United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510–6300

June 30, 2024

VIA ELECTRONIC TRANSMISSION

The Honorable Charlotte A. Burrows
Chair
U.S. Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, D.C. 20002

Chair Burrows:

As Ranking Member of the Senate Health, Education, Labor, and Pensions (HELP) Committee, I write concerning the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, and the significant changes that federal agencies will make to their rulemaking and other processes in its aftermath. For 40 years, Congress and federal courts have ceded their respective responsibilities to write and interpret statutes to federal agencies. Under the Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, courts were required to give broad deference to agencies' interpretations of ambiguous provisions in statutes.[1] The Court has now overturned that deference, reinforcing that Congress and the courts are responsible for writing and interpreting the laws, respectively; not agencies.[2] The Court held that such deference defies the Administrative Procedure Act, and that agency interpretations are no longer entitled to deference.[3]

This decision is an opportunity for executive agencies to re-examine their role relative to Congress, and to return legislating to the people's elected representatives. For too long, *Chevron* deference has let agencies make broad decisions governing a diverse country of over 330 million people. Instead of engaging in the hard work of making tradeoffs and building coalitions needed to legislate, unelected agency bureaucrats exploit statutes to impose policy decisions that exceed their authority from Congress and exercise discretion far outside their core expertise and purpose.

Such unfettered agency power by the unelected is a perversion of the Constitution. *Loper Bright* makes clear that no agency is above the law or should be afforded special treatment when its authority is challenged. Moreover, the Court has separately confirmed that agencies need clear, specific statutory authorization from Congress to take action on issues of "vast 'economic and

[1] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
[2] *Loper Bright Enterprises v. Raimondo*, No. 22-1219, 2024 WL 3208360 (U.S. June 28, 2024).
[3] *Id.* at *3.

political significance.'"[4] Agencies cannot seize broad power based on authorities that Congress intended to be exercised narrowly—subtle, vague, or ambiguous statutory provisions provide no foundation for sweeping action.[5] Even then, Congress cannot delegate its Article I legislative powers to agencies.[6]

Congress is the most politically accountable branch in our government, and should be responsible for making the most important policy decisions that affect the American people. The Court also makes clear that Congress makes law, not agencies. When the Executive Branch does make law, such as promulgating new regulations, it does so to implement the laws Congress makes and only within the clearly established guardrails that Congress sets. In *Loper Bright*, the Court makes clear that the role of federal courts is to "independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[7]

Despite the Court's decision, given your agency's track record, I am concerned about whether and how the U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission") will adapt to and faithfully implement both the letter and spirit of this decision. The Commission recently promulgated rules and issued guidance stretching, and in some cases showing blatant disregard for, congressional intent and the law. For example, EEOC abused its authority to issue regulations on the Pregnant Workers Fairness Act (PWFA) by inserting its own abortion politics into the law, contrary to the text and intent of the PWFA.[8] The plain text and clear congressional intent of the PWFA show it is meant to ensure healthy pregnancies by providing accommodations for women with pregnancy-related medical conditions both during and after their pregnancies.[9] Yet EEOC's PWFA regulations require employers to provide accommodations for workers to get an abortion, despite the lack of any mention of abortion in the text and unmistakable intent to the contrary.

The Commission has also used its regulatory authority to insert identity politics into the workplace. In EEOC's "Enforcement Guidance on Harassment in the Workplace," EEOC characterizes violations of the statute to include "intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity (misgendering)" and "the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity."[10] A federal court, however, prevented the Commission from implementing similar gender identity-related views in

[4] *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).
[5] *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").
[6] *See, e.g.*, *Gundy v. United States*, 588 U.S. 128, 135 (2019) ("Congress, this Court explained early on, may not transfer to another branch 'powers which are strictly and exclusively legislative.'" (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825))).
[7] *Loper Bright*, 2024 WL 3208360 at *2.
[8] Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096 (Apr. 19, 2024) (to be codified at 29 C.F.R. pt. 1636).
[9] Pregnant Workers Fairness Act, 42 U.S.C. §§ 2000gg to 2000gg-6.
[10] U.S. Equal Emp. Opportunity Comm'n, PROPOSED Enforcement Guidance on Harassment in the Workplace (Sept. 29, 2023), https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace.

2022.[11] Now, EEOC is using guidance to circumvent this decision, and diverging from the Supreme Court's decision in *Bostock v. Clayton County* and the text of Title VII itself.[12]

EEOC's responses to congressional oversight have also hindered Congress' ability to make informed policy decisions and hold EEOC accountable for how it has implemented the laws Congress writes. For example, after releasing its proposed guidance under the PWFA, I sent you a five-page letter detailing all of the ways in which EEOC's rule flouts congressional intent, relies on flawed reasoning, and fails to protect religious freedom.[13] In response, EEOC sent a one-page form response, stating that the issues raised were "important" without addressing any issue of substance.[14] The Commission similarly provided a form response to my letter asking for accountability on its workplace harassment guidance, ignoring the points raised about substantive shortcomings of EEOC's guidance and concerns that EEOC would not properly incorporate negative comments into its final guidance.[15]

Agency responses to congressional oversight are not optional. Constructive dialogue between Congress and Executive agencies is critical to both branches serving the American people and fulfilling their respective constitutional responsibilities. To facilitate this dialogue, agencies cannot simply shrug off oversight or side-step legitimate inquiries by providing only the information the agency wants to share. Congress is constitutionally mandated to perform oversight over federal agencies, and EEOC must change its perspective to be more accountable to Congress moving forward.

To understand how EEOC will abide by and implement the Court's new framework, I ask that you answer the following questions, on a question-by-question basis, **by July 19, 2024**:

1. How will EEOC change its current practices to enforce the laws as Congress writes them, and not to improperly legislate via agency action?

    a. Will the Commission be conducting a systematic, action-by-action review of its ongoing activities to identify opportunities where EEOC needs to make changes to comply with or otherwise account for the decision?

    b. Will the Commission pause or stop any existing rulemaking activities in light of the Court's decision? If so, what rule(s) is EEOC halting? If not, why does the

[11] *See Texas v. EEOC*, 633 F.Supp.3d 824, 840 (N.D. Tex. 2022).
[12] *See id.*; *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020); 42 U.S.C. §§ 2000e to 2000e-17.
[13] Press Release, *Ranking Member Cassidy Demands Biden Administration Removal of Partisan Abortion Politics from PWFA Regulation* (Sept. 29, 2023), https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-demands-biden-administration-removal-of-partisan-abortion-politics-from-pwfa-regulation.
[14] Letter from Jacinta Ma, Director of EEOC Office of Communications and Legislative Affairs, to Senator Bill Cassidy, Ranking Member, Senate Committee on Health, Education, Labor, and Pensions (Oct. 16, 2023) (on file with the author).
[15] Letter from Jacinta Ma, Director of EEOC Office of Communications and Legislative Affairs, to Senator Bill Cassidy, Ranking Member, Senate Committee on Health, Education, Labor, and Pensions (Jan. 9, 2024) (letter on file).

Commission feel it is legally able to continue existing rulemakings without considering the impacts of the Court's decision?

2. How does EEOC plan to facilitate greater congressional involvement in policy issues under the agency's purview? Please be as specific as possible with respect to oversight responses, regular briefings, trainings and seminars, and other actions you plan to take.

3. What are your current policies about when your staff may or may not provide briefings to congressional staff? Where are such policies codified?

4. How do you plan to increase EEOC's responsiveness to oversight and technical assistance requests from Congress?

    a. For example, how do you plan to streamline the Commission's process for clearing technical assistance to reduce response times to congressional requests?

5. Moving forward, will you commit to providing a substantive response to congressional oversight requests within 30 days of receipt of the request? If not, why not?

6. Do you plan to review and/or rescind your illegal inclusion of abortion in EEOC's PWFA regulations?

    a. If so, when and in what ways does EEOC plan to address these concerns within its rule?

    b. If not, why does EEOC not believe it is necessary to revisit this rule?

Thank you for your prompt attention to this important matter.

Sincerely,

Bill Cassidy, M.D.

Bill Cassidy, M.D.
Ranking Member
U.S. Senate Committee on Health,
Education, Labor, and Pensions