**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF ARKANSAS**
**DELTA DIVISION**

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| STATES OF TENNESSEE, ARKANSAS, ALABAMA, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, MISSOURI, NEBRASKA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, and WESTERN VIRGINIA,<br><br>*Plaintiffs*,<br><br>v.<br><br>EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,<br><br>*Defendant.* | ) | Case No. 2:24-CV-84 DPM |

**BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, AMERICAN CIVIL LIBERTIES UNION AND ADDITIONAL ORGANIZATIONS IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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## INTEREST OF AMICI

*Amici* are twenty-one organizations dedicated to workers' rights, gender justice, and robust enforcement of anti-discrimination and labor laws. *Amici* include legal advocacy organizations, labor unions, and organizations that counsel workers on their legal rights, including workers seeking protection under the Pregnant Workers Fairness Act (PWFA). *Amici* and their constituencies have direct experience with the adverse health and economic consequences caused by employers' systemic failure to accommodate pregnancy, childbirth, and related medical conditions. They are committed to ensuring workers' access to all the PWFA's protections, including job-protected leave to access the full range of reproductive health care. A complete list of *Amici* is found in the Appendix to this brief.[1]

## SUMMARY OF ARGUMENT

Congress enacted the PWFA to fill gaps in federal law that historically did not provide workers with essential pregnancy-related accommodations that could enable them to work safely. Congress directed the Equal Employment

[1] Pursuant to Federal Rule of Civil Procedure 7.1, the undersigned counsel certifies that none of the *Amici* has a parent corporation and that no corporations hold any stock in the *Amici*.

Opportunity Commission (EEOC) to adopt regulations that would explain the operation and application of the provisions of the new law. The Final Rule clarifies that abortion is a covered condition under the PWFA; explains certain terms with unique application under the PWFA, such as "known limitations" and "qualified"; explains the application of Americans with Disabilities Act (ADA) concepts such as "reasonable accommodation" in the PWFA context; and explains specific unlawful employment practices under the PWFA.

It would frustrate Congress's intent in enacting the PWFA and do grave harm to the public interest to enjoin enforcement of the Final Rule. The diminished access to abortion caused by the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, 383 U.S. 745 (2022), the confusion and ignorance displayed by employers since the PWFA's enactment when confronted with requests for accommodation, and the need for guidance to employers and workers about the PWFA's place in the existing statutory regime all militate against granting the preliminary relief Plaintiffs seek.

# ARGUMENT

## I. THE FINAL RULE IS NECESSARY TO ENSURE WORKERS' ACCESS TO THE FULL RANGE OF PWFA PROTECTIONS

Although Congress outlawed pregnancy discrimination more than four decades ago, 42 U.S.C. § 2000e(k) (PDA), workers did not enjoy an expressly protected right to the pregnancy-related accommodations they need to work safely until Congress enacted the PWFA, 42 U.S.C. §§ 2000gg *et seq*. Neither the PDA nor the Americans with Disabilities Act, as amended by the ADA Amendments Act of 2008, 42 U.S.C. §§ 12101 *et seq*. (ADA), proved adequate, and as Plaintiffs recognize, Pl. Br. 2–3, Congress intended the PWFA to fill gaps left by these earlier statutes. The PWFA's landmark provisions built on the PDA and ADA in critical ways. The use of terms and concepts from these statutes in the new law necessitated rulemaking, and Congress directed the EEOC to provide guidance and examples that would help effectuate the PWFA's distinct purpose: to ensure that workers affected by pregnancy, childbirth, and related medical conditions may obtain the reasonable accommodations they need—before, during, and after pregnancy—to keep working safely, so they no longer are forced to choose between their well-being and their jobs.

The Final Rule[2] clarifies the PWFA's scope and application in four critical respects: (1) it explains the long-established meaning of "pregnancy, childbirth, and related medical conditions"; (2) it explains the statute's application of certain terms and concepts with unique meaning under the PWFA (*e.g.*, "known limitations" that need not rise to the level of ADA disabilities, and the temporary suspension of "essential job functions" as an accommodation); (3) it explains the statute's adoption of other terms and concepts from the ADA (*e.g.*, "reasonable accommodation," "undue hardship," and "interactive process") and illustrates their application in the context of accommodating pregnancy, childbirth, and related medical conditions; and (4) it explains unlawful employment practices under the PWFA.[3]

Along with its Interpretive Guidance containing seventy-eight illustrative examples, the Final Rule gives employers concrete compliance advice, gives workers the tools to advocate for themselves,[4] and gives courts guidance on which to rely when deciding disputes when they arise—ensuring that workers obtain the fullest protection of the law. This guidance is needed.

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[2] 29 C.F.R. §§ 1636 *et seq.* (Apr. 19, 2024).
[3] *See* 42 U.S.C. §§ 2000gg-1 & 2000gg-2(f); 29 U.S.C. §§ 1636.4 & 1636.5(f).
[4] Examples of the Final Rule's value in helping workers successfully self-advocate are detailed in Section II.B., *infra.*

Since the PWFA's June 27, 2023, effective date, workers have reported a wide range of employer refusals and failures to comply with the new law, resulting in adverse health consequences and workplace repercussions, including job loss.

## II. AN INJUNCTION WOULD HARM THE PUBLIC INTEREST BY DEPRIVING WORKERS OF THE PWFA'S PROTECTIONS

Enjoining the Final Rule, even in part, would cause devastating harm to workers, and therefore to the public interest. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (factors of hardship and public interest merge when the Government is the non-moving party); *Adventist Health Sys./SunBelt, Inc. v. United States Dep't of Health & Hum. Servs.*, 17 F.4th 793, 806 (8th Cir. 2021) (denying preliminary injunction in challenge to agency's change to policy that would serve public health as "intended by Congress"). The EEOC issued the Final Rule to implement the PWFA and protect the public's interest in the health and economic security of workers affected by pregnancy, childbirth, and related medical conditions. Since its publication, *Amici* and other groups have relied on the Final Rule to educate employers, workers, and medical professionals on the scope of the PWFA's protections. Enjoining the Final Rule would create confusion about the statute's scope, undermine its

implementation, and thus deprive workers of protections Congress sought to guarantee them.

### A. An Injunction Would Create Confusion About the PWFA's Coverage of Abortion and Interfere with Pregnant Workers' Access to Abortion-Related Leave.

Critically, the Final Rule will ensure consistent interpretation of the phrase "pregnancy, childbirth, or related medical conditions." The EEOC's brief fully explicates the meaning of that phrase in the PDA, specifically that it encompasses abortion, and the confirmation of that understanding in EEOC regulations and judicial opinions for four decades. Def. Br. at 22–25. The PWFA and the Final Rule simply codify the longstanding interpretation of these terms—protection that has always been critical and is particularly so now, given the massive "abortion deserts"[5] created by *Dobbs*.

The Final Rule's affirmation that employers must provide workers seeking abortion care with reasonable accommodations is paramount. Even before the Supreme Court's decision in *Dobbs*, nearly one in ten people

[5] *See*, *e.g.*, Robyn M. Powell, *Disability Reproductive Justice*, 170 U. Pa. L. Rev. 1851, 1873 (2022) (defining "abortion deserts" as "cities in which people must travel at least one-hundred miles to reach an abortion provider").

seeking an abortion had to travel across state lines to obtain one.[6] In 2023, that number doubled to nearly one in five patients.[7] This shocking increase in the proportion of patients who must travel to receive care has been driven by post-*Dobbs* abortion bans and restrictions that eliminated access to in-state abortion care.[8] And of course, these statistics necessarily capture only the patients who actually *succeeded* in traveling to access care, not the pregnant people who were unable to access abortion services altogether.

Across the country, twenty-eight states, including all seventeen Plaintiff states, either severely limit or ban abortion entirely.[9] As a result, workers living

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[6] Isaac Maddow-Zimet & Kathryn Kost, *Even Before Roe Was Overturned, Nearly One in 10 People Obtaining an Abortion Traveled Across State Lines for Care*, Guttmacher Inst. (July 2022), https://perma.cc/USK6-HFQN.

[7] Kimya Forouzan *et al*., *The High Toll of US Abortion Bans: Nearly One in Five Patients Now Traveling Out of State for Abortion Care*, Guttmacher Inst. (Dec. 2023), https://perma.cc/FE6X-GYRF.

[8] *Id.*; *see also* Elizabeth A. Pleasants *et al*., *Association Between Distance to an Abortion Facility and Abortion or Pregnancy Outcome Among a Prospective Cohort of People Seeking Abortion Online*, JAMA Network Open, May 13, 2022, at 1, 2 (finding that greater distance from an abortion facility was associated with delays in and an inability to receive abortion care).

[9] *See, e.g.*, *Interactive Map: U.S. Abortion Policies and Access After Roe*, Guttmacher Inst. (last visited May 23, 2024), https://perma.cc/A6Y3-PRB3 (indicating that Arkansas, Alabama, Florida, Georgia, Idaho, Indiana, Kansas, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia are among the twenty-eight states that are "restrictive," "very restrictive," or "most restrictive" of abortion).

in these states must often take time off work to travel long distances and/or endure lengthy waiting periods and biased "counseling" requirements to seek abortion care.[10] A worker living in Florida who seeks an abortion after the earliest weeks of pregnancy, for example, must travel nearly 600 miles to North Carolina, which imposes a 72-hour waiting period,[11] while workers living in Alabama, Arkansas, Oklahoma, and Tennessee can experience some of the longest one-way travel times in the country. Specifically, some workers in Arkansas must drive nearly six hours to reach their nearest abortion clinic, while others in Alabama, Oklahoma, and Tennessee must drive three and a half hours.[12] Patients who need abortion care later in pregnancy experience more onerous travel requirements because few clinicians provide late-stage abortions, so patients must travel greater distances to find available and trained

[10] *See, e.g.*, *id.* (select Tennessee in drop-down menu to view current abortion policies, including an in-person counseling requirement and a 48-hour waiting period).

[11] Selena Simmons-Duffin & Hillary Fung, *How Florida and Arizona Supreme Court rulings change the abortion access map*, NPR (Apr. 11, 2024), https://perma.cc/3BQN-HGFY.

[12] Sara Estep, *Abortion Access Mapped by Congressional District*, Center Ctr. For American Progress, fig. 1 (Apr. 21, 2024), https://perma.cc/A8PE-W6HW.

providers.[13] The barriers to care created by these abortion restrictions also fall disproportionately on women of color, particularly Black, Latina, and Native American women, women with disabilities, and women living below the federal poverty level, many of whom are more likely to live in states requiring them to travel long distances to obtain care.[14]

As a result of this legal landscape, obtaining an abortion now is often a multi-day process that necessitates a significant amount of time off work. For workers facing these hurdles, the PWFA's protections are critical to ensure that they can take job-protected leave rather than face the Hobson's choice of risking negative repercussions at work, up to and including termination for "absenteeism," or forgoing needed care. For example, Mylissa Farmer was working a low-wage job as a sales representative in Missouri when her water broke shortly before the eighteenth week of her pregnancy. Doctors at the hospital told Mylissa her fetus could not survive, and continuing her pregnancy would lead to a risk of serious infection, hemorrhage, the loss of her uterus,

[13] *See* Ivette Gomez, Alina Salganicoff, and Laurie Sobel, *Abortions Later in Pregnancy in a Post-Dobbs Era* (Feb. 21, 2024), https://perma.cc/KF23-MX64.

[14] Estep, *supra* n. 12; Marissa Ditkowsky *et al*., *State Abortion Bans Harm More Than Three Million Disabled Women*, National Partnership for Women and Families (May 2024), https://perma.cc/8522-MHMX.

and even death. But the hospital refused to treat Mylissa, claiming its hands were tied because of the state abortion ban. She began a harrowing journey to obtain the care she needed. After being turned away from a second hospital in Kansas, she travelled by car for four hours *while in labor* to Illinois, where she was finally able to obtain abortion care four days after the onset of her symptoms.

Throughout Mylissa's ordeal, her employer repeatedly called her and pressured her to return to work. Her physician prescribed two weeks of recovery time, but Mylissa begged to be cleared for work after only two days. Although Mylissa managed to keep her job, she was disciplined on multiple occasions for absences related to her pregnancy loss.[15]

Providers confirm the extent to which abortion is a critical part of the full spectrum of pregnancy-related care protected by the PWFA, and how the ability to secure job-protected leave informs workers' ability to secure needed services. Dr. Erin King, an abortion provider in Illinois, recounted treating a local patient whose fetus had been diagnosed with a rare fatal condition. Dr.

[15] Complaint at 11–13, 14–16, 18–19, *Mylissa Farmer v. Freeman Health Sys., (U.S. Dep't of Health & Human Servs. Ctrs. For Medicare & Medicaid Servs.)*, https://perma.cc/TD99-P2A7; Nat'l Women's Law Ctr. Interview with M. Farmer (May 18–19, 2024).

King advised the patient to take a week off from work after her procedure because the patient's warehouse job involved prolonged standing, heavy lifting, and other strenuous tasks. Notwithstanding the risks to her health, the patient told Dr. King that she had taken so much time off (for the specialist appointments that had revealed the fetal condition) that she felt compelled to return to work the next day rather than take more time off and risk being fired.

Pregnant workers who need an abortion but are denied leave from work also may be forced to delay obtaining care or forgo their preferred method of care, which in turn carries financial, medical, and dignitary harms. Dr. King had a patient from Alabama who had to delay her abortion procedure for weeks because she was unable to get time off work, pushing her care into the second trimester and requiring that she receive a procedural abortion, rather than the medication abortion she had sought.[16] Delays carry financial consequences because abortion care later in pregnancy can be more expensive.[17] And

[16] Dr. Erin King, MD, Remarks at OIRA Meeting re: Regulations to Implement the Pregnant Workers Fairness Act (Feb. 15, 2024), https://perma.cc/7WU7-7REU.

[17] Rachel K. Jones *et al.*, *Differences in Abortion Service Delivery in Hostile, Middle Ground and Supportive States in 2014*, 28 Women's Health Issues 212, 215–16 (Jan. 12, 2018).

although abortion is extremely safe, the risk of medical complications increases as the pregnancy advances.[18] If too much time elapses, the abortion may be unattainable altogether.

Those who cannot take leave to obtain abortion care and are forced to continue a pregnancy face potentially dangerous health outcomes, as well as the lifelong consequences that flow from being unable to choose whether and when to become a parent. Abortion is much safer than carrying a pregnancy—especially an unwanted pregnancy—to term.[19] And being forced to carry a pregnancy places substantial economic burdens on workers and their families. People who are able to obtain a desired abortion are less likely to experience economic hardship than those who are denied a desired abortion.[20] According to one landmark study, compared to women who obtained abortion care, those who were denied such care and subsequently gave birth were nearly four times

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[18] Caitlin Gerdts *et al.*, *Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth After an Unwanted Pregnancy*, 26 Women's Health Issues 55, 58 (2016); Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obstetrics & Gynecology 729, 731 (Apr. 2004).

[19] Gerdts, *Side Effects*, *supra* n. 18, at 55.

[20] Diana Greene Foster *et al.*, *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 Am. J. Pub. Health 1290, 1290 (2018).

more likely to live below the federal poverty line[21] and less likely to have a full-time job several months later.[22] Moreover, pregnant and parenting workers continue to face discrimination, job insecurity, wage inequality, and diminished opportunities.[23] Absent clear guidance about the PWFA's protections for abortion-related leave, pregnant workers who need abortion care will find their health, economic security, and equal employment opportunities in the crosshairs.

### B. An Injunction Would Create Confusion Among Employers, Workers, and the Courts About the Scope of the PWFA's Protections.

Since the PWFA went into effect, employers and workers alike have needed considerable guidance on the basic protections of the PWFA. Indeed, organizations that operate legal hotlines have heard about a wide range of employer responses to accommodation requests that constitute glaring violations of the statute. PWFA lawsuits reflect the same trends. Enjoining the Final Rule will confuse employers about the extent of their obligations and

[21] *Id.* at 1293–94.
[22] *Id.* at 1292.
[23] *See* Brief of Nat'l Women's Law Ctr. *et al.* at 24–31, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021), https://perma.cc/3NQB-VXDT.

embolden them to continue their pre-PWFA approach to accommodations—sowing uncertainty among workers about whether the law has changed at all.

**1. Application of Unique PWFA Terms and Concepts.**

The PWFA's application to "known limitations" that are not ADA-qualifying disabilities and its deeming workers "qualified" who temporarily cannot perform essential job functions are unique to the statute, and thus especially prone to misapplication. The Final Rule and Interpretive Guidance provide much-needed clarity. The Final Rule, for instance, explains that the statute's definition of a "known limitation"—a "physical or mental condition related to, affected by, or arising out of pregnancy," 42 U.S.C. § 2000gg(4)—applies to a condition that "may be modest, minor, and/or episodic," and need not even be an impairment; rather, it simply is a condition that interferes with work, including the need to undertake preventive measures to "maintain[] their health or the health of the pregnancy" and to attend health care appointments. 29 C.F.R. § 1636.3(a)(2). The Interpretive Guidance provides even greater detail, including illustrative examples showing the wide range of "limitations" entitled to accommodation. *See* 29 C.F.R. § 1636, Appendix A (hereinafter "App. A"), Section III ¶¶ 3–22, 29.

Yet workers report routine denials of accommodations for "limitations" that plainly fall within the Final Rule's definition. For instance, A Better Balance (ABB), a national legal advocacy organization that operates a hotline, has assisted multiple pregnant workers who have been punished or threatened with punishment when they needed to leave work to obtain emergency care due to bleeding, fainting, or even miscarrying.[24] The Center for WorkLife Law (WLL), a nonpartisan research and policy organization that has a similar legal hotline, was contacted by a teacher in Illinois with a high-risk pregnancy who needed to be moved to a less active classroom to avoid strenuous physical work and injury.[25] Not understanding that *both* the PWFA and the ADA applied to her condition, her employer demanded that she complete onerous ADA medical documentation when she could have relied on the PWFA, which requires no documentation.

Court filings alleging PWFA violations arising after the statute's effective date, but prior to the Final Rule's issuance, reflect similar complaints. In Florida, for example, a care worker alleged her employer terminated her

[24] A Better Balance, Cmt. Letter (hereinafter "ABB comment"), at 43 (Oct. 10, 2023), https://perma.cc/DW6J-6UGF.
[25] Interview by ACLU with WLL (May 15, 2024).

after she requested time off for pregnancy-related medical appointments.[26] Also in Florida, a clerical worker alleged she was denied her requested accommodation of being excused from overtime due to a high-risk pregnancy, then fired.[27] In Tennessee, a pregnant school bus driver alleged she was denied a transfer to avoid exacerbating her migraines and endangering her high-risk pregnancy.[28] Her employer terminated her employment instead.[29]

Lactating workers also face their employers' ignorance about the fact that they qualify as having a covered "limitation." WLL received a call from a lactating worker whose employer told her that she needed to "make up" the time she spent pumping or risk discipline for failing to meet sales quotas even though the failures were caused by her breaks. WLL also was contacted by a teacher in California who had postpartum depression and requested, as a reasonable accommodation, that she be allowed to leave campus during her

[26] Complaint at ¶¶ 15–18, *Clark v. BNS Enter., Inc. dba Jennifer Gardens Assisted Living Memory Care*, No. 8:24-cv-00909-MSS-SPF (M.D. Fla. Apr. 15, 2024).
[27] Complaint at ¶¶ 14–21, *Borie v. Bluestone Nat'l, LLC*, No. 24-CV-939-CEH-CPT (M.D. Fla. Apr. 18, 2024).
[28] Complaint at ¶¶ 22–26, 29, *Bond v. RLCL Acquisition, LLC d/b/a Gray Line of Tenn.*, No. 3:24-cv-00596 (M.D. Tenn. May 11, 2024).
[29] *Id.* at ¶ 39.

lunch break to visit her baby at a nearby daycare center because nursing can improve mothers' mental health. The employer denied the request.[30]

Workers themselves also have evinced confusion about whether their pregnancy-related symptoms qualify as "limitations" eligible for accommodation. For example, ABB reported inquiries about whether they were protected from: a pregnant postal worker who wanted to reduce the time she spent walking because she was experiencing discomfort and fatigue in the final months of her pregnancy[31]; a pregnant worker with attention deficit hyperactivity disorder (ADHD) whose work suffered when she followed her health care provider's advice to stop taking her ADHD medicine during pregnancy for risk of fetal heart defects[32]; and a lactating deputy sheriff asking if she was entitled to seek temporary reassignment, as recommended by her doctor, because the restrictiveness of her bulletproof vest threatened to decrease her milk supply.[33]

Importantly, with respect to another provision of the PWFA that departs from the ADA—defining employees as "qualified" despite their temporary

[30] Interview by ACLU with WLL, *supra* n. 25.
[31] ABB comment, *supra* n. 24, at 12.
[32] *Id.* at 20.
[33] *Id.* at 12.

inability to perform essential job functions, 42 U.S.C. § 2000gg(6)—the Interpretive Guidance also provides critical explication, including five illustrative examples. App. A, Section III ¶¶ 37–51 & Exs. 1–5. Unsurprisingly, given their years of familiarity with the ADA, which says people who cannot perform essential functions are not "qualified," 42 U.S.C. § 12111(8), employers need direction about this provision. A pregnant steelworker reported, for instance, that her employer forced her on leave, then demoted her, when she sought to be excused from operating heavy machinery, an essential job function, based on her doctor's advice during her second trimester.[34]

**2. Application of ADA Terms and Concepts in the PWFA Context.**

The Final Rule provides detailed explanations of ADA terms and concepts imported into the PWFA, such as "essential functions," 29 C.F.R. § 1636.3(g), "reasonable accommodation," *id.* §§ 1636.3(h) ("generally") & (i) ("examples"), "undue hardship," *id.* § 1636.3(j), and "interactive process," *id.* § 1636.3(k), and outlines how these ADA concepts are to be applied under the PWFA. It further explains the interaction between the PWFA and ADA, such as when a pregnant worker qualifies for an accommodation under both statutes.

[34] Interview by ACLU with WLL, *supra* n. 25.

*See*, *e.g.*, App. A, Section III ¶¶ 146–48; *id*., Section VI ¶¶ 7–20 & Exs. 77–78.[35] The Interpretive Guidance provides invaluable explanations for all these concepts, with detailed examples that illustrate the right—and wrong—ways for employers to conduct the interactive process and reach mutual agreement with workers about workable accommodations. *See*, *e.g.*, App. A, Section III ¶¶ 105–17 & Exs. 51–53. Moreover, the Final Rule's identification of four "predictable assessments" that in "virtually all cases" will be considered reasonable accommodations that do not impose an undue hardship—permitting a worker to carry and drink water, take additional restroom breaks, sit or stand as needed, and take extra breaks to eat and stay hydrated—ensures that some of the most common needs during pregnancy will be met without delay. 29 C.F.R. § 1636.3(j)(4).

The Final Rule's detailed list of possible "reasonable accommodations" is a blueprint for managing the range of covered limitations. 29 C.F.R. §§ 1636.3(h)–(i). The Interpretive Guidance, in turn, provides thirty illustrative examples of reasonable accommodations at various intervals before, during

[35] *See also* 29 C.F.R. § 1636.7; App. A, Section VI ¶¶ 1–6, 22 (discussing PWFA's interaction with Title VII, ADA, FMLA, the Rehabilitation Act, the PUMP Act, Title IX, the OSH Act, and state and local statutes).

and after pregnancy. These include telework, temporary job reassignment, assistive devices, appropriately sized uniforms and safety gear, relief from lifting and other tasks, excusal from penalties for failing to meet attendance or productivity requirements, and time off for medical appointments and to recover from childbirth. *See* App. A, Section III ¶¶ 53–55, 58–73, 81–82 & Exs. 12–22, 26–44. The Final Rule also illustrates effective interim accommodations during the interactive process. *Id.* ¶¶ 74–80 & Exs. 23–25.

Time off for medical appointments is especially critical for workers without access to leave under the FMLA or other statutes, and can help workers avoid preventable medical complications, as intended by the PWFA. For example, one physician reported treating a pregnant worker who had initially sought abortion care, but the physician suspected that the patient might have been experiencing an ectopic pregnancy.[36] Because the patient could not take any more time off from work, however, she was unable to get either an ultrasound or diagnostic lab work. By the time the ectopic pregnancy was confirmed two weeks later, the patient was at substantial risk of a ruptured fallopian tube and required surgery.

[36] Interview by NWLC with Dr. Rebecca Simon (May 15, 2024).

Employers and employees alike will benefit from the Final Rule's explanations of how these ADA concepts operate in the PWFA context. As litigation arises, courts will benefit from the Final Rule's guidance as well.

### 3. Guidance on the Statute's Unlawful Employment Practices.

The Final Rule illuminates other fact patterns constituting violations of the PWFA's nondiscrimination provision pertaining to reasonable accommodations, as well as its ban on retaliation and coercion. 42 U.S.C. §§ 2000gg-1 & 2000gg-2(f); 29 U.S.C. §§ 1636.4 & 1636.5(f); App. A, Section IV ¶¶ 1–34 & Exs. 59–60; *id.*, Section V, ¶¶ 5–17 & Exs. 61–76. Especially critical are its explanations of when an employer's improper requests for medical certification—and delay in granting an accommodation based on a purported failure to provide such certification—can constitute failures to accommodate as well as retaliation and/or coercion. The Final Rule imposes "reasonableness" standards on certification requests and denies altogether the employer's right to seek certification in certain circumstances, including with respect to the minor "predictable assessments" that will generally not be found to impose an undue hardship, discussed *supra*, and with respect to pumping breastmilk—as well as how these standards differ from those under the ADA.

*See*, *e.g.*, App. A, Section III ¶¶ 118–48 & Exs. 54–55; *id.*, Section IV, ¶¶ 3–9; *id.*, Section V ¶¶ 14–16 & Exs. 68, 70, 72–73.

Indeed, in the first three months after the PWFA became effective, the majority of PWFA-related calls to the WLL legal hotline concerned employers' demands for excessive certification and consequent delays in responding to workers' requests for accommodations,[37] which the Final Rule clarifies may constitute an unlawful denial of accommodation, retaliation, and/or coercion. An employer's delay can make the difference between an employee being able to safely stay on the job and being forced to stop working altogether. For example, a hospital technologist reported to ABB that when she requested less strenuous duties on her doctor's advice, her employer required her to remain on unpaid leave for nearly two months while it considered her request.[38] ABB also heard from a pregnant security worker whose employer's delay in responding to her request for restroom accommodations resulted in her hospitalization for pre-term contractions that her doctor attributed to her lack of bathroom breaks.[39]

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[37] Center for WorkLife Law, Cmt. Letter (hereinafter "WLL comment"), at 2 (Oct. 10, 2023), https://perma.cc/645T-DQCU.
[38] ABB comment, *supra* n. 24, at 77.
[39] *Id.* at 76, 77.

Some employers have subjected workers to Kafkaesque approval processes that make obtaining accommodation practically impossible. One employer instructed its pregnant worker to obtain a new doctor's note for each absence related to morning sickness.[40] Another employer, nonsensically, rejected its pregnant employee's doctor's note because it did not offer a projected delivery date *past* her estimated due date.[41] A third employer rejected a pregnant machine operator's doctor's note for failing to address why a pregnant worker should not be exposed to toxic fumes, demanded and then rejected a new note, and finally pushed her onto leave without pay.[42] These onerous certification requirements disproportionately threaten access to accommodations for low-wage workers, who are more likely to live in areas without hospitals, birth centers, or providers offering obstetric care.[43]

Finally, the Final Rule addresses other forms of unlawful discrimination, retaliation, and coercion. For instance, far too many employers continue the common pre-PWFA practice of forcing workers on leave rather than engaging

[40] *Id.* at 68.
[41] *Id.*
[42] *Id.*
[43] WLL comment, *supra* n. 37, at 25.

in the interactive process, a facial violation of the law. 42 U.S.C. § 2000gg-1(4). A pregnant mechanic contacted ABB after her employer forced her on leave when she requested temporary reassignment to an air-conditioned space to safeguard her health from dangerous heat.[44] A nurse told ABB that, after she requested office work to avoid exacerbating her pre-existing high blood pressure, her employer forced her onto leave instead.[45] WLL has heard similar accounts. The steelworker discussed above was compelled to take leave rather than provided the accommodation of being excused from operating heavy machinery. Moreover, while her union was able to secure her return to work, and there was an open position consistent with her limitations for which she was qualified, the company instead forced her to take a data entry job that paid significantly less—a plainly retaliatory response.[46]

*Amici* note the regulations' power to change employer behavior has been shown in several instances. The lactating worker who was threatened with discipline because her pumping breaks caused her to fall short of sales quotas, discussed above, secured temporary exemption from the quota after WLL gave

[44] ABB comment, *supra* n. 24, at 16.
[45] *Id.* at 12.
[46] Interview by ACLU with WLL, *supra* n. 25.

her the Notice of Proposed Rulemaking (Proposed Rule) that included an identical example. The Proposed Rule also helped the Illinois teacher who needed reassignment to a different classroom; after showing it to her employer, the employer withdrew its onerous paperwork request and granted the transfer. In the month since the Final Rule came out, workers have used it, as well: the California teacher whose employer initially denied her request to leave campus to nurse her baby used the relevant portions of the Final Rule to eventually secure the accommodation,[47] and a pregnant hotel worker in Arkansas with a lifting restriction used the Final Rule to obtain a transfer to front desk duty instead of being forced onto leave.[48] These examples reflect just how critical the Final Rule is to ensure proper and consistent implementation of the PWFA nationwide for the full range of pregnancy-related needs.

## CONCLUSION

*Amici* urge the court to deny the motion in its entirety to prevent unnecessary confusion and harm for all workers.

[47] *Id.*
[48] *Id.*

Respectfully submitted,

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## APPENDIX: *AMICI* STATEMENTS OF INTEREST

1. The **American Civil Liberties Union** (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than three million members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws, including the right of individuals to make their own reproductive decisions. The ACLU Women's Rights Project (WRP), co-founded in 1972 by Ruth Bader Ginsburg, has long been a leader in legal advocacy to ensure women and girls' full equality in society and ending workplace sex discrimination, including pregnancy discrimination. As direct counsel and amicus, WRP litigated the contours of the right to accommodation under the Pregnancy Discrimination Act, including in *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015), *Durham v. Rural/Metro Corp.*, 955 F.3d 1279 (11th Cir. 2020) (*per curiam*), and *Legg v. Ulster Cnty.*, 832 Fed. App'x 727 (2d Cir. 2020), and played a leading role in securing the passage of the Pregnant Workers Fairness Act.

2. The **American Civil Liberties Union of Arkansas**, an affiliate of the national ACLU founded in 1969, is committed to advancing the right to equal protection under the law for all people, including pregnant persons. The ACLU of Arkansas has represented and advocated on behalf of pregnant Arkansans who have

needed access to abortion care, or who have been pressured by state officials to undergo unwanted abortion.

3. The **National Women's Law Center** (NWLC) is a nonprofit legal advocacy organization founded in 1972 dedicated to the advancement and protection of legal rights and opportunities for women, girls, and all who face sex discrimination. NWLC focuses on issues including economic security, workplace justice, education, and health, including reproductive rights, with a particular focus on the needs of those who face multiple and intersecting forms of discrimination. NWLC played a leading role in advocating for the passage of the Pregnant Workers Fairness Act and has participated as counsel or amicus curiae in numerous cases to expand access to health care, including reproductive health care, and to ensure equal opportunities for women and LGBTQI+ individuals in the workplace, both of which are critical to gender equality.

4. **A Better Balance** (ABB) is a national legal advocacy organization using the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. Through legislative advocacy, litigation, and public education, ABB is committed to advancing fair and supportive work-family policies for women

and caregivers nationwide. A Better Balance's call for change inspired the introduction of the Pregnant Workers Fairness Act and the organization was a leader in the decade-long movement to pass the Pregnant Workers Fairness Act, including twice testifying in support before Congress and helping to draft the legislation. The organization runs a legal helpline in which the clarity provided by the EEOC's regulations for pregnant workers can be seen firsthand. ABB submitted an extensive comment to the EEOC, informed by hundreds of workers who had called the helpline after the Pregnant Workers Fairness Act effective date, urging robust regulations. In 2014, A Better Balance opened a Southern Office, headquartered in Tennessee, providing services to low-wage workers and pushing for policy change in the Southeast United States.

5. **Actors' Equity Association** (Equity), a labor organization that represents live theatrical actors and stage managers, is devoted to protecting live theatre as an essential component of a thriving civil society and the basis of its members' livelihoods. Since l 913, Equity has fought to win its members a dignified workplace at the theatre, from pay guarantees and pension and welfare benefits to the rules governing auditions. With more than 51,000 members across the nation, Equity is among the oldest and largest labor unions

in the performing arts in America. Broadway tours of America's favorite musicals come to every major market in the United States. Equity members live and work in every state in the United States and many members travel frequently throughout the country for work. Preserving protections for pregnant workers and preserving access to reproductive care is critical to the ability of Equity members to work in live theatre throughout the country. It is in defense of these protections, and for the reasons set out in the amicus brief, that Equity now urges this Court to deny the request for a preliminary injunction.

6. The **American Federation of Labor and Congress of Industrial Organizations** (AFL-CIO) is a democratic, voluntary federation of 60 national and international labor unions that represent more than 12.5 million working people. The AFL-CIO's mission focuses on improving the lives of working people by ensuring that all workers are treated fairly, with decent paychecks and benefits, safe jobs, dignity, and equal opportunities. As an organization dedicated to worker protections, the AFL-CIO is committed to ensuring that no worker has to choose between their job and their health. The AFL-CIO supported the Pregnant Workers Fairness Act (PWFA) and submitted comments on the Equal Employment Opportunity Commission's proposed

rule, including to support the inclusion of abortion among the conditions for which PWFA requires reasonable accommodations.

7. **American Federation of State, County and Municipal Employees, AFL-CIO** (AFSCME) advocates for fairness in the workplace, excellence in public services, and freedom and opportunity for all working families. We are a membership association and labor union of 1.4 million members who serve in hundreds of frontline occupations across the nation—from nurses and EMTs, to corrections officers, childcare providers to sanitation workers—providing the vital services that make America happen. For decades, AFSCME has advocated for protections for pregnant workers, both on behalf of its members and as a matter of policy. No worker should have to be faced with a choice between their job or their health. The Final Rule provides employers and courts with critical guidance necessary to effectively implement the PWFA, so that pregnant workers are accommodated when needed. Where many pregnant employees work well into their pregnancies, at times in physically demanding and hazardous frontline jobs, the Final Rule stems confusion over the application of the PWFA and reduces instances in which those employees are forced to choose between their financial security and accessing essential maternal care.

8. The **American Federation of Teachers** (AFT), an affiliate of the AFL-CIO, was founded in 1916 and today represents approximately 1.7 million members who are employed across the nation and overseas in K-12 and higher education, public employment, and healthcare. AFT has long supported the civil rights of our members and the communities they serve and regularly participates in litigation fighting bias and discrimination in the workplace. AFT considers ensuring the fair treatment of pregnant and postpartum workers as an important part of its mission to protect and advance the workplace rights of all employees.

9. The **American Postal Workers Union, AFL-CIO**, is a labor organization that represents over 200,000 workers in the postal industry. Our collective bargaining partners include the U.S. Postal Service as well as private sector transportation and logistics companies, and our bargaining unit members work in every U.S. state and territory, including Arkansas. We represent workers who balance their jobs with their pregnancy, childbirth or related medical conditions. The EEOC's final rule on PWFA is important to these workers for the recognition and consistent application of workers' rights during and after pregnancy and childbirth.

10. The **Center for WorkLife Law** at the University of California College of the Law, San Francisco, is a national research and advocacy organization that advances legal protections for employees and students who are pregnant, breastfeeding, and caregiving. WorkLife Law provides resources for employers, healthcare providers, and employees regarding the accommodation of pregnant workers. Through its free legal helpline, WorkLife has counseled scores of employees on accessing their legal rights under the Pregnant Workers Fairness Act in the 11 months since its enactment.

11. The **Communications Workers of America** (CWA) is the largest communications and media labor union in the United States. Its membership consists of workers in the communications and information industries, as well as the news media, the airlines, broadcast and cable television, public service, higher education, health care, manufacturing, video games, and high tech. CWA takes an active role advocating for its members on workplace issues, which includes participating in litigation as a party or amicus.

12. **Legal Aid at Work** (formerly known as the Legal Aid Society – Employment Law Center) is a non-profit public interest law firm founded in 1916 whose mission is to help people understand and assert their workplace rights and to advocate for employment laws and systems that empower low-

paid workers and marginalized communities. Legal Aid at Work frequently appears in state and federal courts to promote justice for workers and their families and is dedicated to ensuring that workers can care for their health and that of their family without having to sacrifice their jobs or income. Legal Aid at Work has been deeply involved in shaping and passing California's progressive workplace protections for pregnant workers and ensuring that the workers who need these protections the most can equitably access them. Legal Aid at Work was among the organizations that helped to shape the Pregnant Workers Fairness Act when it was first introduced in Congress, drawing on its experience advocating for and enforcing California's protections for pregnant workers over several decades.

13. **NCLEJ** works across the country to advance racial and economic justice for low-income families, individuals, and communities through litigation, policy advocacy and support for grassroots groups. For more than sixty years, NCLEJ's mission has been to enforce the rule of law, protect entitlement to a wide range of public benefits and advance the rights and safety of low-wage workers. Our workers' rights project collaborates with worker centers on a wide range of issues affecting their members, including access to public benefits, wage justice, and health and safety, as well as supporting the

Worker-driven Social Responsibility movement. NCLEJ has represented workers who were victims of pregnancy discrimination, including clients who suffered devastating consequences when their employers refused to accommodate their needs.

14. Amicus **National Education Association** (NEA) is a national labor organization dedicated to supporting educators and students nationwide. The NEA's membership is predominantly comprised of educators in K-12 public schools and at colleges and universities. More than 70% of the NEA's active members identify as female, and virtually all work for state or local government entities like the Plaintiff States. The NEA supports both the Pregnant Workers Fairness Act (PWFA) and the Final Rule, which offer critical supports to educators and other workers who may have pregnancy-related needs, including pregnancy loss and termination, over the course of their careers.

15. The **National Employment Law Project** (NELP) is a national non-profit with over 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive access to good jobs and the full protection of labor and employment laws, including

protections from discrimination based on pregnancy and related conditions. NELP's community-based partners, including worker centers, unions, and other worker-support organizations in communities across the 50 states, have seen the kinds of impacts raised in this case, and would be harmed if the Court rules against the EEOC in this case. NELP has litigated and participated as amicus curiae in countless cases in federal circuit and state courts and the U.S. Supreme Court addressing the importance of compliance with workplace protections.

16. **National Nurses United** (NNU), with 225,000 members nation-wide, is the largest union and professional association of registered nurses in the country. NNU members work as bedside health care professionals in hospitals and clinics across the country. Nurses understand that pregnancy care, including abortion, is an essential part of health care, and that a patient's right to control their own body is at the very basis of a free and just society. And we have urged both houses of Congress multiple times to do everything necessary to protect this vulnerable patient population as well as preserve and protect nurses' ability to provide all necessary patient care. Additionally, as a largely female workforce, the Pregnant Worker Fairness Act impacts nurses directly as workers, in addition to impacting them as healthcare providers. Accordingly,

National Nurses United submits this brief to shed light on how impeding the Pregnant Workers Fairness Act would negatively impact working conditions for nurses.

17. The **National Partnership for Women & Families** is a nonprofit, nonpartisan advocacy group that has over 50 years of experience in combating barriers to equity and opportunity for women. The National Partnership works for a just and equitable society in which all women and families can live with dignity, respect, and security; every person has the opportunity to achieve their potential; and no person is held back by discrimination or bias. In particular, the National Partnership has worked extensively on workplace protections to accommodate work-family and caregiving needs, including the full range of care needs before, during, and after pregnancy. In line with our mission, the National Partnership supports the Pregnant Worker Fairness Act (PWFA) and its regulations, which play a critical role in clarifying the law for employers and protecting pregnant working people. The PWFA protects health, safety and economic security of women and pregnant people, keeping them in the workforce for as long as possible and protecting their jobs when leave is required. The PWFA is good for our economy, businesses, and workers.

18. **One Fair Wage** is dedicated to raising wages and improving working conditions in the service sector and lifting millions of subminimum wage-earning employees out of poverty by advocating for all employers to pay the full minimum wage as a cash wage, with fair, non-discriminatory tips on top. In the face of low wages, workers often contend with wage theft, pervasive sexual harassment, and potential retaliation for using leave or sick time, organizing under the National Labor Relations Act, or filing claims with the Equal Employment Opportunity Commission. Given this, One Fair Wage is keenly focused on ensuring that this same workforce does not face discrimination based on race, gender, disability status, healthcare needs, pregnancy status, or other categories. Workers should not have to choose between addressing crucial medical needs and keeping their jobs. Protecting workers who receive healthcare, including abortion and pregnancy-related care, is essential to maintaining workplaces free from all forms of discrimination and mistreatment. This protection is also crucial to One Fair Wage's mission to advocate for and protect workers' rights.

19. **Public Counsel** is a nonprofit public interest law firm dedicated to advancing civil rights and racial and economic justice, as well as to amplifying the power of our clients through comprehensive legal advocacy. Advancing

equality for women, girls, and gender expansive people and investing in their futures strengthens the well-being of entire communities. The Audrey Irmas Gender Justice Project was founded in 2017 to build on Public Counsel's longstanding efforts to secure equal justice and opportunity for women, girls, and gender expansive people. Public Counsel represents individual clients in employment discrimination and gender equity matters and supports community-led efforts to transform unjust systems through policy advocacy and litigation in and beyond Los Angeles to secure equal opportunity for women, girls, and gender expansive people.

20. The **Service Employees International Union** (SEIU) is a labor organization of approximately two million people employed across the United States, Puerto Rico, and Canada in the healthcare, janitorial, security, airport, and fast food industries, and in the public sector. Its members and the workers it is organizing represent the swath of the workforce most likely to need accommodations related to pregnancy, childbirth, and related medical conditions: care workers and low-paid workers, many of whom are women of color, who work in physically demanding jobs. SEIU has significant familiarity with the critical need for and importance of robust, enforceable regulations on

the Pregnant Workers Fairness Act, and a strong interest in ensuring no worker has to choose between their job and their health or a healthy pregnancy.

21. The **United Food and Commercial Workers International Union** is a labor union that represents over 1.2 million workers. UFCW members stand hours on their feet each day behind a cash register, work in warehouses climbing ladders and stacking heavy boxes, work under stressful conditions in healthcare, and work on the line in meat and poultry processing. Pregnancy accommodations are critically important to UFCW members, who are 50% women. UFCW supports clear employment standards requiring employers to provide reasonable accommodations to pregnant and postpartum workers who need them, absent undue hardship. The Pregnant Workers Fairness Act and the Final Rule will help keep these workers healthy while allowing them to remain in the workforce. While our members benefit from the protection of a collective bargaining agreement, we believe these rules provide important clarity for both workers and employers and will fulfill the law's purpose of ensuring people with known limitations related to pregnancy, childbirth, or related medical conditions, including abortion care, can remain healthy and working.