No. 25-30398

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS; SOCIETY OF THE ROMAN CATHOLIC CHURCH OF THE DIOCESE OF LAKE CHARLES; SOCIETY OF THE ROMAN CATHOLIC CHURCH OF THE DIOCESE OF LAFAYETTE; CATHOLIC UNIVERSITY OF AMERICA,

Plaintiffs-Appellants,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; ANDREA R. LUCAS,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Louisiana (Lake Charles)
No. 2:24-cv-00691, Hon. David C. Joseph

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, ETHICS AND RELIGIOUS LIBERTY COMMISSION, DEMOCRATS FOR LIFE OF AMERICA, THE NATIONAL ASSOCIATION OF EVANGELICALS, SECULAR PRO-LIFE, AND AMERICANS UNITED FOR LIFE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

1. Christian Legal Society, Amicus Curiae
2. Ethics and Religious Liberty Commission, Amicus Curiae
3. Democrats for Life of America, Amicus Curiae
4. National Association of Evangelicals, Amicus Curiae
5. Secular Pro-Life, Amicus Curiae
6. Americans United for Life, Amicus Curiae
7. Kimberlee Wood Colby, Counsel for Amicus Curiae
8. Thomas C. Berg, Counsel for Amicus Curiae
9. University of St. Thomas School of Law Religious Liberty Appellate Clinic, Counsel for Amicus Curiae

Dated: May 26, 2026

/s/ Kimberlee Wood Colby
Kimberlee Wood Colby

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INTEREST OF AMICI CURIAE[1]

Amici are organizations committed to the protection of human life at all stages from conception to natural death. As such, amici oppose abortion and seek to restrict it through law, call attention to its violation of human dignity, and build a culture of life. Some of these amici oppose abortion because of religious beliefs; others oppose it solely because of nonreligious beliefs. Whether amici's beliefs and missions are religious or secular, they face severe burdens from the Final Rule of appellee Equal Employment Opportunity Commission ("EEOC") requiring accommodation of employees' abortions. As applied to pro-life organizations, the Rule violates, among other things, their rights under the First Amendment and the Religious Freedom Restoration Act.

Christian Legal Society ("CLS") is a nonprofit association of Christian attorneys and law students in every state and over 130 law schools. CLS believes that free religious expression of citizens should be and is legally protected. CLS believes that a free society prospers only when the free exercise of religion of all Americans is protected. CLS was instrumental in the passage of the Religious Freedom Restoration Act ("RFRA") and has filed amicus briefs in many religious freedom and First Amendment rights cases.

The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's

[1] No party's counsel authored this brief in whole or in part. No party or counsel for any party funded the preparation or submission of this brief. All parties have consented to the filing of this brief pursuant to Fed. R. App. 29(a)(2).

largest Protestant denomination. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious freedom, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

Democrats for Life of America ("DFLA") is the preeminent national organization for pro-life Democrats. DFLA believes that the protection of human life at all stages is the foundation of human rights, authentic freedom, and good government. These beliefs animate DFLA's opposition to abortion and all other injustices that directly and indirectly threaten human life. DFLA is committed to defending restrictions on government funding of abortion. Such restrictions properly ensure that government gives its support to the protection, rather than the taking, of human life. Funding restrictions also respect the conscience of millions of Americans, including DFLA's members.

The National Association of Evangelicals is the largest network of evangelical churches, denominations, colleges, and independent ministries in the U.S. It serves forty member denominations, as well as numerous evangelical associations, missions, social-service charities, refugee and humanitarian aid agencies, colleges, seminaries, and independent churches.

Secular Pro-Life ("SPL") is a nonprofit organization whose mission is to advance secular arguments against abortion; create space for atheists, agnostics, and other secularists interested in anti-abortion work; and build interfaith coalitions of people who recognize that abortion violates the human right to life. Like many pro-life organizations, SPL supported the Pregnant Workers Fairness Act hoping it would address unjust employment practices that lead mothers to feel that abortion is their only option. The EEOC turned that purpose on its head and smuggled a pro-abortion agenda into what should have been a common-ground piece of legislation. SPL also takes an interest in this case because the Final Rule unconstitutionally censors SPL's free expression and association under the First Amendment. SPL is a nonreligious organization and accordingly does not join Parts IV and V of the brief.

Americans United for Life is a national pro-life legal advocacy organization that has dedicated over fifty years to advocating for legal protections for human life.

INTRODUCTION AND SUMMARY OF ARGUMENT

The EEOC's Final Rule, adopted in purported reliance on the Pregnant Workers Fairness Act, 42 U.S.C. § 2000gg *et seq.* ("PWFA"), requires employers to make accommodations for abortions that its employees have. See Final Rule, 29 C.F.R. § 1636 *et seq.*, 89 Fed. Reg. 29,096 (April 19, 2024); *see also* Appendix A to Part 1636, "Interpretive Guidance on the Pregnant Workers' Fairness Act," 89 Fed. Reg. 29,189 *et seq.* As applied to a pro-life organization whose beliefs and message oppose abortion,

the Rule requires the organization to accommodate the very conduct that it speaks and works to prevent. This makes no more sense, and is no more justifiable, than forcing an anti-tobacco organization to give its employees smoking breaks. Moreover, the Rule's "anti-coercion" provision, as applied, prohibits a pro-life organization from counseling its employees against abortion. The Rule thus forces organizations like amici to accommodate conduct contravening their core mission and to stay silent, in important contexts, about that mission. This is government-coerced hypocrisy.

The Final Rule was challenged by (among others) Plaintiffs-Appellants here—the U.S. Conference of Catholic Bishops, two Catholic dioceses, and the Catholic University of America. *See* Br. for Appellants 8. As Appellants detail, the district court ruled that the abortion accommodation mandate violated the PWFA, but only as to "purely elective" abortions—therefore leaving it in place for abortions "'stemming from the underlying treatment of a medical condition related to pregnancy.'" *Id.* at 13-14 (quoting ROA.9167-68, 9168 n.1). Thus the court preserved the mandate for "abortions obtained to alleviate 'modest' or 'minor' symptoms of 'anxiety' and 'depression,' 'dehydration,' 'nausea or vomiting,' 'loss of balance,' and even 'changes in hormone levels.'" *Id.* at 28-29 (quoting 29 C.F.R. §§ 1636.3(a)(2), 1636.3(b)). "Given the universality of some of these experiences in pregnancy, the district court's order effectively requires the Bishops to accommodate virtually any abortion." *Id.* at 29 (cleaned up). Thus the mandate conflicts with pro-life organizations' beliefs, whether

by its original terms or under the district court's ruling. This brief refers to either interchangeably as "the Rule" or "the mandate."

Amici agree that the mandate violates the PWFA and fails under the "major questions" doctrine. *See* Br. for Appellants 18-30. We emphasize a separate point: the mandate in its application also violates the First Amendment and statutory rights of pro-life organizations, both religious and nonreligious. Such organizations include pro-life advocacy groups, pregnancy help centers, and religious organizations with beliefs against abortion.

As applied to both religious and nonreligious pro-life organizations, the Rule violates First Amendment rights of expressive association and speech. The Rule burdens expressive association by forcing a pro-life entity to accommodate employee conduct—that is, abortion—that undermines its message to employees and to the public. The Rule also burdens expressive association by prohibiting the pro-life entity, in multiple ways, from speaking to employees against abortion. These burdens trigger strict constitutional scrutiny, and the Rule fails that demanding standard.

As applied to organizations that oppose abortion because of religious belief—like the appellant Catholic organizations here—the Rule violates both the Religious Freedom Restoration Act ("RFRA") and the Free Exercise Clause. The restrictions already described impose a "substantial burden" under RFRA, and again, the government cannot justify that burden under strict scrutiny. Finally, the Rule as applied violates the Free Exercise Clause, properly interpreted, for a variety of reasons, but

amici focus here on one. The Supreme Court should overrule *Employment Division v. Smith*, 494 U.S. 872 (1990), insofar as it rejects free exercise challenges to "neutral laws of general applicability." *Smith* contravenes the clause's text and its historical meaning and purposes. Under any free exercise standard that replaces *Smith*, no government interest sufficiently justifies the Rule's burdens on religious pro-life entities.[2]

ARGUMENT

I. The Rule Violates the Expressive Association Rights of Pro-Life Organizations by Forcing Them to Provide Abortion Accommodations, Forcing Them to Retain Employees Seeking Abortion Accommodations, and Chilling Pro-Life Speech within the Organization.

The First Amendment's right of expression includes "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). The right of expressive association "prevent[s] the majority from imposing its views on a group that would rather express other, perhaps unpopular, ideas." *Dale*, 530 U.S. at 647. Such protection is vital with respect to abortion, which "presents a profound moral issue on which Americans hold sharply conflicting views." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 223 (2022). Views on abortion have regularly generated expressive association

[2] Amici join appellants in raising this argument to preserve it for Supreme Court review. Br. for Appellants 56 n.5. As applied to religious organizations with pro-life beliefs, the Rule also violates the PWFA's religious-organizations exemption and constitutional protections for church autonomy. *See id.* at 36-50.

claims. *See, e.g.*, *CompassCare v. Hochul*, 125 F.4th 49, 57 (2d Cir. 2025); *Slattery v. Hochul*, 61 F.4th 278, 283 (2d Cir. 2023). This case squarely implicates pro-life entities' expressive association because the Rule requires them to act and speak antithetically to the message they aim to express.

To invoke protection for expressive association, a party must (1) engage in some form of expression and (2) show that the government action significantly burdens that expression. *Dale*, 530 U.S. at 648, 653. Significant burdens on the group's right can only "be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623; *accord Dale*, 530 U.S. at 648.

A. Pro-Life, Mission-Oriented Organizations Engage in Expression of a Viewpoint.

Under the expressive association test, an entity must show first that it engages in expression. *Dale*, 530 U.S. at 648. Pro-life organizations easily satisfy this test. "[P]rotection of expressive association is not reserved for advocacy groups" in the narrow sense; a group need only "engage in some form of expression, whether it be public or private." *Id.* Furthermore, a court must give "deference to an association's assertions regarding the nature of its expression." *Id.* at 653. In any event, pro-life organizations pervasively engage in expressive activity because they are explicitly mission-oriented entities that advocate a pro-life viewpoint. *See Slattery*, 61 F.4th at 287

(holding that pregnancy care center engaged in expressive activity by "shar[ing its] pro-life message with the world" and with "pregnant women" whom it served).

B. The Rule Significantly Burdens Pro-Life Entities' Expressive Association by Forcing Them to Accommodate Conduct Antithetical to Their Message and by Chilling Their Pro-Life Speech.

Next, an expression-association claimant must show that the government action would "significantly affect [its] ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 650. Just as the court must "give deference to an association's assertions regarding the nature of its expression, [it] must also give deference to an association's view of what would impair its expression." *Id.* at 653. The Rule impairs pro-life entities' expression by restricting both their policies and their speech toward employees.

1. The Rule forces pro-life entities to accommodate—that is, facilitate—employee conduct that undermines their core beliefs and message.

The Rule forces pro-life entities to accommodate employees who have or seek to have an abortion; it also prohibits such entities from dismissing or disciplining employees for seeking such accommodations. Both restrictions significantly burden an entity's ability to cultivate its message among its employees and to express the message outside the entity.

a. The Rule forces a pro-life organization to act antithetically to its expressive mission.

Under the Rule, an employer's duty of "reasonable accommodation" includes "permitting the use of paid leave" or "providing unpaid leave for reasons including . . .

attend[ance at] health care appointments . . . related to pregnancy [or] related medical conditions." 29 C.F.R. §§ 1636.3(i)(2), (i)(3)(i). The Rule includes abortion among "related medical conditions" (*id.* at § 1636.3(b)); the district court ruled that abortion could be covered as treatment for a wide range of pregnancy-related conditions (*see supra* p. 4). Either way, the mandate forces a pro-life organization to give employees time off, paid or unpaid, to have an abortion or attend an abortion-related appointment. The organization must take affirmative steps supporting the very conduct its core expression opposes.

The Supreme Court has made clear that it is a significant burden to force an expressive organization to retain members whose conduct contradicts the organization's expressed mission and beliefs. *Dale*, 530 U.S. at 648. It is an even more significant burden to force the organization to facilitate such conduct by taking affirmative steps, that is, providing accommodations. "'It would be difficult,' to say the least, for an organization 'to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct.'" *Slattery*, 61 F.4th at 290 (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006)). Conveying its message "sincerely and effectively" is even more difficult if the organization must actively facilitate the conduct through accommodations.

Forcing an expressive organization to accommodate conduct violating its core message harms its expression in multiple ways. First, it directly undercuts the

organization's integrity. In comments to the EEOC, pro-life organizations stated the obvious: "[A]ny accommodation related to abortion would be antithetical to our mission." March for Life Education and Defense Fund, Comment Letter on Equal Employment Opportunity Commission Regulations to Implement the Pregnant Workers Fairness Act (Oct. 10, 2023), https://www.regulations.gov/comment/EEOC-2023-0004-98287.

Second, forced accommodation can devastate the organization's expression by devastating the morale of other employees who advance that expression. Research indicates that good employee morale is especially crucial for nonprofit and mission-based organizations. "One of the primary reasons people seek nonprofit employment is an attachment to the organization's mission." *What Nonprofit Employees Say They Love Most About Their Job*, 501(c) Services (Mar. 24, 2026), https://501c.com/nonprofit-employees-love-about-jobs/?utm. Such employees are "stimulated by the shared personal and organizational prosocial values and the promise of meaningful work"; an organization's drift away from its mission "leads to a decrease in employees' commitment" by decreasing their "belief that their work investments serve prosocial goals." Philipp Kruse, *Drifting Away: An Experimental Investigation of Mission Drift Consequences in Social Entrepreneurship from an Employee Perspective*, 68:1 Studia Psychologica 45, 48, 53 (2026), https://doi.org/10.31577/sp.2026.01.934. And nonprofit institutions face distinct challenges in maintaining employee morale. Consultants observe that "[a] cycle of low morale and high turnover" can "undermine the long-term health of the

institution and its ability to execute its mission." *Nonprofit Organizational Climate and Morale Issues*, Littleford & Associates, https://www.jlittleford.com/non-profit-organizational-climate-and-morale-issues/.

Third, forced accommodation undercuts an expressive organization's freedom to cultivate its message among its employees. Burdens on expressive association include "intrusion into the internal structure or affairs of an association." *Dale*, 530 U.S. at 648 (quotation omitted). The organization's protected internal affairs include its communications to employees. *See also* Br. for Appellants 41-50 (mandate violates religious entities' autonomy over "internal governance"). Internal communications not only constitute the organization's direct expression; they also create the conditions supporting expression of its message externally. In *Slattery*, the Second Circuit recognized that "[t]he right of [a pro-life, pregnancy help center] to choose those who promote its views is not protected by the First Amendment simply because it communicates a message, but because an expressive association's membership and leadership is integral to its ability to play an important role in nurturing the freedom of speech." 61 F.4th at 290 (citation modified). An expressive organization must be free to nurture its message within its own walls.

Finally, the mandate forces a pro-life organization to engage in hypocritical conduct. The Second Circuit recognized this burden in *Slattery*, which involved New York's law prohibiting entities from making employment decisions based on an employee's beliefs and actions regarding abortion. *Id.* at 284. The district court had held

that the law did not significantly burden pro-life organizations but "posed only a 'danger that others could call the Plaintiffs hypocrites.'" *Id.* at 285 (citation omitted). The Second Circuit reversed, ruling that such logic "devalue[d the pro-life organization's] interest in expressive association." *Id.* at 290. The court found a burden and held that it could not be eliminated by simply "drawing a distinction for the public between what [the plaintiffs] believe and what the State requires." *Id.* at 290 (brackets in original). Forcing pro-life organizations to facilitate the very thing they oppose is a burden.

b. The Rule forces a pro-life organization to retain employees who act antithetically to its mission.

The Rule not only requires abortion accommodations; it forbids a pro-life organization to dismiss or penalize an employee who seeks one. The Rule makes it unlawful for an employer "[t]o take adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy." 29 C.F.R. § 1636.4(e)(1). Again, the Rule extends this prohibition to situations of abortion. Thus a pro-life organization may not discipline or dismiss an employee for seeking accommodation for an abortion.

This prohibition violates the core precedents on expressive association. "[T]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648 (citation

omitted); *accord Christian Legal Soc'y*, 453 F.3d at 861. It is a severe burden to force a pro-life organization to retain employees who act directly contrary to its very mission by obtaining or seeking an abortion or abortion accommodation.

The Second Circuit found that a pro-life entity alleged a severe burden in almost exactly this scenario. *Slattery*, 61 F.4th 278. There a pro-life pregnancy help center, Evergreen, challenged a New York statute that prohibited employers from taking negative employment actions because of an employee's reproductive health decision making. *Id.* at 283. "Evergreen hire[d] only employees who oppose[d] abortion" and only retained personnel who could "credibly communicate to patients its opposition to abortion." *Id.* at 284 (citation modified). The Second Circuit rejected the contention that "the burden on Evergreen's expressive association rights was incidental rather than severe." *Id.* at 288. Because "[t]he statute force[d] Evergreen to employ individuals who act or have acted against the very mission of its organization," the court found that it plausibly imposed "severe burdens on Evergreen's right to freedom of expressive association." *Id.* The Rule here imposes the same severe burden.

Pro-life organizations warned of these burdens during the notice and comment procedure for the Rule. Amicus Democrats for Life of America ("DFLA") warned that "[t]he proposal will directly impact the functions of DFLA negatively regarding hiring and advocacy, and potentially force the organization to support actions by its employees that it actively campaigns against." Democrats for Life of America, Comment Letter on EEOC's Pregnant Workers Fairness Act Regulations (Oct. 10, 2023),

https://www.regulations.gov/comment/EEOC-2023-0004-98545; *see also* The Heritage Foundation, Comment Letter on Proposed Regulations to Implement the Pregnant Workers Fairness Act (Oct. 10, 2023), https://www.regulations.gov/comment/EEOC-2023-0004-98543. The accommodations mandated by the Rule undercut a pro-life entity's ability to manage its expression through its hiring and discipline.

2. The Rule's anti-coercion provision directly forces pro-life organizations to alter the content of their message.

In addition to mandating accommodations that undercut a pro-life entity's message, the Rule directly burdens the entity's expression of the message. The "anti-coercion" provision makes it illegal to "coerce . . . or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by the PWFA." 29 C.F.R. § 1636.5(f)(2). As applied to abortion accommodations, the provision restricts what a pro-life entity may say to individuals contemplating or seeking an abortion accommodation, as well as to individuals who have "aided or encouraged" others to seek an accommodation. *Id.* The alleged coercion or interference can violate the Rule without deterring anyone from getting an abortion. *Id.* at § 1636.5(f)(2)(ii). Thus, the anti-coercion provision affixes a wide muzzle over a pro-life organization's speech to employees reflecting its anti-abortion values.

The EEOC's interpretive guidance demonstrates the severe practical burdens that the anti-coercion provision places on pro-life organizations like amici. Under it:

- An organization cannot "coerc[e] an [employee] to relinquish or forgo an accommodation," including accommodation for an abortion. 89 Fed. Reg. 29,096, 29,216. Thus a pro-life organization cannot counsel employees to follow its core beliefs in the very situation—facilitating an actual or contemplated abortion—where those beliefs may be most relevant to the employee's conduct. The provision restricts "the spoken word[, which] is perhaps the quintessential form of protected speech." *Chiles v. Salazar*, 146 S. Ct. 1010, 1023 (2026).
- Neither can amici "issu[e] a policy or requirement" to limit the Rule's abortion protections. 89 Fed. Reg. 29,216.
- Amici must repeal any preexisting "ordinary workplace policies or practices" if they pose any obstacle to the accommodation (including abortion accommodation) protections. *Id.* at 29,199.
- Under the EEOC's definition of "retaliatory harassment," a pro-life organization could be liable if some of its workers counsel their coworkers against an abortion accommodation or criticize the choice of an elective abortion. *Id.* at 29,218 (explaining liability for coworkers' "unwelcome, critical comments" about an accommodation).

The Rule as applied not only prohibits amici's pro-life speech, but also compels their acceptance of unwanted speech. Because the Rule prohibits "discipline [of an

employee] for assisting other employees" in seeking accommodations, it would prohibit a pro-life entity from disciplining an employee who promotes abortion accommodations or assists a coworker in procuring one. *Id.* (capitalization removed). Thus the mandate compels a pro-life organization to give access, in its workplace, to employee speech that contradicts and undermines its core views. The Court has held that "compulsion [on news media] to publish that which reason tells them should not be published is unconstitutional." *Miami Herald v. Tornillo*, 418 U.S. 241, 256 (1974) (citation modified). It is also unconstitutional to compel a parade organizer to give access to a group with "a message it [does] not like" and wishes to exclude. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group*, 515 U.S. 557, 574 (1995). As with media organizations and parades, government cannot compel other expressive organizations to give access to views that contradict their message.

In all these ways, the Rule as applied imposes severe burdens on a pro-life organization's expressive association. It must therefore satisfy strict scrutiny; and, as we show in Part III, it cannot.

Moreover, these burdens not only impede a pro-life organization's expressive association, but they also directly violate the Free Speech Clause, as we now detail.

II. By Forcing Pro-Life Organizations to Alter the Content of Their Message, the Anti-Coercion Provision Directly Violates the Free Speech Clause.

The First Amendment prohibits laws that abridge the freedom of speech, and courts distinguish between content-based and content-neutral speech regulations. *Nat'l*

Inst. of Fam. & Life Advocates v. Becerra, 585 U.S. 755, 766 (2018) ("*NIFLA*"). "Content-based regulations 'target speech based on its communicative content,'" and are presumptively unconstitutional. *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). They must face strict scrutiny, "a demanding standard" under which "it is rare that a regulation will ever be permissible." *Chiles*, 146 S. Ct. at 1021 (quoting, *inter alia*, *Reed*, 576 U.S. at 163) (citation modified). Strict scrutiny protects the fundamental principle that the government has "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *NIFLA*, 585 U.S. at 766 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Compelling an organization to remain silent on a particular message, especially while permitting or encouraging the opposing view, "alters the content" of its speech. *See id.* (quoting *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

There are "even greater dangers associated with regulations that discriminate based on the speaker's point of view." *Chiles*, 146 S. Ct. at 1021. Viewpoint discrimination is "an egregious form of content regulation, and governments in this country must nearly always abstain from it." *Id.* (citation modified).

Here, the anti-coercion provision is a content-based—indeed, a viewpoint-based—restriction on anti-abortion speech. Its application to pro-life organizations forbids them to disseminate their core beliefs and messages to employees in many situations. Conversely, the provision compels them to permit speech in the opposite direction: speech assisting or favoring accommodation for abortion, "the very practice

that [they] are devoted to opposing." *NIFLA*, 585 U.S. at 755. Thus, the anti-coercion provision "plainly 'alters the content' of [amici's] speech." *Id.* (quoting *Riley*, 487 U.S. at 795). As applied to pro-life organizations, it must satisfy the strictest scrutiny.

The EEOC's attempts to deny these free speech problems are unavailing. First, it has claimed that it would not prohibit "the making of general statements regarding an employer's mission or religious beliefs." 89 Fed. Reg. 29,148. But it also says it will prohibit any "conduct that is reasonably likely to interfere with the exercise or enjoyment of PWFA rights." Mem. In Supp. of Summ. J., ECF 75-1, at 28 ("Def.MSJ.") (quoting 89 Fed. Reg. 29,148). Apparently then, the EEOC will still penalize a pro-life organization for counseling an employee against abortion or stopping another employee from counseling for it. The Rule does not give precise guidance on the line between general statements and those "reasonably likely to interfere" with PWFA rights. 89 Fed. Reg. 29,148. The First Amendment requires "precision of regulation" here, lest pro-life organizations be deterred from engaging in pro-life speech with their employees. *NAACP v. Button*, 371 U.S. 415, 432-33 (1963); *see FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012) ("When speech is involved, rigorous adherence to [precision in regulation] is necessary to ensure that ambiguity does not chill protected speech."). Moreover, the First Amendment does not permit government to confine speech to generalized, abstract statements on the basis that "one-on-one communication" excites more controversy. *McCullen v. Coakley*, 573 U.S. 464, 488-89 (2014).

The EEOC has also claimed it will consider First Amendment defenses on a case-by-case basis. 89 Fed. Reg. 29,152. But again, this will do nothing to counter the chill on pro-life organizations' speech.

Finally, the EEOC is mistaken to the extent it claims that these burdens on speech are merely incidental to a licit regulation of employer conduct. *See* Def.MSJ. at 27-28. A speech restriction is permissibly "incidental" in two situations: if it "restricts speech only because it is integrally related to unlawful conduct" or if it "restricts expressive conduct only for reasons unrelated to its content." *Chiles*, 146 S. Ct. at 1026. The Final Rule's speech restrictions are content-based: they restrict speech that opposes an abortion accommodation. And they do not relate to conduct that is "separately unlawful" (*id.*), because as already discussed, it cannot be "unlawful" for a pro-life organization to refuse to accommodate the very conduct it is devoted to opposing. *See supra* Part I.

III. The Application of the Rule and Its Anti-Coercion Provision Fails Strict Scrutiny.

Because the Rule and its anti-coercion provision significantly burden speech and expressive association, they must pass strict scrutiny: serving a compelling state interest by the least restrictive, or by narrowly tailored, means. *Dale*, 530 U.S. at 648; *NIFLA*, 585 U.S. at 766. They fail that test.

A. The EEOC's Interest Is Not Compelling Enough to Overcome the First Amendment.

The Rule's general stated purpose is to provide reasonable accommodations, without coercion and discrimination, to employees as related to pregnancy, childbirth, or related medical conditions. 29 C.F.R. § 1636.1(b). But the EEOC included abortion accommodations on its own accord; Congress never intended such a result. *See* Br. for Appellants 18-30. The agency cannot assert a compelling interest in a regulation that is unauthorized by the governing statute.

The EEOC claims that its interests include "eliminating discrimination and promoting women's health and economic security." Def.MSJ. at 45 (citation modified). Such interests are important in general, but the Court has repeatedly held that they cannot justify applying a nondiscrimination law to restrict the expression of ideas and viewpoints. For example, while public accommodations laws play a "vital role" in realizing civil rights, they "can sweep too broadly when deployed to compel speech." *303 Creative LLC v. Elenis*, 600 U.S. 570, 590, 592 (2023). Likewise, *Hurley* held that a public accommodations law could not be "applied to expressive activity," like a parade, to compel speech. 515 U.S. at 578. And *Dale* held that a public accommodations law could not justify "a severe intrusion on the Boy Scouts' rights to freedom of expressive association." 530 U.S. at 659. When a "public accommodations law and the Constitution collide, there can be no question which must prevail." *303 Creative*, 600 U.S. at 592. The government's general interest underlying the abortion accommodation

mandate is outweighed by a pro-life organization's right to speak and associate in support of its core belief. That is especially true because employees of a pro-life organization have chosen to work for an employer that publicly states its pro-life mission.

Moreover, the Rule exempts employers with fewer than 15 employees, 89 Fed. Reg. 29,151—an exemption that likely leaves more than 25 million workers unprotected.[3] That gap "undermines" any assertion that forcing pro-life organizations to accommodate abortions is necessary to serve a compelling interest. *Fulton v. City of Philadelphia*, 593 U.S. 522, 534, 542 (2021) (other exemption "undermines the [government's] contention that its non-discrimination policies can brook no departures").

B. The Final Rule Is Neither Narrowly Tailored Nor the Least Restrictive Means of Pursuing the Government's Interests.

Even if the EEOC's interests were compelling, it could have created a carve out for mission-oriented organizations expressing their beliefs. It declined to do so. 89 Fed. Reg. 29,153. The EEOC has admitted that its anti-coercion provision is extremely broad, not narrowly tailored. The Rule states that "[t]he scope of the PWFA anti-

[3] *See* Bureau of Labor Statistics, *Employment by Size of Establishment, Private Industry, March 2025*, U.S. Dep't of Labor, https://www.bls.gov/charts/county-employment-and-wages/employment-by-size.htm. The statistics show more than 20 million employees in businesses with up to 9 employees, and nearly 15 million in businesses with 10 to 19 employees. *Id.* Halving the latter category, proportionate to the threshold of 15 employees, produces roughly 27.5 million employees overall below 15 employees.

coercion provision is broader than [Title VII's] anti-retaliation provision; it reaches those instances when conduct does not meet the 'materially adverse' standard required for retaliation." *Id.* at 29,216. Thus, it goes well beyond conduct that "might have dissuaded a reasonable worker" from seeking an abortion accommodation. *Id.* at 29,215 (citation omitted). Far from being narrowly tailored, the anti-coercion provision restricts a pro-life organization's speech in multiple scenarios. *See, e.g.*, *id.* at 29,216 (giving examples such as Nos. 61, 64, 66); *see supra* pp. 14-15.

IV. The Rule, as Applied to Religious Pro-Life Organizations, Violates RFRA.

Under the Religious Freedom Restoration Act, the federal government, including agencies like the EEOC, may not "substantially burden [the] exercise of religion" by a person, including an organization, unless "it demonstrates that "application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b); *see* 1 U.S.C. § 1 (defining "person"). RFRA prohibits application of the Rule to organizations that oppose abortion for religious reasons.

Application of the Rule substantially burdens the religious exercise of a pro-life religious organization. Appellants adhere to Catholic doctrines that oppose most abortions, including many abortions that the district court held are still protected by the PWFA. *See supra* p. 4. The Rule requires such an organization to accommodate (facilitate) abortions. *See supra* at pp. 8-12. It prohibits the organization from speaking

in important ways to employees against abortion, while compelling it to allow speech among its employees facilitating abortion. *See supra* pp. 12-18.

Imposing this burden on religious pro-life organizations serves no compelling interest, let alone by the least restrictive means. RFRA provides "very broad protection for religious liberty," and its "least-restrictive-means standard is exceptionally demanding." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693, 728 (2014). The government cannot justify imposition of a substantial burden based on "broadly formulated interests": it must demonstrate a compelling interest in applying "the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 726-27 (quoting 42 U.S.C. § 2000bb-1(b); *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006)).

As already discussed, there is no legitimate, let alone compelling, interest in applying the accommodation mandate when that mandate has no authorization in the PWFA in the first place. *See supra* pp. 20-21. Whatever interest supports an abortion accommodation mandate for employers in general, no compelling interest supports applying it to the "particular claimant[s]" here: religious organizations that oppose abortion based on their religious tenets. *Hobby Lobby*, 573 U.S. at 726-27. There can be no compelling reason to require an organization with a mission against abortion to facilitate that very act. *See supra* pp. 20-21. And exempting pro-life religious organizations is a less restrictive means of achieving whatever interest government could claim in requiring abortion accommodations.

V. *Employment Division v. Smith*'s Interpretation of the Free Exercise Clause Should be Overruled; Under Any Interpretation Replacing *Smith*, Application of the Rule to Religious Pro-Life Organizations Violates Free Exercise.

As appellants explain, the Rule also violates the Free Exercise Clause as applied to religious organizations with pro-life tenets. *See* Br. for Appellants 55-57. Amici agree; we focus here on one free exercise argument. The Supreme Court should overrule *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), to the extent that decision holds that "neutral law[s] of general applicability" do not violate the Free Exercise Clause.

Smith contradicts the clause's text, which states that government "shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. When a law makes a religious practice illegal, it prohibits the exercise of religion. That is true "regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons." *Smith*, 494 U.S. at 893 (O'Connor, J., concurring in the judgment). Religious organizations opposed to abortion exercise their religion by providing accommodations that promote rather than end life and by speaking to employees against abortion. The Rule prohibits them from doing so. It thus prohibits religious exercise, even though it also restricts non-religious employers.

Smith is also "antithetical" to the clause's original meaning and purposes. *Fulton*, 593 U.S. at 578 (Alito, J., concurring). At the time of the clause's enactment, the "predominant model" among state constitutions' religious freedom provisions

"extend[ed] broad protection for religious liberty but expressly provide[d] that the right [did] not protect conduct that would endanger 'the public peace' or 'safety.'" *Id.* at 576; *see* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1462 (1990). These provisions "provide the most direct evidence of the original understanding," because the amendment's drafters and adopters likely "assumed the term 'free exercise of religion' meant what it had meant in their states." McConnell, *supra*, at 1456. *Smith* is inconsistent with the state provisions' structure, especially their "peace and safety" carve outs. "If, as *Smith* held, the free-exercise right does not require any religious exemptions from generally applicable laws, it is not easy to imagine situations in which a public-peace-or-safety carveout would be necessary." *Fulton*, 593 U.S. at 578 (Alito, J., concurring); McConnell, *supra*, at 1462.

Smith also undercuts the clause's original purposes, which appear from its background:

> In the 18th century, every colony found that free exercise required exempting dissenters from oaths, military service, and other requirements that burdened their religious practices. Those laws, although neutral and generally applicable, overrode conscience, caused psychological suffering and loss of liberty or property, inflamed social conflict, and discouraged people from settling or remaining in the colony.

Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020–21 Cato Sup. Ct. Rev. 33, 38-39 & n.30 (citing scholarship). Although these were legislative exemptions, they indicate "the founding era's understanding of" free religious exercise and thus should guide courts' constitutional interpretation. *Fulton*, 593 U.S. at

584-85 (Alito, J., concurring); *cf. Kennedy v. Bremerton*, 597 U.S. 507, 536 (2022) ("analysis focused on original meaning and history" should govern Establishment Clause cases).

Finally, *Smith*'s "neutrality and general applicability" standard presents significant problems of workability: it "vastly complicates" and "prolongs" litigation, sometimes with dire effects on religious believers. Laycock & Berg, *supra*, at 39-40 (describing case of Jehovah's Witness patient needing liver transplant who deteriorated, ultimately dying during lengthy litigation over whether state Medicaid rule denying coverage for a bloodless transplant was generally applicable).

Smith should be overruled. And under any historically grounded standard that replaces it, the government cannot justify forcing pro-life religious entities to accommodate employees' abortions. Forcing entities to act contrary to a core religious tenet—for employees who chose to work at an organization with that tenet—does not promote public peace or safety, and (as already discussed) it certainly is not necessary to furthering a compelling governmental interest.

CONCLUSION

Amici agree with appellants that this Court should reverse and remand with instructions to vacate the Final Rule's abortion-accommodation mandate. With respect to this brief's arguments, this Court should also enter permanent injunctive relief for appellants barring application of the Rule on First Amendment and statutory grounds.

Respectfully submitted.

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CERTIFICATE OF COMPLAINCE

This brief complies with Rules 29(a)(5) and 32(a)(7) because it contains 6,241 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

Dated: May 28, 2026

/s/ Kimberlee Wood Colby
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CERTIFICATE OF SERVICE

I filed this brief on the Court's electronic filing system, which will email everyone requiring notice.

Dated: May 28, 2026

/s/ Kimberlee Wood Colby
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