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October 10, 2023

From: The Heritage Foundation
214 Massachusetts Ave NE
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To: U.S. Equal Employment Opportunity Commission
131 M Street, NE Washington, DC 20507

Via electronic filing on Regulations.gov

Re: Comment in Opposition to Proposed Regulations to Implement the Pregnant Workers Fairness Act, RIN 3046-AB30

Dear Commissioners,

The Heritage Foundation submits the following comment on the Equal Employment Opportunity Commission's (EEOC) proposed regulations, 88 Fed. Reg. 54714 (Aug. 11, 2023), to implement the Pregnant Workers Fairness Act (PWFA), 42 U.S.C. § 2000gg, *et seq.* The Heritage Foundation is a non-profit non-partisan Washington D.C. based think tank that frequently provides comments on proposed federal regulations as part of its mission, which includes advocating for sound public policies. Additionally, as an employer of more than 14 persons, the Heritage Foundation will be directly subject to the proposed rule once effective. The Heritage Foundation submits its objections to the proposed rule both as part of furthering its mission and as a covered employer that will suffer concrete and particularized harms from the rule.

The Heritage Foundation is quintessentially an expressive association whose employees work in common cause to formulate, communicate, and advocate for conservative ideas and policy solutions in a timely, persuasive, and understandable manner for policy makers, the media, and the public at large. Among the most important positions the Heritage Foundation advocates for is protecting innocent unborn children and their mothers from abortion. The Heritage Foundation for decades called for overturning *Roe v. Wade* and is deeply committed to securing state and federal protection of innocent human life from conception. For example, the Heritage Foundation does not, as a moral matter, offer any abortion coverage in its employer sponsored health care plan. As another example, the Heritage Foundation not only advocated for the rights of the Little Sisters of the Poor to not be forced to participate in the provision of contraception in their health care plans by the Affordable Care Act (Obamacare),¹ the Heritage Foundation, at significant

¹ See e.g., Sarah Torre, Religious Liberty at the Supreme Court: Little Sisters of the Poor Take on Obamacare Mandate, (Mar. 22, 2016) <https://www.heritage.org/religious-liberty/report/religious-liberty-the-supreme-court-little-sisters-the-poor-take-obamacare>; and Heritage: Supreme Court Ruling Finally Lets Nuns Live Out Their Faith (Jul. 8, 2020)

cost, has retained grandfather status for its own plan under Obamacare since approximately 2010. This continuing effort to be exempt from Obamacare is driven, in significant part, by a sincere conscience-driven desire to avoid the requirement that the Heritage Foundation's health plan cover contraceptives, some of the most common of which interfere with the implantation of a fertilized human egg, thereby operating as an abortifacient. In short, at the Heritage Foundation, we practice what we preach.

We are deeply concerned that the EEOC's proposed rule will violate the Heritage Foundation's constitutional and statutory rights, including its right of expressive association and the religious beliefs of its employees, as well as the rights of similarly situated institutions.² Specifically, among other objectionable provisions, the proposed rule would define a pregnancy "related medical condition" to include abortion and use of birth control, and require accommodations thereof.

The Heritage Foundation is pro-family³ and provides benefits to its employed pregnant mothers well above what the law requires, including paid maternity leave and paid sick leave. We also have a nursing mother's room on the premises. We would never discriminate against or fail to reasonably accommodate any pregnant employee and her⁴ pregnancy related needs. We also recognize that abortion is the antithesis of supporting a pregnant mother and is, in fact, not healthcare at all. The proposed rule's inclusion of abortion as a required accommodation makes a mockery of the practice of loving, caring medicine and the sincere concerns of an employer for

<https://www.heritage.org/press/heritage-supreme-court-ruling-finally-lets-nuns-live-out-their-faith>.

² The Heritage Foundation's comment is a summary of its position and, for the sake of convenience and brevity, does not raise every available legal, policy, or factual argument or defense against the rule here. As such any omission should not be deemed a waiver of any defense.

³ Under Section 654 of the Treasury and General Government Appropriations Act, 1999, (Pub. L. 105-277) federal agencies are required to assess the impact of proposed regulations on families. Officially known as the "Family Policymaking Assessment," agencies are required to assess their actions "before implementing policies and regulations that may affect family well-being." The EEOC must do so here.

⁴ The proposed rule repeatedly uses plural "they/their" pronouns when referring to an "individual" or "employee" that is or can become pregnant. The EEOC should clarify whether it believes that PWFA protections can apply to a male who self-identifies as female and has no actual capacity to ever be pregnant, experience childbirth, or have a medical condition related to pregnancy and childbirth. The EEOC should clarify whether a male taking estrogen in order to produce nipple secretions to "chest feed" a baby is eligible for the same accommodation related to lactation that a breastfeeding or pumping mother is eligible for. Similarly, the EEOC should clarify the scope of what requires an accommodation under "changes in hormone levels" as proposed in § 1636.3 and whether it means that the PWFA would be used to apply to gender "transition" interventions, such as cross-sex hormone treatments, sterilizing surgeries, and the use of puberty blockers. The Heritage Foundation's view on all the above is that logic and law dictate the answers to these questions is no.

the well-being of its employees and their children. The EEOC would nevertheless force the Heritage Foundation to accommodate abortions undertaken by its employees in violation of its mission, expression, and statutory and constitutional rights, and despite such procedures being increasingly prohibited around the country.

For these reasons and more, the Heritage Foundation cannot and will not comply with the proposed rule once finalized to the extent it will require it to pay for or grant leave or travel benefits specifically for a Heritage Foundation employee requesting such leave or travel benefits as an accommodation for an elective abortion.

1. Textual Analysis of the PWFA

Abortion is not a “medical condition,” rather it is the immoral and intentional ending of an innocent human life through tools commonly used in legitimate medicine, such as for miscarriage management. Miscarriage would be a pregnancy related medical condition and the Heritage Foundation has no objection to its inclusion in the rule. But the fact that legitimate tools for legitimate medical conditions (miscarriage) can be twisted for illegitimate ends (abortion) does not convert a non-medical condition into medical one. It is much like the difference between an opioid taken to manage pain after major surgery versus an opioid taken to further a drug abuse habit. Additionally, pregnancy itself should never be considered a medical condition that is to be treated with abortion because pregnancy itself is not a disease and neither is the living human being in the womb.

Here and elsewhere, the Heritage Foundation quotes and incorporates by reference the, difficult to improve upon, textual analysis contained in the comment submitted by the Alliance Defending Freedom (ADF), to wit:⁵

[U]nder the PWFA, an employee’s limitation to be accommodated must be a physical or mental condition that relates to, is affected by, or arises out of pregnancy, childbirth, or related medical conditions—meaning a medical condition *related to a present or recent pregnancy and childbirth, not any aspect of sexual or reproductive health*.⁶ EEOC acknowledges that related medical conditions mean “medical conditions which relate to, are affected by, or arise out of pregnancy or childbirth,” but EEOC then deems apparently every aspect of female sexual function or reproductive health related to pregnancy. EEOC even says that medical conditions related to pregnancy include acts for avoiding pregnancy (using birth control), acts for achieving pregnancy (through IVF), and bodily functions not necessarily connected to pregnancy (such as menstrual cycles or hormone

⁵ Alliance Defending Freedom comment, Oct. 2, 2023, available at <https://drupal-files-delivery.s3.amazonaws.com/2023-10/ADF-Public-Comment-EEOC-2023-10-02-Pregnant-Workers-Fairness-Act.pdf>. Reference and incorporation of this and any other comment submitted by a third party does not constitute their endorsement of any part of the Heritage Foundation’s comment nor does it constitute the Heritage Foundation’s endorsement of their comments beyond the quoted or cited portions.

⁶ 42 U.S.C. § 2000gg(4).

level changes).⁷ But EEOC’s anything-and-everything definition of “related medical conditions” would render the term childbirth superfluous, as childbirth is of course “related” to pregnancy.⁸

Congress felt it necessary to add the word “childbirth” to the PWFA because childbirth is not the equivalent to “pregnancy.” Rather, it is the natural (or medically facilitated) process of completing a pregnancy, with the goal of preserving the life and well being of mother and the unborn child being the default presumption. Indeed, when Congress passed the Emergency Medical Treatment and Labor Act (EMTALA), it required certain hospitals to stabilize the mother *and* the “unborn child” during emergency labor complications.⁹ This life-affirming understanding of labor is the same understanding that carried over to the PWFA when Congress added the term “childbirth” to assure that it is accommodated. Yet now the EEOC would arbitrarily and capriciously add the life-destroying antithesis of childbirth—abortion—into the statute. It is unthinkable that Congress moved to protect childbirth explicitly because it was *not* clearly a pregnancy related condition while at the same time protecting abortion *sub silentio* because on an a theory that abortion is more obviously a pregnancy related condition than actual childbirth. It would be like interpreting provisions of the Endangered Species Act specifically allowing “relocation” of endangered birds from their nests under specific conditions to implicitly include relocating them using a hunter’s rifle.

ADF reinforces the point from the other direction when it explains in its comment that:

[W]hen Congress wants to address all aspects of female sexual function or reproductive health, or deem abortion to be healthcare, it knows how to do so. For instance, under the FACE Act, Congress defined “reproductive health services” to include “services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.”¹⁰ Yet, in the PWFA, Congress referred only to pregnancy, childbirth, or related medical conditions—a narrower category. *See Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996) (“The plain language of the PDA does not suggest that ‘related medical conditions’ should be extended to apply outside the context of ‘pregnancy’ and ‘childbirth.’”). EEOC thus fails to recognize that there thus must be a present or recent pregnancy or childbirth for the Act to apply. Without a present or recent pregnancy, there is no pregnancy, childbirth, or related medical condition to accommodate.¹¹

Perhaps most fundamentally, “[T]he act of obtaining an elective abortion—is not a medical, physical, or mental condition, or a known limitation.”¹² As ADF elaborated:

⁷ 88 Fed. Reg. at 54,721, 54,767, 54,774 (proposed 29 C.F.R. § 1636.3(b)).

⁸ <https://drupal-files-delivery.s3.amazonaws.com/2023-10/ADF-Public-Comment-EEOC-2023-10-02-Pregnant-Workers-Fairness-Act.pdf>.

⁹ 42 U.S. Code § 1395dd(c).

¹⁰ 18 U.S.C. § 248(e)(5).

¹¹ <https://drupal-files-delivery.s3.amazonaws.com/2023-10/ADF-Public-Comment-EEOC-2023-10-02-Pregnant-Workers-Fairness-Act.pdf>.

¹² *Id.*

[E]mployers must accommodate pregnant working women by enabling them to keep their jobs and their babies, but accommodating the act of seeking an elective abortion seeks to avoid, rather than to accommodate, pregnant women and unborn children.¹³ The PWFA requires reasonable accommodations for physical or mental conditions from pregnancy, childbirth, and related medical conditions, like time off for prenatal appointments, so that pregnant women can keep their jobs and their children. But accommodating the act of seeking an elective abortion does not accommodate a pregnancy or childbirth, or pregnancy-related medical conditions, such as prenatal depression or anxiety. It does not help pregnant women keep their jobs and their babies. It is not healthcare, and it does nothing to make a workplace accessible for women with pregnancies. Moreover, forcing employers to facilitate elective abortions is never reasonable and is per se an undue hardship for any employer, especially pro-life and religious employers. In sum, nothing in the PWFA's text directly or indirectly covers the act of obtaining an elective abortion.

The Heritage Foundation fully supports pregnant mothers and their unborn children in its workplace. It does not sever the two interests because they do not contradict each other,¹⁴ but the proposed rule would force the Heritage Foundation to affirm and support, through an abortion accommodation scheme, the willful destruction of the unborn child. The Heritage Foundation cannot comply with such an immoral edict.

ADF makes an additional persuasive argument with respect to the rule's impact on employers:

[I]ntroducing abortion expressly or implicitly into the PWFA wreaks havoc with the Act's structure and text by putting employers to inconsistent obligations. Pregnancy and abortion cannot exist side by side anywhere in the Act, but especially not when employers factor in the PWFA's intimidation, harassment, and retaliation provisions. These provisions seek to protect pregnant and post-partum women from being made to feel that their accommodation requests are or would be unwelcome.¹⁵ But making employers offer special privileges for the act of seeking an elective abortion could make many pregnant women feel unwelcome for seeking more expensive pregnancy accommodations and would chill pro-life workplace cultures and speech.

As held repeatedly by the Supreme Court, the right of expressive association includes the right to have exclusive membership policies on the front end and binding conduct policies for members at the back end. This is because if an expressive association cannot control who can become a member and what conduct members may or may not engage in to remain a member in good

¹³ 42 U.S.C. §§ 2000gg(4), 2000gg-1.

¹⁴ The Heritage Foundation has long held that procedures designed to save a mother's life that *incidentally* result in the death of the unborn child is not an abortion. An abortion attempted to ostensibly save the mother's life that results in a live mother and the birth of a live child is still considered a botched abortion because the death of the child is an indispensable purpose of abortion.

¹⁵ 88 Fed. Reg. at 54,743-44, 54,771-54,772, 54,792-93 (proposed 29 C.F.R. § 1636.5(f)).

standing, it will cease to be the expressive association it was founded to be. This is true even in the face of enforcement of certain anti-discrimination laws.¹⁶

There should be no doubt that the Heritage Foundation qualifies as an expressive association. Think tanks are by their nature expressive associations as their very purposes include the dissemination of ideas. Accordingly, the Heritage Foundation vets potential employees for mission fit, which includes elimination from consideration candidates for employment who, through their conduct or speech, would be reasonably expected to publicly oppose, or be publicly perceived as opposing, one or more of the Heritage Foundation's defined publicly stated positions. Indeed, the Heritage Foundation's standard job announcement requires candidates to "understand *and support* the Heritage mission and vision for America, and the [particular] department's goals and objectives."¹⁷

Once hired, the Heritage Foundation applies its well-known "One Voice" policy which requires employees to refrain from publicly expressing views directly contrary to official policy positions of the Heritage Foundation.¹⁸ Prospective employees are generally made aware of the One Voice policy before hiring and are periodically briefed on it by their supervisors once employed. The Heritage Foundation enforces the One Voice policy by, for example, requiring employees to delete social media posts that contradict Heritage Foundation policy positions and repeated willful flouting of the One Voice policy can result in termination.

The proposed rule would require the Heritage Foundation to support and affirm, with its own resources, employees who would engage unrepentantly, if not proudly, in conduct that the Heritage Foundation decries as abhorrent, specifically, the unjustified taking of innocent human life. This would be a gross violation of the Heritage Foundation's rights, as well as those of other expressive associations holding similar pro-life views.

As stated by the U.S. Conference of Catholic Bishops in its comment on this rule:

[O]ne way to address and solve these potential conflicts is to construe the PFWA to not require accommodation for these procedures in the first place, ... 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 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

¹⁶ See, e.g., *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*, 515 U.S. 557 (1995) (private host of a parade cannot be forced to include homosexual advocacy group as a marching unit); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (public accommodations law cannot force Boy Scouts to accept, contrary to its message and associational rights, openly gay scout leaders).

¹⁷ Job announcement for CRM Specialist, Information Technology, (emphasis added), available at <https://heritage.applytojob.com/apply/O1qdiR0dr7/CRM-Specialist,-Information-Technology>.

¹⁸ <https://www.heritage.org/one-voice>.

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.¹⁹

Of the two ways of addressing this conflict identified by the USCCB, the first is by far the superior route as it is the only one that complies with the law and avoids contradicting the text of the PWFA, while the second option is a way of making an unlawful interpretation of a statute less harmful.

2. Legislative History

To our knowledge, no Member of Congress that eventually voted for the PWFA bill claimed before passage that it in any way covered abortion as to do so could have triggered a filibuster in the Senate and jeopardized passage of this bi-partisan bill. As noted in the comment submitted by the U.S. Conference of Catholic Bishops and several others, the legislative history forecloses the EEOC's proposed interpretation of the PWFA.²⁰ Democratic Senator Patty Murray, a pro-abortion senator on the Senate Health, Education, Labor and Pensions (HELP) Committee made no mention of abortion when describing the purpose of the bill and stated that it was utterly uncontroversial:

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.²¹

This is very simple: Give pregnant workers a break, give them a seat and give them a hand. Give them the dignity, the respect and basic workplace accommodations that they need. This is way overdue, and I can't think of a more common-sense, less controversial bill.²²

¹⁹ See USCCB and Catholic University of America comment on Regulation to Implement the Pregnant Workers Fairness Act, Sept. 2023, https://www.usccb.org/sites/default/files/about/general-counsel/rulemaking/upload/2023.USCCB_CUA_comments.PWFA_regulations.pdf. Reference and incorporation of this and any other comment submitted by a third party does not constitute their endorsement of any part of the Heritage Foundation's comment nor does it constitute the Heritage Foundation's endorsement of their comments beyond the quoted or cited portions.

²⁰ *Id.*

²¹ <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>.

²² Floor statement of Senator Murray, https://www.facebook.com/watch/live/?ref=watch_permalink&v=617057866858396.

Moreover, the lead sponsor of the PWFA, Democratic Senator Bob Casey, specifically disclaimed that it covered abortion, including through any subsequent EEOC rulemaking:

[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.²³

Presumably, had the EEOC revealed before passage that it would interpret the PWFA directly contrary to the understanding of the lead sponsor of the bill and the Republican co-sponsors, they would have added even more explicit (though technically unnecessary) language to bar the EEOC from disregarding the plain language and purpose of the statute.

Pro-life Republican Senator Steve Daines, joined the chorus warning the EEOC against doing exactly what it has proposed to do when he said:

Senator Casey’s statement [quoted above] 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.²⁴

The EEOC also cannot ignore the statement of the lead Republican sponsor of the PWFA, Senator Bill Cassidy, made in response to the EEOC unveiling the proposed regulations on his bill:

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.²⁵

²³ Floor statement of Senator Casey,

https://www.facebook.com/watch/live/?ref=watch_permalink&v=617057866858396.

²⁴ 168 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>.

²⁵ Sen. Cassidy press release of August 8, 2023, <https://www.cassidy.senate.gov/newsroom/press-releases/ranking-member-cassidy-blasts-biden-administration-for-illegally-injecting-abortion-politics-into-enforcement-of-bipartisan-pwfa-law>.

Nor should it dismiss his floor statement rejecting the EEOC's characterization of his bill:

I reject the characterization that [the Pregnant Workers Fairness Act] would do anything to promote abortion.²⁶

This legislative history makes clear that the EEOC is inserting an infamous term (abortion) with national policy importance, into the statute with no Congressional support. As stated by ADF in its comment:

[W]hether the PWFA includes abortion, [is] a decision of “magnitude and consequence on a matter of earnest and profound debate across the country,” *Biden v. Nebraska*, 143 S. Ct. at 2374 (cleaned up). Yet a decision of this 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. It is especially inapposite in a law protecting pregnant women and their children. To prevail, EEOC must show much more than the PWFA is silent or ambiguous on abortion. Under the major questions doctrine, the clear-notice federalism canon, and the canon of constitutional avoidance, EEOC must show that an abortion mandate was unmistakably clear in the text of the PWFA at the time of enactment. *E.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022). But it would be “odd indeed” if Congress had tucked the power to negate the enforcement of state abortion laws in such “a relatively obscure provision” of the PWFA. *Sackett v. EPA*, 143 S. Ct. 1322, 1340 (2023).²⁷

The EEOC's addition of abortion to the PWFA flies directly in the face of both the legislative history and Supreme Court precedent limiting the ability of federal agencies to make up national policy without crystal clear direction from Congress.

3. Conscience Conflicts

As described above, the proposed rule, if finalized, would violate the Heritage Foundation's First Amendment rights, but that is not the only constitutional right that would be under assault. As discussed and held in *March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.C. Dist. Ct. 2015), non-profits can and do exercise rights of conscience that cannot be infringed arbitrarily. Specifically, the court held that March for Life, a non-religious non-profit dedicated to ending abortion, could not be forced by federal agencies to provide abortifacient coverage in its health plan when religious organizations with the same fundamental objection to abortion were exempted. The court found this irrationally disparate treatment violated the Fifth Amendment's Equal Protection Clause.

The PWFA requires that religious organizations be exempted from application of the accommodation requirement with respect to the employment of persons of a particular religion, which quite clearly includes declining to employ persons who disagree with the religious

²⁶ Floor statement of Sen. Cassidy,

https://www.facebook.com/watch/live/?ref=watch_permalink&v=617057866858396.

²⁷ <https://drupal-files-delivery.s3.amazonaws.com/2023-10/ADF-Public-Comment-EEOC-2023-10-02-Pregnant-Workers-Fairness-Act.pdf>.

organization’s teaching on the morality of accommodations requested under the PWFA.²⁸ To interpret it otherwise would render the statutory religious exemption a dead letter.

The EEOC is rather coy on this point in the NPRM and only states definitively that it “will consider the application of the provision on a case-by-case basis.”²⁹ This presents significant “logical outgrowth” problem that constrains the ability of the EEOC to finalize the rule in any way that contradicts the fact that the broad religious exemption provision in the PWFA is, in fact, broadly applicable.³⁰

Presuming the EEOC will correctly apply this exemption to religious organizations that object to the abortion accommodation mandate, it would be arbitrary, capricious, and in conflict with the Fifth Amendment’s Equal Protection Clause for the agency not to extend the exemption to similarly situated non-religious organizations, such as the Heritage Foundation, that object to the same mandate on moral grounds.

As found by the March for Life court:

If the purpose of the religious employer exemption is, . . . to respect the anti-abortifacient tenets of an employment relationship, then it makes no rational sense—indeed, no sense whatsoever—to deny [a pro-life nonprofit] that same respect. By singling out a specific trait for accommodation, and then excising from its protection an organization with that precise trait, it sweeps in arbitrary and irrational strokes that simply cannot be countenanced, even under the most deferential of lenses. As such, the Mandate violates the equal protection clause of the Fifth Amendment and must be struck down as unconstitutional.³¹

That organizations, including non-profit and closely-held for profit businesses, can exercise and are due protections for their sincere convictions, religious or otherwise, is by now beyond dispute. *See e.g., Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014); *Zubik v. Burwell*, 578 U.S. 403 (2016).³²

²⁸ 42 U.S.C. § 2000gg-5(b).

²⁹ 88 Fed. Reg. at 54746.

³⁰ EEOC’s studied opacity on this point is doubly problematic given Congress’s mandate to the EEOC that its regulations “provide examples of reasonable accommodations” under the Act, which presumably includes examples as to when such accommodations are not required. 42 U.S. Code § 2000gg-3(a).

³¹ *March for Life v. Burwell*, 128 F. Supp. 3d 116, 128 (2015).

³² With respect to the ability of religious organizations to raise a defense to application of the EEOC’s rule under the Religious Freedom Restoration Act (RFRA), the EEOC suggests RFRA would not apply to suits filed by private parties. 88 Fed. Reg. at 54747. But application of a federal regulation, in federal court, is clearly conduct that would fit within RFRA’s requirement of federal government state action. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1 (1948) (prohibiting court enforcement of private suits to enforce racially restrictive land covenants entered into by private parties).

Conclusion

The EEOC's proposed abortion accommodation mandate is as lawless as it is harmful. It is not a coincidence that the EEOC is pushing abortion in rulemaking not long after the Biden administration responded to the (wholly correct) overturning of *Roe v. Wade* by engaging in a campaign of massive resistance to the *Dobbs* decision.³³ In this administration's zeal to insert abortion into as many federal regulations as it can, it is apparently now the turn of the administration's allies in the EEOC. But abortion politics are ordinarily resolved through the democratic process and here Congress has spoken unequivocally. It required employers like the Heritage Foundation to reasonably accommodate childbirth and pregnant mothers in the workplace (as the Heritage Foundation already does), but did not require it to accommodate abortion. Full stop.

But if the EEOC nevertheless chooses to proceed with its abortion accommodation mandate, as described above, it would impose an intolerable burden on the operations, mission, and conscience of the Heritage Foundation in violation of its rights under law and the constitution. Under those circumstances, the Heritage Foundation would have no choice but to resist the imposition on its rights and those of its employees.

Respectfully submitted on behalf of the Heritage Foundation,



Roger Severino

Vice President for Domestic Policy

³³ See, e.g., Melanie Israel, Appropriations Process: An Opportunity for Congress to Defend Life (cataloging Biden administration efforts to unlawfully establish abortion as national policy) <https://www.heritage.org/life/report/appropriations-process-opportunity-congress-defend-life>.