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SUBMITTED ELECTRONICALLY
VIA REGULATIONS.GOV

Mr. 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 Mr. Windmiller:

The State of Tennessee, joined by 19 co-signing States, appreciates the opportunity to comment on the Equal Employment Opportunity Commission's proposed rule to implement the Pregnant Workers Fairness Act (PWFA), Pub. L. 117-328 (2022), 136 Stat. 6084. *See* EEOC, *Regulations to Implement the Pregnant Workers Fairness Act*, 88 Fed. Reg. 54,714 (Aug. 11, 2023). A broad, bipartisan coalition passed that law with a laudable goal: Protecting pregnant workers and their babies by directing that women receive workplace accommodations for "pregnancy, childbirth, or related medical conditions." 136 Stat. at 6085. Congress directed EEOC to adopt a rule effectuating the Act's protections for the wellbeing of pregnant women who work outside the home, their unborn children, and their families.

Now, in a perverse plot twist, three unelected EEOC members have proposed hijacking the Act's *pro-pregnancy* provisions to require employers to accommodate *abortions*. If finalized, EEOC's rule would require the State of Tennessee and other covered employers to devote resources—including by providing extra leave time and potentially paying for travel—to assist their workers' decisions to terminate fetal life. This federal abortion-accommodation mandate defies States' duly enacted abortion prohibitions and commitment to the "preservation of prenatal life at all stages of development." *Dobbs v. Jackson*, 142 S. Ct. 2228, 2284 (2022).

Congress has *never* required the Nation's private employers—let alone the States themselves—to carry out pro-abortion policy, and plainly did not take that novel step by passing an Act that *protects* pregnancy. In nonetheless distorting the PWFA to push its abortion agenda, EEOC commits a series of statutory, constitutional, and administrative-law fouls that would render the proposed rule invalid:

First, EEOC's proposal contravenes the Commission's statutory authority. The PWFA's text, structure, history, and purpose foreclose the conclusion that it protects abortions. And other federal laws confirm EEOC lacks the power to enshrine an employment-law requirement to subsidize abortions. At a minimum, the major-questions doctrine means EEOC must point to clear congressional authorization for its controversial abortion-accommodation regime. EEOC cannot do so, which precludes its novel effort to cram down federal abortion policy on the Nation's employers.

Second, EEOC's proposal suffers serious constitutional flaws. Federalism limits preclude EEOC from commandeering States into proactively promoting abortions that are illegal under state law. EEOC's rule also flouts the First Amendment as applied to employers who wish to promote life or whose religious beliefs bar them from aiding abortions. Worse still, EEOC Commissioners' unlawful insulation from presidential removal gives them cover to pursue this problematic policy without the public accountability the U.S. Constitution demands.

Third, EEOC's proposal is arbitrary and capricious. Among other flaws, EEOC's accounting of the rule's costs focuses solely on those employees who need accommodations to safely continue working while pregnant. EEOC entirely fails to consider *any* costs associated with accommodating the untold thousands of abortions covered employees would seek annually, thus omitting a significant category of costs employers would shoulder. EEOC's fuzzy math does not pass muster under the Administrative Procedure Act (APA), which requires agencies to adequately assess its regulations' downsides.

The undersigned States detail each of these problems below. We hope this analysis—as well as the tens of thousands of other opposing comments—will cause EEOC to abandon its unlawful effort to transform a bipartisan victory for pregnancy protection into a novel and controversial abortion-accommodation regime.

I. EEOC's Abortion-Accommodation Rule Lacks Statutory Authority

As an administrative agency, EEOC "literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The upshot: Agencies can only act "within the bounds" of their statutory authority when promulgating rules. *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014); *see* 5 U.S.C. § 706(2)(C). This principle forecloses the proposed rule because the PWFA does not vest EEOC with authority to require employer accommodations for abortions. If any doubt remained that EEOC lacks its asserted abortion-accommodation power, the major-questions doctrine and constitutional problems with EEOC's interpretation counsel against EEOC's unprecedented proposal.

A. EEOC's Interpretation Contravenes the Pregnant Workers Fairness Act

The "'traditional tools' of statutory interpretation" confirm that EEOC's abortion-accommodation power is "contrary to the clear meaning of" the PWFA. *Arangure v. Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018) (quoting *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). Start with the Act's text, which in relevant part requires employers to accommodate any "known limitation[s] … related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions." *See* PWFA § 102(4), 136 Stat. at 6084. EEOC seeks to define the term "related medical conditions" to mean "having … an abortion." 88 Fed. Reg. at 54,721. The term "condition," in this context, means a "state of health or physical fitness" or "illness or other medical problem." *New Oxford Am. Dictionary* 362 (3d. ed. 2010). Yet abortion is neither a medical state of being nor an illness or medical problem—each of which connotes a medical status with a continuing state. Abortion is instead a voluntary, time-limited medical procedure.

Other portions of the provision likewise foreclose EEOC's attempt to read "abortion" into the statute. The PWFA requires employers to accommodate "known limitations" associated with pregnancy, childbirth, and related conditions. "Limitation," here, means "a condition of limited ability," *New Oxford Am. Dictionary* 1014—again referring to a continuing health circumstance. Further, under the *ejusdem generis* canon, the general term "or related medical conditions" is best read to cover only those concepts akin to the specific terms it follows—*i.e.*, "pregnancy" and "childbirth." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012). Both of those terms, in turn, refer to conditions arising from *being* pregnant or *having* a child. It turns the statute upside down to cover abortion, which *terminates* pregnancy and unborn children's lives. The Act's title provides yet another "useful clue" that EEOC is wrong by referencing "Pregnant Workers"—a category that by definition excludes workers who end their pregnancies via abortion. *Dubin v. United States*, 143 S. Ct. 1557, 1567 (2023).

EEOC's interpretation likewise makes a hash of the federal statutory prohibitions on abortion funding, including those Congress passed alongside the PWFA. As EEOC's rule acknowledges, providing workplace accommodations has undoubted costs in the form of employee productivity, leave time, and resources. *See, e.g.*, 88 Fed. Reg. at 54,754-60. In approximately one dozen provisions Congress passed at the same time as the PWFA, Congress barred appropriated monies and federal entities from supporting, requiring, performing, or facilitating abortions.[1] One such provision prohibits funds from flowing to global-health organizations "to motivate or coerce any person to practice abortions." 136 Stat. at 4986. Another specifies that no appropriated funds for federal employees' health plans "shall be available to pay for an abortion." *Id.* at 4699. Title X of the Public Health Service Act—which funds grants for certain types of family planning services—likewise commands that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Congress's myriad prohibitions on federal abortion funding belie EEOC's view that it has carte blanche to require States to indirectly fund abortions by administrative fiat.

[1] *See* Pub. L. 117-328 (2022), 136 Stat. at 4541, 4699, 4710, 4723, 4857, 4880, 4908, 4985-86, 4990, 5014, 5020, 5077.

The PWFA's purpose and history provide "extra icing on a cake already frosted" by the statutory text and structure. *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021) (citation omitted). In the lead up to the Act's passage, Congress confronted evidence suggesting that "more than 80 percent of first-time mothers work until their final month of pregnancy," and concluded that "pregnant workers may need reasonable accommodations to protect the health of both mother and baby." H.R. Rep. No. 117-27, at 11 (2021). To protect women's ability to pursue both motherhood and continued employment, a bipartisan majority of Congress—supported by pro-life groups like the U.S. Conference of Catholic Bishops—passed the Act without referencing abortion.

The statute's omission of abortion was no oversight, but reflects the sponsors' express representations that covering abortion was off the table. A lead proponent of the bill, Senator Bob Casey (D), rejected EEOC's current position on the Senate floor:

> [U]nder the Pregnant Workers Fairness Act, 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. 191 Cong. Rec. S7050 (daily ed. Dec. 8, 2022).

Senator Steve Daines (R) later endorsed that statement:

> Senator Casey's statement reflects the intent of Congress in advancing the [PWFA] 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. *Id.* at S10081 (daily ed. Dec. 22, 2022).

It is difficult to imagine clearer legislative history against EEOC's position. It is thus no surprise that EEOC's new interpretation has drawn criticism from Congress and beyond. As Senator Bill Cassidy (R), a chief sponsor of the law, put it, EEOC's "decision to disregard the legislative process to inject a political abortion agenda is illegal and deeply concerning." Senate HELP Committee, *Ranking Member Cassidy Blasts Biden Administration for Illegally Injecting Abortion Politics into Enforcement of Bipartisan PWFA Law* (Aug. 8, 2023), https://tinyurl.com/3u466n6m. EEOC's proposed rule acknowledges none of this history.

Nor are EEOC's two cited circuit cases—which read Title VII's sex-discrimination provisions to outlaw discriminating against women who have abortions—nearly enough to support its strained reading. *See* 88 Fed. Reg. at 54,721. For one thing, EEOC's precedents do not address imposing an affirmative duty to accommodate abortions, which presents novel interpretive and constitutional problems. For another, the Supreme Court has recently advised it is "unlikely … that a smattering of lower court opinions could ever represent the sort of judicial consensus so broad and unquestioned that we must presume Congress knew of and endorsed it." *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1541 (2021) (citation omitted). That is true as ever here, where the legislative history shows Congress knew how to expressly reference particular standards from Title VII for use in the PWFA and declined to do so in the provision at issue. Regardless, EEOC cannot "ignore clear statutory language on the ground that other courts have done so," and here the "text and structure of the statute are to the contrary" of EEOC's reading. *Id.* (citation omitted).

B. EEOC's Interpretation Cannot Overcome the Major-Questions Doctrine and Constitutional Avoidance Principles

Even were the PWFA ambiguous, EEOC still could not use it to smuggle novel abortion-accommodation requirements into employment law nationwide. At the outset, EEOC's interpretation runs afoul of the major-questions doctrine, which requires "clear congressional authorization" before an agency may decide an issue of great "economic and political significance." *West Virginia v. EPA*, 142 S. Ct. 2587, 2608-09 (2022). This principle reflects the commonsense presumption that Congress "does not… hide elephants in mouseholes" when delegating agency authority. *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001). Here, abortion is not simply a question of major "political significance"—it is arguably *the* defining political issue of our time with "profound moral" implications. *Cf. Dobbs*, 142 S. Ct. at 2241, 2285 (*Roe* "sparked a national controversy that has embittered our political culture for a half century"). In order to exercise its "unprecedented" authority to require employers and States to affirmatively accommodate abortions, EEOC therefore must point to "'clear congressional authorization' for the power it claims," not just a "colorable textual basis." *West Virginia*, 142 S. Ct. at 2609. EEOC cannot do so.

The acute federalism and constitutional concerns EEOC's interpretation raises also cut against its reading. As *Dobbs* makes clear, abortion is an issue "the Constitution leaves for the people," working through their elected representatives at the local, State, and federal levels. 142 S. Ct. at 2265; *see also id.* at 2284 (the "Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion"). States have broad prerogative to regulate abortion pursuant to their inherent police powers. Yet EEOC's rule—proposed without the safeguards of bicameralism and presentment—injects the agency into a politically and morally significant matter within the States' domain by mandating abortion accommodations. The Supreme Court's "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power" in this manner. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (*per curiam*). Again, EEOC points to no plausible authority for the abortion-accommodation mandate, let alone clear authorization. On top of all that, EEOC's construction of the Act uniquely "raise[s] serious constitutional problems" under the First and Tenth Amendments. *Infra* p. 6-7. The constitutional-avoidance canon "takes precedence" over any interpretive deference EEOC might claim and further cuts against EEOC's interpretation. *Arangure*, 911 F.3d at 339-40.[2]

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[2] EEOC has not invoked *Chevron* as a basis for its interpretation, and for good reason. There have been widespread critiques of *Chevron*'s validity, *see, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring); *Michigan v. EPA*, 576 U.S. 743, 760-64 (2015) (Thomas, J., concurring); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 109-10 (2015) (Scalia, J., concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150-54 (2016), and the Supreme Court has granted cert to expressly address "[w]hether the Court should overrule *Chevron*." Pet. for Writ of Cert. i, *Loper Bright Enters. v. Raimondo* (U.S. No. 22-451) (cert. granted May 1, 2023).

II. EEOC's Abortion-Accommodation Rule Violates the Constitution

Agency rules cannot be "contrary to constitutional right [or] power." 5 U.S.C. § 706(2)(B). Here, at least three categories of constitutional violations pervade EEOC's proposal. *First*, EEOC's rule exceeds the agency's power to regulate States. *Second*, EEOC's rule improperly dictates abortion-related speech and action contrary to the First Amendment's protections for speech and religious exercise. *Third*, EEOC's putatively independent structure—in which Commissioners are insulated from at-will presidential removal—violates the separation of powers.

A. The Rule Exceeds Federalism Limits on Regulating States

"[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Reflecting this "fundamental principle," *id.*, the Tenth Amendment to the U.S. Constitution provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," U.S. Const. amend. X. This directive reflects that the States "retained 'a residuary and inviolable sovereignty'" in areas outside the "discrete, enumerated" powers the Constitution confers on Congress. *Printz v. United States*, 521 U.S. 898, 919 (1997) (citation omitted).

From this structure flows critical limits on the federal government's ability to regulate States. Relevant here, though Congress "has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York v. United States*, 505 U.S. 144, 166 (1992). Put simply, the federal government "may not conscript state governments as its agents," *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018), including by "dictat[ing] what a state legislature may and may not do," *id.* And while Congress may sometimes regulate the States as employers, it cannot do so in a way "that is destructive of state sovereignty." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985). These rules help "reduce[] the risk of tyranny and abuse" by government officials, "promote[] political accountability" by ensuring voters "know who to credit or blame" for regulations, and "prevent[] Congress from shifting the costs of regulation to the States." *Murphy*, 138 S. Ct. at 1477.

EEOC's rule transgresses these federalism limits by strongarming States to promote and implement a federal preference for abortions made illegal by state law. EEOC's rule would coopt state resources like employee time and require States to adopt gap-filling measures so that important governmental work can be done while workers procure abortions. Plainly, the result of EEOC's accommodation mandate is a requirement of indirect funding by States and their taxpayers of abortions that States prohibit. EEOC's rule thus denigrates States' interest in fetal life and duly enacted abortion prohibitions, contrary to the federalism limits on the EEOC's ability to "conscript state governments" as unwilling agents in EEOC's pro-abortion agenda. *Murphy*, 138 S. Ct. at 1477.

B. The Rule Contravenes First Amendment Protections for Speech and Religion

EEOC's abortion-accommodation mandate also runs afoul of First Amendment protections for freedom of speech and religion. It is a basic freedom-of-speech rule that the "government may not compel a person to speak its own preferred messages." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023). Nor can the federal government "burden" a private employer's "religious exercise by

putting it to the choice" of following federal law or "approving" behavior "inconsistent with its beliefs," particularly where—as here—the governing law does not generally apply to all employers. *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021).

As applied here, these constitutional protections mean that employers may engage in speech promoting fetal life over abortion, including by funding and encouraging the use of programs that provide support to pregnant women and their families. *See* Office of Governor Bill Lee, *Gov. Lee Launches Tennessee Strong Families Grant Program* (Sept. 13, 2023), https://tinyurl.com/9e8kebvb. Yet certain portions of EEOC's proposed rule would bar any "interference" relating to a worker's seeking out an abortion accommodation. 88 Fed. Reg. at 54,792. To the extent these proposed EEOC provisions would prevent employers from promoting or encouraging a worker to seek out pro-life resources and instead require pro-abortion speech, that regulation would violate the First Amendment.

Similar legal flaws infect rules requiring employers to accommodate abortion contrary to their sincerely held religious beliefs: Whether under the First Amendment or the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, such a mandate would impermissibly violate employers' free-exercise rights. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720-21 (2014). Though EEOC's rule acknowledges that religious organizations might be exempt from the rule's scope, the First Amendment's protections sweep further and include all religious employers, even if privately held, as well as employees. *Id.* EEOC's misguided statement that RFRA does not apply in suits between private parties is no response. The First Amendment's limits also would govern EEOC's rule, which is not generally applicable due to its exemptions for small employers. *Cf. Fulton*, 141 S. Ct. at 1881-82. To ensure employers' (and employees') free speech and religious liberty are appropriately safeguarded, EEOC should clarify that its rule would not impinge on the employers' right to engage in pro-life speech and conduct.

C. The Rule Is Invalid Because EEOC Is Unconstitutionally Structured

Article II of the Constitution vests "'the executive Power'—all of it"—in the President. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. Const. art. II, § 1). As a corollary, the Constitution demands that the President maintain the ability "to remove those who assist him in carrying out his duties." *Id.* (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513-14 (2010)). This requirement of at-will removal applies to all "multimember expert agencies" that "wield substantial executive power." *Id.* at 2199-200 (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)). Put simply, if "an agency does important work," Article II demands that the agency's leaders be removeable at will by the President—full stop. *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021).

EEOC's putative status as an "independent federal agency" violates these Article II commands.[3] Courts and the EEOC itself have interpreted the agency's governing statute—which provides for five-year terms for Commissioners, 42 U.S.C. § 2000e-4(a)—as allowing removal only

[3] Dep't of Labor, *Equal Employment Opportunity*, https://www.dol.gov/general/topic/discrimination (last accessed Sept. 19, 2023).

for cause.[4] Yet the Commission wields an array of "quintessentially executive power[s]," including the authority to issue binding regulations and pursue enforcement actions in federal court on behalf of the United States. *Cf. Seila Law*, 140 S. Ct. at 2200; *see also Collins*, 141 S. Ct. at 1785-86. EEOC's structure thus violates the Constitution, which in turn renders the agency's rules unlawful and would require a court to set aside the rule "as void." *Seila Law*, 140 S. Ct. at 2196; *see also Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023) (being subjected to "unconstitutionally insulated" agency decisionmaker is "here-and-now injury").

EEOC's separation-of-powers foul is no mere technicality, but instead hinders the Constitution's central means for promoting "requisite responsibility … in the Executive Department" for enforcing federal laws. *Free Enter. Fund*, 561 U.S. at 492 (citation omitted). Our constitutional system ensures "the ultimate authority resides in the people alone," Jonathan Skrmetti, *Why We Must Fight to Preserve the Constitution*, The Tennessean (Sept. 15, 2023), https://tinyurl.com/ycjx7wwu, including by requiring that the executive officials who "wield significant authority … remain[] subject to the ongoing supervision and control of the elected President," *Seila Law*, 140 S. Ct. at 2203. Yet armed with protection from at-will removal, independent agency heads can push the bounds of the law knowing that the President is "powerless to intervene" in most cases. *Id.* The President, in turn, can "escape responsibility" for problematic agency policies by citing agencies' independence from his control. *Free Enter. Fund*, 561 U.S. at 498.[5] The U.S. Constitution does not countenance the "diffusion of accountability" attending EEOC's independent-agency structure. *Id.*

III. EEOC's Abortion-Accommodation Rule Is Arbitrary and Capricious

The APA's arbitrary-and-capricious standard requires agency decisionmaking to be "reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Agency analysis cannot "run[] counter to the evidence before the agency," must show a "rational connection between the facts found and the choice made," and needs to "consider" all "important aspects[] of the problem" the agency is addressing. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation omitted). EEOC's proposal violates these baseline APA rules in several respects.

First, EEOC has entirely failed to consider several important aspects of the regulatory problem. EEOC has not addressed the federalism concerns associated with forcing States to

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[4] Inferring for-cause protection from a term-of-years provision is dubious as a matter of modern-day statutory interpretation, given that Congress expressly vested other agency heads with for-cause removal protections. *See, e.g.*, *Calcutt v. FDIC*, 37 F.4th 293, 337-39 (6th Cir. 2022) (Murphy, J., dissenting), *rev'd on other grounds by* 143 S. Ct. 1317 (2023); *PHH Corp. v. CFPB*, 881 F.3d 75, 173 n.1 (D.C. Cir. 2018) (*en banc*) (Kavanaugh, J., dissenting) (citing Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 834-35 (2013); *Note, The SEC Is Not an Independent Agency*, 126 Harv. L. Rev. 781, 801 (2013)).

[5] *Compare, e.g.*, Maegan Vazquez, *Biden Not in Favor of Ban on Gas Stoves, White House Says*, CNN Politics (Jan. 11, 2023), https://tinyurl.com/3euytvme ("The President does not support banning gas stoves—and the Consumer Product Safety Commission, *which is independent*, is not banning gas stoves." (emphasis added)), *with* Consumer Product Safety Commission, *Request for Information on Chronic Hazards Associated with Gas Ranges and Proposed Solutions*, 88 Fed. Reg. 14,150 (Mar. 7, 2023).

accommodate abortions that are illegal under state law. Nor has it assessed the impact of First Amendment precedents—including the Supreme Court's decisions in *303 Creative LLC v. Elenis*, 143 S. Ct. 2290 (2023), and *Fulton v. City of Philadelphia, Penn.*, 141 S. Ct. 1868 (2021)—on its proposal to mandate abortion accommodations and limit any speech that "interferes" with women's seeking abortions. EEOC must grapple with these considerations before finalizing the rule and justify the legality of its proposal in light of the serious constitutional issues it presents.

Second, EEOC does not even claim to consider *any* costs associated with implementing the abortion-accommodation mandate. In calculating the rule's purported costs, EEOC only addresses the expenses associated with providing accommodations to pregnant women who choose to *continue* their pregnancies. As a result, EEOC generates the number of annually affected pregnant women using the percentage of women who "gave birth to at least one child the previous year." 88 Fed. Reg. at 54,757. EEOC further disclaims that its rule will have any meaningful costs in the many states, like Tennessee, that already protect pregnant workers. *Id.* at 54,755. *Nowhere* does EEOC attempt to quantify the costs associated with extending pregnancy-accommodation provisions to the great number of women who obtain abortions annually—a figure researchers have estimated at 860,000 per year. *E.g.*, Br. of *Amici Curiae* Am. College of Obstetricians & Gynecologists *et al.* 9, *Dobbs*, 142 S. Ct. 2228.

Even accounting for a fraction of this figure would produce immense new costs that EEOC has unlawfully ignored. It is bad enough that EEOC seeks to impose an improper mandate that departs from the bipartisan law Congress passed and the President signed. But the APA at a minimum requires EEOC to be transparent about the tremendous compliance costs its abortion-accommodation regime will impose—including on scores of the Nation's private employers, the States, and their taxpayers. The APA requires EEOC to incorporate this new category of costs into its rulemaking, as well as offer a supplemental comment period so that the public can fully vet this missing aspect of EEOC's current proposed rule. *Cf. Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).

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The undersigned States thank EEOC for its consideration of these concerns. We ask EEOC to abandon pursuit of an abortion-accommodation rule that would coopt the States whose citizens have rejected pro-abortion policies through the democratic process. Tennessee and the other co-signing States are prepared to pursue legal action should EEOC fail to heed its statutory, constitutional, and APA bounds.

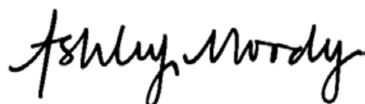
Sincerely,

Jonathan Skrmetti
Tennessee Attorney General & Reporter

Steve Marshall
Alabama Attorney General

Treg Taylor
Alaska Attorney General

Tim Griffin
Arkansas Attorney General



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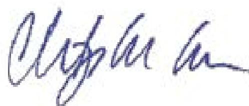
Florida Attorney General



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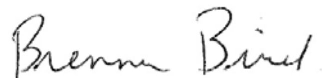

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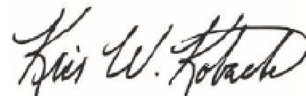

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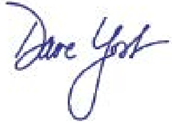

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