

Specifically, the Commission proposes a definition of “related medical conditions” that includes “termination of pregnancy, including via miscarriage, stillbirth, or abortion.”<sup>12</sup> Miscarriage and stillbirth are tragic, involuntary, pregnancy-related conditions that many women unfortunately face. Elective abortion is categorically different and must be eliminated from this definition. Indeed, in a list of conditions that the Commission provides in the preamble, abortion is the only one preceded by “having or choosing not to have,” reinforcing that elective abortion should not be treated like gestational diabetes, preeclampsia, endometriosis, incontinence, or other medical conditions that inherently arise from pregnancy or childbirth.<sup>13</sup>

The Commission’s proposed definition is baffling, and exacerbates the ongoing obfuscation and fearmongering about pregnancy complications in the public debate about abortion. As a medical professional, I implore you not to conflate these issues, and to improve and clarify this language to ensure that women are able to receive reasonable accommodations for medical procedures related to a miscarriage or stillbirth. As stated, this law is about promoting and protecting healthy pregnancies, and promoting abortion is entirely inconsistent with Congress’ intent.<sup>14</sup>

### *The Commission’s Proposed Rule Fails to Adequately Protect Religious Freedom and Employer Rights*

The Commission’s consideration of the PWFA’s rule of construction must adequately address how its implementation of the PWFA will protect core religious and employer rights. The rule of construction is intended to protect the rights of religious employers, and the Commission’s discussion of this language in the NPRM raises significant concerns, especially in light of the

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<sup>10</sup> See *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (emphasis added).

<sup>11</sup> See, e.g., *Condition*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/condition> (last visited Aug. 30, 2023) (defining “condition” as “the particular state that something or someone is in,” and “any of different types of diseases”).

<sup>12</sup> Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54767 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

<sup>13</sup> *Id.* at 54721.

<sup>14</sup> See, e.g., Statement of Sen. Bob Casey, *supra* note 4; Statement of Sen. Bill Cassidy, *supra* note 5.

Commission’s woefully incorrect proposal to define abortion as a medical condition. The language clearly allows for –

...[a] religious corporation, association, education, 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, education institution, or society of its activities.<sup>15</sup>

Again, congressional intent is quite clear. In my remarks on the Senate-amended language on this matter, I stated, “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.”<sup>16</sup>

The Commission’s discussion of this language creates a false choice: there is no trade-off between protecting *both* a religious employer’s right to make an employment decision based on religious beliefs, and a religious employer’s right not to be forced to make accommodations that are inconsistent with their religious beliefs.<sup>17</sup> The Commission must adopt the broadest interpretation of the rule of construction, consistent with Congress’ intent, to ensure that religious employers are not harmed.

Further, the potential for employers to claim “undue hardship” does not sufficiently address concerns that they will be required to allow for time away from work for an employee to get an abortion. The PWFA allows employers to deny an accommodation on the basis of an “undue hardship,” defined to mean a “significant difficulty or expense” will be incurred by the employer. The proposed rule does not clearly establish that employers, either religious or non-religious, can claim undue hardship if employees seek accommodations for abortion. This exposes employers to significant potential liability if they were to seek undue hardship exemptions in such cases and the Commission were to disagree with that interpretation. The NPRM further notes that “nothing in the text of the proposed rule limits the rights of covered entities under the U.S. Constitution,” and that applications of “undue hardship” claims will be considered on a case-by-case basis.<sup>18</sup> Employers across the country of all different types and sizes deserve certainty that the accommodations that they must provide related to pregnancy and childbirth do not extend to abortion. Further, the EEOC should clarify that it will not penalize employers for asserting their constitutional rights.

*Conclusion: The Commission Should Not Adopt the Proposed Rule Without Significant Changes*

On the first page of the NPRM, the Commission touts the “broad bipartisan support” for the PWFA, and the support of, among others, “faith-based organizations,” then inexplicably proposes to implement the PWFA contrary to congressional intent in a way that will jeopardize the very

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<sup>15</sup> 42 U.S.C. § 1981.

<sup>16</sup> Statement of Sen. Bill Cassidy, *supra* note 5.

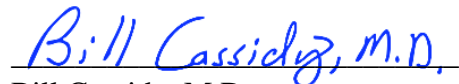
<sup>17</sup> Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54746 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636).

<sup>18</sup> *Id.* at 54714.

broad support it trumpets.<sup>19</sup> The Commission fails to recognize the statements from Senator Casey and myself, and instead substitutes its own judgement for that of Congress to fulfill a political agenda. The goal of the PWFA is to ensure a safe workplace for pregnant mothers and their unborn children. Using it instead to advance abortion access via regulation corrupts bipartisan legislating and leaves the Commission open to legal challenges on several grounds.

Thank you for your prompt attention to this important matter.

Sincerely,

A handwritten signature in blue ink that reads "Bill Cassidy, M.D." with a horizontal line underneath.

Bill Cassidy, M.D.

Ranking Member

U.S. Senate Committee on Health,  
Education, Labor, and Pensions

CC: Vice Chair Jocelyn Samuels  
Commissioner Keith E. Sonderling  
Commissioner Andrea R. Lucas  
Commissioner Kalpana Kotagal

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<sup>19</sup> *Id.*