Americans United for Life

October 10, 2023

Submitted Electronically via Federal Rulemaking Portal

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

Re: Regulations to Implement the Pregnant Workers Fairness Act (RIN 3046–AB30)

Dear Executive Officer Windmiller,

On behalf of Americans United for Life ("AUL"), I am writing in limited opposition to the inclusion of elective induced abortion[1] within the proposed rule, "Regulations to Implement the Pregnant Workers Fairness Act," 88 Fed. Reg. 54,714. AUL is the oldest and most active pro-life nonprofit advocacy organization in the country. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*,[2] AUL has dedicated over fifty years to advocating for comprehensive legal protections for human life from conception until natural death. AUL attorneys are legal experts on constitutional law and bioethics, and regularly testify before state legislatures and Congress on abortion issues.[3] Supreme Court opinions have cited AUL briefs and

[1] AUL incorporates the American Association of Pro-Life Obstetricians and Gynecologists' ("AAPLOG") definition of elective induced abortion, which is "drugs or procedures used with the primary intent to end the life of the human being in the womb." *AAPLOG Statement: Clarification of Abortion Restrictions*, AM. ASS'N OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS (July 14, 2022), https://aaplog.org/aaplog-statement-clarification-of-abortion-restrictions/. Unless otherwise stated, AUL uses "abortion" in this comment to refer specifically to elective induced abortion.
[2] 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).
[3] *See, e.g.*, *What's Next: The Threat to Individual Freedoms in a Post-Roe World Before the H. Comm. on the Judiciary*, 117th Cong. (2022) (testimony of Catherine Glenn Foster, President & CEO, Americans United for Life).

scholarship in major bioethics cases, including *Dobbs v. Jackson Women's Health Organization*.[4]

Thank you for the opportunity to comment on the proposed rule.[5] Based on AUL's legal expertise, I urge the Equal Employment Opportunity Commission ("EEOC") not to include abortion protections within the final rule for the Pregnant Workers Fairness Act ("PWFA"). Below, I elaborate how (I) the EEOC has rewritten the plain language and meaning of the PWFA to contrive protections for abortion; (II) the PWFA's legislative history shows Congress did not intend to include abortion under the PWFA; (III) the EEOC violates the major questions doctrine by protecting abortion; (IV) the EEOC has not spoken in plain language by comparing abortion to other situations of pregnancy termination; (V) the EEOC cannot act contrary to federal pro-life policy; (VI) the EEOC does not have the power to lessen the government's interest in protecting unborn human life, and has not analyzed abortion's harm upon unborn children; and (VII) the EEOC has not considered abortion's harmful effects upon women.

Integrating abortion as a "related medical condition" in the final rule for the PWFA would be arbitrary and capricious, without a legal basis, antithetical to federal pro-life policy, and ultimately would condone abortion violence against women, children, and families across America. AUL urges the EEOC to remove abortion as a "related medical condition" from the final rule.

I. The EEOC Has Rewritten the Plain Language and Meaning of the Statute to Contrive Protections for Elective Induced Abortions.

Under the PWFA "a covered entity [must] provide a reasonable accommodation for a known limitation of a qualified employee or applicant related to pregnancy, childbirth, or related medical conditions, absent undue hardship."[6] A "known limitation," is a:

> physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or applicant or the representative of the employee or applicant has communicated to the covered entity whether or not such condition meets

[4] 142 S. Ct. 2228, 2266 (2022) (citing CLARKE D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 127, 141 (2012)).
[5] Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54,714, 54,719 (proposed Aug. 11, 2023) ("The Commission seeks comment on any part of the proposed regulation, the section-by-section analysis, and the appendix.").
[6] *Id*. at 54,766; *see* Pregnant Workers Fairness Act, 42 U.S.C. § 2000gg-1(1).

> the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102.[7]

Although not originally defined in the PWFA, the proposed rule then directs that "'[r]elated medical conditions' are medical conditions which relate to, are affected by, or arise out of pregnancy or childbirth, as applied to the specific employee or applicant in question, including, but not limited to, *termination of pregnancy, including via miscarriage, stillbirth, or abortion* . . . ."[8] By including abortion, the EEOC has subverted the plain language and meaning of the PWFA.

An abortion is not a "related medical condition." According to the American Association of Pro-life Obstetricians and Gynecologists ("AAPLOG"), "elective abortion is defined as those drugs or procedures used with the primary intent to end the life of the human being in the womb."[9] It is not medically required. AAPLOG explains, "'[e]lective' . . . refers to inductions done in the absence of some condition of the mother or the fetus which requires separation of the two in order to protect the life of one or the other (or both)."[10] This means that "by definition, there is no medical indication for elective induced abortion, since it cures no medical disease. In fact, there is no medical indication for elective induced abortion. Pregnancy is not a disease, and the killing of human beings in utero is not medical care."[11] In other words, medical professionals perform elective induced abortions for *non-medical* reasons.

Elective induced abortion likewise is an *intervention*, not a medical *condition*. Pregnancy is the woman's medical condition.[12] A condition is distinguishable from an intervention, which is "the act or fact or a means of interfering with the outcome or course especially of a condition or process (as to prevent harm or improve functioning)."[13] Elective induced abortion involves an "artificial separation method[]" that interferes with a woman's pregnancy.[14] Medical professionals can use surgical interventions, such as through dilation & evacuation ("D&E", also known as

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[7] 88 Fed. Reg. at 54,767; *see* 42 U.S.C. § 2000gg(4).
[8] 88 Fed. Reg. at 54,767 (emphasis added).
[9] *AAPLOG Statement*, *supra* note 1.
[10] Rsch. Comm., Am. Ass'n of Pro-Life Obstetricians & Gynecologists, *Concluding Pregnancy Ethically*, Prac. Guideline No. 10, at 5 (Aug. 2022).
[11] Pro. Ethics Comm., Am. Ass'n of Pro-Life Obstetricians & Gynecologists, *Hippocratic Objection to Killing Human Beings in Medical Practice*, Comm. Op. No. 1, at 8 (May 8, 2017).
[12] *Pregnancy*, MERRIAM-WEBSTER'S MEDICAL DICTIONARY https://unabridged.merriam-webster.com/medical/pregnancy (last visited Oct. 10, 2023) ("the condition of being pregnant").
[13] *Intervention*, MERRIAM-WEBSTER'S MEDICAL DICTIONARY https://unabridged.merriam-webster.com/medical/intervention (last visited Oct. 10, 2023).
[14] *Concluding Pregnancy Ethically*, *supra* note 10, at 5.

dismemberment abortions),[15] or chemical intervention, such as through the mifepristone drug regimen,[16] to end the pregnancy for non-medical reasons. Regardless of the method, an elective induced abortion acts as an intervention to end the medical condition (*i.e.*, pregnancy). Accordingly, the EEOC has contradicted the plain language of "related medical condition" by including elective induced abortion, an intervention performed for non-medical reasons.

II. The PWFA's Legislative History Shows Congress Did Not Intend to Include Abortion Under the PWFA.

Congress passed the PWFA with broad bipartisan support.[17] This support included the votes of many pro-life Members, who publicly advocated to reduce the harms of abortion violence.[18] It defies logic for the EEOC to infer these pro-life Members intended the PWFA to cover abortions. The legislative debates confirm the PWFA does not encompass abortions.

Senator Thom Tillis expressed concern that the bill would cover abortions, affirming that "I and a number of other people do not believe that abortion is healthcare. I believe it is a brutal procedure that destroys an innocent child. The Federal Government should not be promoting abortion, let alone mandating that pro-life employers and employers in States that protect life facilitate abortion-on-demand."[19] In response, Senator Bill Cassidy stated, "I regret that my colleague has objected to this bill, but I reject the characterization that this would do anything to promote abortion."[20] Likewise, Senator Bob Casey stated that "under the Pregnant Workers Fairness Act, the Equal Opportunity Employment Commission, the EEOC, could not—could not—issue any regulation that requires abortion leave, nor does the act permit the EEOC to require employers to provide abortions in violation of State law."[21]

Senator Steve Daines separately indicated in the Congressional Record that:

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[15] Rsch. Comm., Am. Ass'n of Pro-Life Obstetricians & Gynecologists, *State Restrictions on Abortion: Evidence-Based Guidance for Policymakers*, Comm. Op. No. 10, at 4–5 (Sept. 2022).
[16] *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, U.S. FOOD & DRUG ADMIN. (Sept. 1, 2023), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation.
[17] 88 Fed. Reg. at 54,714.
[18] *See*, *e.g.*, Brief Amici Curiae of 228 Members of Congress in Support of Petitioners, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).
[19] 168 CONG. REC. S7,049 (daily ed. Dec. 8, 2022).
[20] *Id*. at S7,050.
[21] *Id*.

> the purpose of the Pregnant Workers Fairness Act is to help pregnant mothers in the workplace receive accommodations so that they can maintain a healthy pregnancy and childbirth. Therefore, I want to make clear for the record that the terms "pregnancy" and "related medical conditions," for which accommodations to their known limitations are required under the legislation, do not include abortion.[22]

Senator Daines further stated that "[t]his 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."[23] This legislative history indicates the PWFA does not cover abortions. Accordingly, the EEOC has subverted the congressional intent behind the PWFA.

III. The EEOC Violates the Major Questions Doctrine by Protecting Abortion.

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court held there is no federal constitutional right to abortion and returned the abortion issue to the democratic process.[24] Under the major questions doctrine, this means that the EEOC must have explicit authority from Congress to regulate abortion because *Dobbs* restored the legislatures' authority to create abortion policy. The doctrine "refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[25] As the Court recognized, "there are 'extraordinary cases' that call for a different approach—cases in which 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."[26]

In *Biden v. Nebraska*, the Supreme Court recently rejected the "Government's reading of the HEROES Act, [under which] the Secretary [of Education] would enjoy virtually unlimited power to rewrite the Education Act," including the cancellation of $430 billion in student loans.[27] Likewise, the EEOC cannot rewrite the PWFA to contrive protections for abortion. And just as the Court "f[oun]d it 'highly unlikely that Congress would leave' to 'agency discretion' the decision of how much coal-based generation there should be over the coming decades" in *West Virginia v.*

[22] 168 CONG. REC. S10,081 (daily ed. Dec. 22, 2022).
[23] *Id*.
[24] 142 S. Ct. at 2242–2243.
[25] *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2609 (2022).
[26] *Id*. at 2608 (citation omitted) (alteration in original).
[27] 143 S. Ct. 2355, 2372–2373 (2023).

Environmental Protection Agency,[28] it is equally unlikely that the PWFA authorizes the EEOC to set a national abortion policy. Abortion is a heated political topic. As *Dobbs* notes, there has not been "a national settlement of the abortion issue," but, rather, abortion has been a contentious issue over the past half-century after "*Roe* and *Casey* [] enflamed debate and deepened division."[29] Yet, the EEOC tries to institute a national abortion policy by protecting abortion under the guise of "related medical conditions" even though the PWFA does not mention abortion. Since the abortion issue has returned to the democratic process, Congress holds the federal power to legislate on the abortion issue. The EEOC must show that Congress has delegated that authority to the EEOC, but it cannot. Accordingly, the EEOC has violated the major questions doctrine by contriving protections for abortion in the PWFA.

IV. The EEOC Has Not Spoken in Plain Language by Comparing Abortion to Other Situations of Pregnancy Termination.

The proposed rule indicates that "[t]he Commission has attempted to draft this NPRM in plain language. The Commission invites comment on any aspect of this NPRM that does not meet this standard."[30] Yet, the proposed rule has lumped abortion with other methods of pregnancy termination, which involve distinct legal and bioethical considerations. Accordingly, the EEOC has not spoken in plain language in how it has inserted "termination of pregnancy" and "abortion" into the proposed rule.[31]

"[T]ermination of pregnancy" is vague and euphemistic. As AAPLOG describes, "[d]ifferent political and professional groups equivocate on terms such as 'abortion,' 'induction,' delivery,' and 'termination of pregnancy.' These terms refer to outcomes, and do not always clearly indicate what [] ethical principles are involved in these endings."[32] In other words, "[a]ll pregnancies end."[33] Some pregnancies end in a live birth, some end in miscarriage or stillbirth, and some end through induced separation of the mother and unborn child. Even in this last category, how and why the medical professional separates the mother and unborn child distinguish whether the procedure is legally and ethically permissible.[34]

The EEOC, however, has conflated complex medical terminology and bioethical considerations by using the phrase "termination of pregnancy." As this

[28] 142 S. Ct. at 2613.
[29] *Dobbs*, 142 S. Ct. at 2243.
[30] 88 Fed. Reg. at 54,766.
[31] *See id*. at 54,767.
[32] *Concluding Pregnancy Ethically*, *supra* note 10, at 1.
[33] *Id*.
[34] *See generally id*.

comment further clarifies, abortion is not the same as the (A) premature separation of the mother and unborn child to save the mother's life, nor (B) miscarriage and stillbirth treatment. Abortion is legally and bioethically distinct from these situations.[35]

A. Elective Induced Abortion is Different than Medical Treatment that Ends a Pregnancy to Save the Mother's Life.

In the proposed rule, the EEOC has included "abortion" as a "related medical condition,"[36] but even abortion "is a vague term with a multitude of definitions depending on the context in which it is being used."[37] As discussed above, the EEOC does not have the authority to protect elective induced abortion. If the proposed rule covers a "medically-indicated maternal-fetal separation," then the EEOC should use this term, not a broad word like "abortion."

A medically-indicated maternal-fetal separation is different than an elective induced abortion. As AAPOG explains, a "medically-indicated maternal-fetal separation" is "[d]one to prevent the mother's death or immediate, irreversible bodily harm, which cannot be mitigated in any other way. Examples include treatment of ectopic pregnancy, previable delivery for early pre-eclampsia with severe features, or previable delivery for other life-threatening conditions in pregnancy."[38] However, medical professionals accomplish these procedures with the acknowledgement that they "are treating two patients, the mother and the baby, and every reasonable attempt to save the baby's life would also be a part of [the] medical intervention."[39] Accordingly, "[e]lective induced abortion procedures are fundamentally different in their intent as well as practice from emergency parturition procedures."[40] As AAPLOG explains:

> Since the goal of elective induced abortion is to guarantee a dead fetus, destructive procedures or feticide is used to ensure fetal demise before parturition. And, in order to escape the scrutiny and accountability

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[35] *AAPLOG Statement*, *supra* note 1. ("Elective abortion is not treatment of a miscarriage or an ectopic pregnancy nor is it separating the mother and the baby at any gestational age to save a mother's life. There are no laws in any state in the United States which criminalize treatment of any of these conditions.").

[36] 88 Fed. Reg. at 54,767.

[37] *Glossary of Medical Terms for Life-Affirming Medical Professionals*, Am. Ass'n of Pro-Life Obstetricians & Gynecologists 1, 1 (June 2023) https://aaplog.org/wp-content/uploads/2023/06/Glossary-of-Medical-Terms_20230615_7.pdf.

[38] *Id*. at 2.

[39] *What is AAPLOG's Position on "Abortion to Save the Life of the Mother?"*? [sic], AM. ASS'N OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS (July 9, 2009), https://aaplog.org/what-is-aaplogs-position-on-abortion-to-save-the-life-of-the-mother/.

[40] Pro. Ethics Comm., *supra* note 11, at 9.

> inherent in hospital based parturitions, elective abortion procedures are designed to be done in physician offices, in procedures that can involve days of cervical ripening.
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> In contrast, emergency parturitions are done in hospitals where the medical needs of both the mother and her neonate can be addressed immediately. The procedures themselves are done in a manner to maximize survival of both, and include emergency cesarean section as well as emergency deliveries.[41]

Thus, a medically-indicated maternal-fetal separation is not the same as an elective induced abortion. The EEOC should remove the term, "abortion," and replace it with "medically-indicated maternal-fetal separation"—including AAPLOG's definition of this term—to clarify the final rule does not cover elective induced abortions.

B. Elective Induced Abortion is Distinguishable from Miscarriage and Stillbirth Treatment.

The EEOC groups abortion with miscarriage and stillbirth treatment as examples of termination of pregnancy.[42] Yet, elective induced abortion is distinguishable from miscarriage and stillbirth treatment. According to the Centers for Disease Control and Prevention ("CDC"), "[b]oth miscarriage and stillbirth describe pregnancy loss, but they differ according to when the loss occurs. In the United States, a miscarriage is usually defined as loss of a baby before the 20th week of pregnancy, and a stillbirth is loss of a baby at or after 20 weeks of pregnancy."[43] Sometimes miscarriage is called "spontaneous abortion."[44] According to Mayo Clinic, "[a]bout 10% to 20% of known pregnancies end in miscarriage. But the actual number is likely higher. This is because many miscarriages happen early on, before people realize they're pregnant."[45] The CDC indicates that "[a]bout 1 pregnancy in 100 at 20 weeks of pregnancy and later is affected by stillbirth, and each year about 24,000 babies are stillborn in the United States."[46]

When a woman's body does not naturally pass the unborn child's remains, she needs a medical professional to remove the remains to preserve her health.

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[41] *Id*.
[42] 88 Fed. Reg. at 54,767.
[43] *What is Stillbirth?*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 29, 2022), https://www.cdc.gov/ncbddd/stillbirth/facts.html.
[44] *Concluding Pregnancy Ethically*, *supra* note 10, at 3.
[45] *Miscarriage*, MAYO CLINIC (Sept. 8, 2023) https://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/symptoms-causes/syc-20354298.
[46] *Pregnancy and Infant Loss*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 30, 2022) https://www.cdc.gov/ncbddd/stillbirth/features/pregnancy-infant-loss.html.

Accordingly, miscarriage and stillbirth may involve surgery or medication to remove fetal tissue from the woman's body.[47] However, "[i]n those cases [of miscarriage and stillbirth], pregnancy has already fundamentally concluded, but there is a delay in completion of the process of miscarriage or delivery."[48] Miscarriage and stillbirth treatment contrast with elective induced abortion, in which the unborn child is alive, and the surgical or chemical intervention's primary intent is to end that unborn child's life. Consequently, miscarriage and stillbirth treatment do not carry the same legal or bioethical concerns that exist with elective induced abortion.

Ultimately, the EEOC has failed to meet its own standard of drafting the proposed rule in plain language by (A) using vague and overbroad terms like "abortion" and "termination of pregnancy," and (B) grouping abortion with distinguishable treatments, such as stillbirth and miscarriage treatment.

V. EEOC Subverts Federal Pro-life Policy by Furthering Abortion.

Dobbs v. Jackson Women's Health Organization overruled *Roe v. Wade* and returned the abortion issue to the democratic process. There is no federal right or interest in protecting elective induced abortion following *Dobbs*. Accordingly, Congress, not the EEOC, has the power to legislate on the abortion issue. Federal laws, moreover, have set a pro-life policy stance, which the EEOC has subverted by contriving protections for abortion.

A. There is No Federal Right or Legally Protected Interest to Abortion Following *Dobbs*.

There is no federal right or legally protected interest in abortion, and none existed before *Roe v. Wade* concocted it.[49] Accordingly, the EEOC has no authority to protect abortion within the PWFA's text. *Roe* was a consequence of abortionists turning to judicial activism to create an abortion "right." The Supreme Court in *Roe* held the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[50] As Justice Alito wrote in *Dobbs*,

> *Roe* . . . was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not

[47] *Concluding Pregnancy Ethically*, *supra* note 10, at 6, 9.
[48] *Id*. at 9.
[49] *See* 410 U.S. 113.
[50] *Id*. at 153.

> mentioned . . . And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[51]

The *Roe* Court then concocted an arbitrary trimester test for determining the constitutionality of abortion regulations.

Planned Parenthood of Southeastern Pennsylvania v. Casey subsequently clarified that abortion was a substantive due process right, not a privacy right, and reaffirmed the right to a pre-viability abortion "is the most central principle of *Roe v. Wade*."[52] Justice Alito noted in *Dobbs* that "[t]he *Casey* Court did not defend [*Roe*'s] unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the 'liberty' protected by the Fourteenth Amendment's Due Process Clause."[53]

Dobbs refuted *Roe* and *Casey*'s faulty foundations by holding there is no constitutional right to abortion. The Due Process Clause protects rights guaranteed by the first eight Amendments and, at issue in *Dobbs*, unenumerated fundamental rights. However, for unenumerated fundamental rights, the Court must "ask[] whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[54] After analyzing abortion under this test, the Court held "[t]he inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions."[55]

Further, there is no federal statute protecting a right to abortion. The EEOC must have a statutory basis for implementing a federal abortion policy, given there is no constitutional provision. The EEOC cannot point to such a statute since none exists. To include protections for elective induced abortion within a proper interpretation of the PWFA, the EEOC *must* explicitly point to a provision providing authority to create a national abortion policy. *See supra* Section III. The EEOC cannot do so due to *Dobbs*' ruling that there is no constitutional right to abortion, and the issue has properly returned to the authority of the democratic process.

B. The EEOC's Protection of Abortion Subverts Congress' Pro-life Policy Stance.

Federal policy is overwhelmingly pro-life. There is a plethora of statutes protecting women, unborn children, families, and medical professionals from the

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[51] *Dobbs*, 142 S. Ct. at 2245.
[52] 505 U.S. 833, 871 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.
[53] *Dobbs*, 142 S. Ct. at 2245.
[54] *Id*. at 2246 (citation omitted) (second alteration in original).
[55] *Id*. at 2253.

harms of abortion violence. Congress maintains a pro-life policy stance, and the EEOC cannot act contrary to that policy by manufacturing abortion protections within the PWFA.

Many federal statutes highlight the emphasis Congress has placed on protecting women and unborn life from the harms of abortion violence. The Born-Alive Infants Protection Act recognizes that children born alive after attempted abortion are legal persons under federal law and cannot be left to die without medical care.[56] The Partial-Birth Abortion Ban Act prohibits the horrific abortion method that induces labor just to kill the child when he or she is partially born.[57] In the findings of the Partial-Birth Abortion Ban Act, Congress described the unborn child as "living" and partial-birth abortion as a "gruesome and inhumane procedure."[58] The committee even noted that part of its motivation for banning the procedure stemmed from the belief that the procedure cultivates a "complete disregard for infant human life."[59] Federal law also bars the use of the United States Postal Service or common carriers from mailing abortion-inducing drugs, including the chemical abortion regimen of mifepristone and misoprostol.[60] As expressions of public policy, these statutes overwhelmingly manifest Congress's intention to protect human life from abortion.[61]

Over the past half-century, Congress has enacted numerous statutes protecting medical professionals that conscientiously object to taking a human life through abortion, including the Church Amendments,[62] Coats-Snowe Amendment,[63] and Weldon Amendment.[64] There are conscience protections throughout federal law, such as in the Danforth Amendment to Title IX's definition of sex discrimination,[65]

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[56] 1 U.S.C. § 8.
[57] 18 U.S.C. § 1531.
[58] Pub. L. 108-105, § 2(1), 117 Stat. 1201, 1201 (2003).
[59] *Id*. at § 2(14)(L).
[60] 18 U.S.C. §§ 1461; 1462.
[61] Objectors may point to the Freedom of Access to Clinic Entrances Act ("FACE Act") as evidence to the contrary. The law prohibits using force or threatening somebody to impede them from obtaining reproductive health services. *See* 18 U.S.C. § 248. The statute's coverage includes harassment against pro-life pregnancy resource centers and separately covers "place[s] of religious worship." *Id*. This law does not authorize violence against unborn life, but rather evenhandedly "protect[s] the public safety and health and activities affecting interstate commerce" in reproductive healthcare and religious activities. Pub. L. No. 103-259, § 2, 108 Stat. 694, 694 (1994).
[62] 42 U.S.C. § 300a-7.
[63] 42 U.S.C. § 238n.
[64] *See*, *e.g.*, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. H, tit. V, § 507(d), 136 Stat. 4459, 4908 (2022).
[65] 20 U.S.C. § 1688.

amendments regulating managed-care providers in the Medicare and Medicaid programs,[66] and Affordable Care Act provisions regarding insurance.[67]

Congress regularly restricts public funding of elective abortion. The Hyde Amendment has been a cornerstone of every federal health and welfare appropriations bill since Congressman Henry Hyde first proposed it in 1976.[68] The present version of the Hyde Amendment restricts abortion funding except for medical emergencies and cases of rape or incest.[69] Congress also restricts abortion in other areas. The Dornan Amendment prohibits the District of Columbia from expending public funds for abortion except if the mother's life is at risk or in cases of rape or incest.[70] Federal programs often include explicit abortion funding prohibitions, such as Title X, which restricts recipients from using public funds "in programs where abortion is a method of family planning."[71] Congress has enacted restrictions on federal assistance if those funds promote abortion. For instance, Congress enacted the Biden Amendment—named after President Joe Biden when he was a Senator—to prevent federal funds from supporting biomedical research relating to abortion.[72]

Congress notably passed the PWFA as part of the Consolidated Appropriations Act, 2023, which included many pro-life riders that limited the harms of abortion violence.[73] The proposed rule's inclusion of abortion contravenes this overarching pro-life policy stance of the Consolidated Appropriations Act, 2023.

These statutes show that federal policy opposes abortion violence. Moreover, Congress has repeatedly rebuffed anti-life bills that would concoct legal protections for abortion.[74] Again, there is no federal right or legally protected interest in abortion following the *Dobbs* decision. Rather, federal abortion policy protects infants born-alive after a botched abortion, prohibits gruesome partial-birth abortions, bans the mailing of abortion-inducing drugs, safeguards conscientious objections towards abortion, and restricts the public funding of abortion. Accordingly, federal policy is pro-life. Injecting abortion into the PWFA would directly conflict with federal pro-life policy.

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[66] 42 U.S.C. §§ 1395w-22(j)(3)(B), 1396u-2(b)(3)(B).
[67] 42 U.S.C. § 18023(b)(4).
[68] *See* Pub. L. No. 94-439 tit. II, § 209, 90 Stat. 1418, 1434 (1976).
[69] Consolidated Appropriations Act, 2023, div. H, tit. V, §§ 506–507.
[70] Consolidated Appropriations Act, 2023, div. E, tit. VIII, § 810.
[71] 42 U.S.C. § 300a-6.
[72] 22 U.S.C. § 2151b(f)(3).
[73] *See*, *e.g.*, the Weldon, Hyde, and Dornan Amendments, *supra* notes 64, 69–70.
[74] *See*, *e.g.*, Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021); Women's Health Protection Act of 2019, H.R. 2975, 116th Cong. (2019).

In sum, the EEOC has not shown it has the authority to disregard and act contrary to Congress' pro-life policy stance. As a result, the EEOC lacks the authority to include abortion within the PWFA.

VI. The EEOC Does Not Have the Power to Diminish the Government's Interest in Safeguarding Unborn Human Life, Which Would Create Grave Societal Costs.

The proposed rule has unlawfully diminished Congress' interest in protecting unborn human life. Likewise, the proposed rule has failed to consider abortion's harmful impacts upon unborn children, which include economic, diversity, and societal costs.

A. The EEOC Has Not Considered, Nor Does It Have the Power to Weigh, the Government's Interest in Protecting Unborn Human Life.

By writing abortion into the PWFA's text, the EEOC is unlawfully rebalancing Congress' interest in protecting the unborn child from harm. As the Supreme Court directs in *Dobbs*, "States [and Congress] may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'"[75] The Court recognizes that:

> These legitimate interests include respect for and preservation of prenatal life at all stages of development . . . the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.[76]

Furthermore, "[a] law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'"[77]

Congress has balanced its interests in favor of protecting mothers during pregnancy and childbirth, excluding abortion from the PWFA. At no point does the proposed rule consider the government's interest in protecting unborn children.[78] Moreover, the EEOC does not have the authority to rebalance Congress' interests. Congress has already weighed the appropriate considerations and decided to protect

[75] 142 S. Ct. at 2283–2284 (citation omitted).
[76] *Id*. at 2284.
[77] *Id*. (citation omitted).
[78] *See generally* 88 Fed. Reg. 54,714.

them in the manner the PWFA lays out. The EEOC lacks the authority to attempt to change how Congress has weighed the interests at stake in pregnancy by diminishing protections for unborn children.

B. The EEOC Has Not Analyzed the Costs of Ending Unborn Human Life.

Not only does abortion have negative effects on birthrates and social welfare programs, but it also creates racial and disability disparities. The EEOC has failed to analyze these economic and diversity costs of ending unborn human life.

The Joint Economic Committee Republicans detailed many of abortion's costs in their 2022 report, *The Economic Cost of Abortion*.[79] According to the report:

> [T]he economic cost of abortion to unborn babies in the U.S. was $6.9 trillion in 2019, 32 percent of gross domestic product (GDP) that year. This cost is 425 times larger than the $16.2 billion loss in earnings that new mothers would be expected to incur over the first six years of the child's life.[80]

Unfortunately, "abortion has reduced the U.S. population, and in so doing, has shrunk the labor force, prevented innovative ideas from improving American lives, and suppressed total economic output."[81]

Abortion negatively impacts the social welfare system by "stress[ing] society's capability to care for older Americans."[82] There are less children to care for elderly parents, and less working Americans to contribute to Social Security and Medicare.[83]

Abortion causes racial and disability disparities. "Black women have abortions . . . nearly four times the rate at which [w]hite women have abortions."[84] In 2019, for example, even though abortions performed on Black women comprised 38.4% of all abortions, only 12.9% of all women were Black.[85] "This disparity results in a U.S. population that is less racially and ethnically diverse than it would otherwise be if abortion were restricted."[86] Likewise, "[a]bortion also reduces diversity through selective termination of babies with disabilities."[87] Abortion

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[79] JOINT ECON. COMM. REPUBLICANS, 117TH CONG., THE ECONOMIC COST OF ABORTION (June 15, 2022).
[80] *Id*. at 2.
[81] *Id*. at 7.
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id*. at 7–8.
[86] *Id*. at 8.
[87] *Id*.

particularly targets unborn children with Down syndrome, reducing the population of the Down syndrome community.[88]

The EEOC has not analyzed these costs. AUL asks the EEOC to consider how the final rule will impact abortion rates, and to respond to how abortion has negative economic, diversity, and societal costs.

VII. EEOC Has Not Considered Abortion's Harmful Effects upon Women.

The EEOC has failed to acknowledge the negative impact abortion has on women's welfare. Women do not need abortion to succeed socially or economically. Rather, abortion negatively affects women's physical and mental health, as well as increases a woman's risks of intimate partner violence and reproductive control.

Abortion rates and ratios do not correlate with women's socioeconomic success.[89] Yet, the proposed rule contends "the reasonable accommodations provided by the PWFA for workers experiencing pregnancy, childbirth, or related medical conditions are critical to the economic security of women workers and their families."[90] This is incorrect regarding abortion because there is an "absence of empirical evidence to show abortion's positive effects upon women."[91] This contention also can harm women's equality because "[i]t easily communicates that women's pregnancy and parenting is a disability most females suffer. It explicitly or implicitly assumes that the male body and reproductive model is the norm, to which women should conform in order to achieve 'agreed' measures of success—good, well-paying employment outside of the home."[92]

Additionally, abortion carries risks to women's physical health and safety, especially considering this is an elective procedure and not medically necessary. A 2021 peer-reviewed study, for example, showed alarming results: chemical-abortion related emergency room visits (*i.e.*, visits medically coded as chemical abortion complications) per 1,000 abortions "went from 8.5 to 51.7, an increase of 507%" over thirteen years.[93] By 2015, the rate of emergency room visits within 30 days for any cause (*i.e.*, any emergency room visit regardless of how it was medically coded) per 1000 chemical abortions was 354.8.[94] This means 35.48% of women ended up in the

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[88] *Id*.
[89] Helen M. Alvaré, *Nearly 50 Years Post-*Roe v. Wade *and Nearing Its End: What is the Evidence That Abortion Advances Women's Health and Equality?*, 34 REGENT U. L. REV. 165, 212 (2022).
[90] 88 Fed. Reg. at 54,716.
[91] Alvaré, *supra* note 90, at 213.
[92] *Id*.
[93] James Studnicki et al., *A Longitudinal Cohort Study of Emergency Room Utilization Following Mifepristone Chemical and Surgical Abortions, 1999–2015*, HEALTH SERVS. RSCH. & MANAGERIAL EPIDEMIOLOGY, Nov. 9, 2021, at 1, 5.
[94] *Id*. at 4–5.

emergency room within thirty days of taking chemical abortion drugs.[95] The study found that "[emergency room] visits following [a chemical abortion] grew from 3.6% of all postabortion visits in 2002 to 33.9% of all postabortion visits in 2015."[96] During the same period, chemical abortions "increased from 4.4% of total abortions in 2002 to 34.1% in 2015."[97]

Abortion poses mental health risks for women and girls. "Pregnancy loss (natural or induced) is associated with an increased risk of mental health problems."[98] "Research on mental health subsequent to early pregnancy loss as a result of elective induced abortions has historically been polarized, but recent research indicates an increased correlation to the genesis or exacerbation of substance abuse and affective disorders including suicidal ideation."[99] Scholarship shows "that the emotional reaction or grief experience related to miscarriage and abortion can be prolonged, afflict mental health, and/or impact intimate or parental relationships."[100] Similarly, "[s]everal recent international studies have demonstrated that repetitive early pregnancy loss, including both miscarriage and induced abortions, is associated with increased levels of distress, depression, anxiety, and reduced quality of life scores in social and mental health categories."[101]

Women also face increased risks of intimate partner violence ("IPV") when considering abortion. There are "[h]igh rates of physical, sexual, and emotional IPV . . . among women seeking a[n abortion]."[102] For women seeking abortion, the prevalence of IPV is nearly three times greater than women continuing a pregnancy.[103] Post-abortive IPV victims also have a "significant association" with

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[95] *Id*.
[96] *Id*. at 8.
[97] *Id*.
[98] David C. Reardon & Christopher Craver, *Effects of Pregnancy Loss on Subsequent Postpartum Mental Health: A Prospective Longitudinal Cohort Study*, INT'L J. ENV'T RSCH. & PUB. HEALTH, Feb. 23, 2021, at 1, 1.
[99] Kathryn R. Grauerholz et al., *Uncovering Prolonged Grief Reactions Subsequent to a Reproductive Loss: Implications for the Primary Care Provider*, FRONTIERS PSYCH., May 12, 2021, at 1, 2.
[100] *Id*.
[101] *Id*.; *see, e.g.*, Louis Jacob et al., *Association Between Induced Abortion, Spontaneous Abortion, and Infertility Respectively and the Risk of Psychiatric Disorders in 57,770 Women Followed in Gynecological Practices in Germany*, 251 J. AFFECTIVE DISORDERS 107, 111 (2019) (finding "a positive relationship between induced abortion . . . and psychiatric disorders in gynecological practices in Germany").
[102] Megan Hall et al., *Associations Between Intimate Partner Violence and Termination of Pregnancy: A Systematic Review and Meta-Analysis*, PLOS MED., Jan. 7, 2014, at 1, 15.
[103] Comm. on Health Care for Underserved Women, Am. Coll. of Obstetricians & Gynecologists, *Reproductive and Sexual Coercion*, Comm. Op. No. 554, at 2 (reaffirmed 2022).

"psychosocial problems including depression . . . , suicidal ideation . . . , stress . . . , and disturbing thoughts."[104]

Similarly, intimate partners, family members, and sex traffickers may be asserting reproductive control over the woman, which are "actions that interfere with a woman's reproductive intentions."[105] In the context of abortion, reproductive control not only produces coerced abortions or continued pregnancies, but it also affects whether the pregnancy was intended in the first place.[106] Reproductive control is a prevalent issue for women. "As many as one-quarter of women of reproductive age attending for sexual and reproductive health services give a history of ever having suffered [reproductive control]."[107]

The EEOC has not analyzed abortion's harm to women. For the final rule, AUL asks the EEOC to consider these costs.

VIII. Conclusion.

For the foregoing reasons, the EEOC does not have the legal authority to include abortion as a "related medical condition" within the final rule. AUL urges the EEOC to adhere to federal pro-life policy, and not protect a practice (*i.e.*, elective induced abortion) that endangers the health and safety of women and intentionally ends the life of an unborn human child.

Sincerely,

Carolyn McDonnell, Esq.
Litigation Counsel
AMERICANS UNITED FOR LIFE

[104] Hall, *supra* note 102, at 11.
[105] Sam Rowlands & Susan Walker, *Reproductive Control by Others: Means, Perpetrators and Effects*, 45 BMJ SEXUAL & REPROD. HEALTH 61, 62, 65 (2019).
[106] *Id*. at 62–63.
[107] *Id*. at 62.