No. 24-2249

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATES OF TENNESSEE, ARKANSAS, ALABAMA, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, MISSOURI, NEBRASKA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, and WEST VIRGINIA,
Plaintiffs-Appellants,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Arkansas (No. 2:24-cv-84-DPM)

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ARKANSAS FOUNDATION, AND ADDITIONAL 22 ORGANIZATIONS IN SUPPORT OF DEFENDANT-APPELLEE FOR AFFIRMANCE

Gillian Thomas
Ming-Qi Chu
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2500
gthomas@aclu.org
mchu@aclu.org

John C. Williams (Ark. #2013233)
ACLU OF ARKANSAS FOUNDATION
904 W. 2nd St.
Little Rock, AR 72201
Tel: (501) 374-2842
john@acluarkansas.org

Signatures continued on next page

Katherine Sandson
Gaylynn Burroughs
Leila Abolfazli
Elizabeth Theran
NATIONAL WOMEN'S LAW CENTER
1350 I Street NW, Suite 700
Washington, D.C. 20005
Tel: (202) 588-5180
ksandson@nwlc.org
gburroughs@nwlc.org
labolfazli@nwlc.org
etheran@nwlc.org

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the amici curiae here, American Civil Liberties Union (ACLU), American Civil Liberties Union of Arkansas Foundation (ACLU-AR), National Women's Law Center (NWLC), A Better Balance (ABB), American Civil Liberties Union of Iowa ("ACLU of Iowa"), American Civil Liberties Union of Minnesota (ACLU-MN), ACLU of Missouri Foundation, American Civil Liberties Union of Nebraska (ACLU Nebraska), American Civil Liberties Union of North Dakota, South Dakota, and Wyoming, Actors' Equity Association (Equity), American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME), American Federation of Teachers (AFT), Center for WorkLife Law at the University of California College of the Law, San Francisco (CWLL), Communications Workers of America (CWA), Legal Aid at Work (LAAW), National Center for Law and Economic Justice (NCLEJ), National Education Association (NEA), National Employment Law Project (NELP), National Nurses United (NNU), National Partnership for Women & Families, One Fair Wage, Public Counsel, and Service Employees International Union (SEIU), United Food and Commercial Workers International Union state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: August 30, 2024

By: */s/ John C. Williams*
John C. Williams

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Legislative Materials

Other Authorities

INTERESTS OF AMICI

Amici are 25 organizations dedicated to workers' rights, gender justice, and robust enforcement of anti-discrimination and labor laws.[1] *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. A complete list of *Amici* is found in the Appendix to this brief.

SUMMARY OF ARGUMENT

Congress passed the historic Pregnant Workers Fairness Act to ensure that workers' pregnancy-related medical needs do not cost them their jobs. Like the Pregnancy Discrimination Act, the Americans with Disabilities Act, and the Family and Medical Leave Act, as well as dozens of other federal, state, and local laws, the PWFA recognizes that forcing workers to choose between their health and their paychecks is a cognizable civil rights violation. *Amici* agree with Defendant-

[1] Pursuant to Federal Rule of Appellate Procedure Rule 29(c), *amici curiae* certify that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief.

Appellee, the Equal Employment Opportunity Commission ("EEOC"), that this court need not reach Appellants' request for a preliminary injunction.[2]

Amici write separately to urge that, if this court does consider whether a preliminary injunction should be granted, it should deny Appellants' prayer for injunctive relief because it grievously harms the public interest in three key respects. First, enjoining the abortion-related provision of the EEOC's regulations regarding the *Implementation of the Pregnant Workers Fairness Act*, 89 Fed. Reg. 29,096 (Apr. 19, 2024) (the "Final Rule"), to any extent, will create confusion as to workers' full range of protections under the PWFA. For nearly fifty years, workers, employers, and courts have understood abortion to be included in the legal definition of "pregnancy, childbirth, and related medical conditions," and Congress imported that definition into the PWFA. Second, enjoining employers' obligation to accommodate abortion imposes profound costs on workers' health and economic security—results that the PWFA was specifically enacted to prevent. And finally, excising a particular pregnancy-related need from the Final Rule is both arbitrary and unworkable, with effects that include confusion for workers, employers, and

[2] As the EEOC explains, Appellants have not established Article III standing and, even if this court were to find that Appellants have standing, remand to the district court is appropriate. *See generally* Brief for Defendant-Appellee, *Tennessee v. Equal Emp. Opportunity Comm'n*, No. 24-2249 (8th Cir. Aug. 23, 2024) ("EEOC Br.").

the courts, and exposing employers to liability under the Pregnancy Discrimination Act and other statutes.

ARGUMENT

I. THE FINAL RULE ENSURES WORKERS' ACCESS TO THE FULL RANGE OF PWFA PROTECTIONS

A. The PWFA Addressed Gaps in the Longstanding Patchwork of Protections for Workers Needing Accommodations Due to Pregnancy, Childbirth, and Related Medical Conditions.

Congress enacted the PWFA to remedy gaps within a longstanding patchwork of protections among federal and state laws, which prevented individuals with limitations related to pregnancy, childbirth, or related medical conditions from receiving reasonable workplace accommodations. In 1978, the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) ("PDA"), became the first federal statute to explicitly outlaw discrimination against workers "affected by pregnancy, childbirth, and related medical conditions." But while the PDA effected critical change, it did not expressly protect workers' right to pregnancy-related accommodations; rather, it afforded workers a comparative right to only the same job modifications afforded others "similar in their ability or inability to work." *Id.*; *see also Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 210 (2015).

Although the Americans with Disabilities Act, as amended by the ADA Amendments Act of 2008, 42 U.S.C. §§ 12101 *et seq.* ("ADA"), imposes no such comparator requirement on workers seeking accommodation, its definition of a

qualifying "disability" excludes all but the most serious pregnancy-related conditions, leaving swaths of workers categorically ineligible for accommodations. *See, e.g.*, 29 C.F.R. §1630, Appendix, § 1630.2(h) (2019). And while the 1993 Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.* ("FMLA"), entitles workers to twelve weeks of job-protected unpaid leave for pregnancy and related conditions, the statute only covers employees who satisfy its onerous eligibility requirements. Consequently, just 56 percent of workers qualify for time off under the law.[3] Among low-wage workers, that percentage falls to 38 percent.[4] Workers not covered by the FMLA risk discipline, or worse, for pregnancy-related absences.

Recognizing these gaps in federal protections, numerous states enacted laws affirming pregnant and postpartum workers' right to accommodation regardless of the benefits afforded to those "similarly situated." As a result, when the PWFA was enacted in 2022, thirty states and several localities had enacted their own separate

[3] Scott Brown, et al., *Employee and Worksite Perspectives of the Family and Medical Leave Act: Executive Summary for Results from the 2018 Surveys* 3 (July 2020), https://perma.cc/QVQ2-WZN4.
[4] Scott Brown, et al., *Leave Experiences of Low-Wage Workers* 1 (Nov. 2020), https://perma.cc/B73T-9VZC.

and distinct pregnancy accommodation statutes,[5] resulting in varying protections for workers nationwide and confusing obligations for employers.[6]

The House report accompanying the PWFA extensively documented the myriad gaps in this statutory landscape, as well as employers' pervasive refusals to accommodate even minor pregnancy-related limitations.[7]

B. The PWFA Incorporates the PDA's Definition of "Pregnancy, Childbirth, and Related Medical Conditions," Which Includes Abortion.

Congress intended the PWFA to supplement the protections provided under the PDA,[8] and the language "pregnancy, childbirth, or related medical conditions" in the PWFA is taken directly from the PDA. The Final Rule's inclusion of abortion among the pregnancy-related "limitations" eligible for PWFA accommodation is rooted not only in nearly fifty years of legislative, administrative, and judicial authority interpreting identical language in the PDA, but also in medical practice. *See* Brief for Amicus Curiae American College of Obstetricians and Gynecologists et al. in Support of Defendant-Appellee, *Tennessee v. Equal Emp. Opportunity Comm'n*, No. 24-2249, at 6–12, (8th Cir. August 30, 2024) ("ACOG Br."). Appellants' characterization of the Rule as a

---

[5] *See State Pregnant Workers Fairness Laws*, A BETTER BALANCE (Jan. 10, 2024), https://perma.cc/BW7A-TVQ6.
[6] *See* H.R. Rep. No. 117-27, pt. 1, at 31–32 (2021).
[7] *See id*. at 11–21.
[8] *See id*. at 17.

specific "abortion accommodation mandate" ignores the Final Rule's even-handed treatment of all pregnancy-related medical conditions. As the EEOC explains, the Final Rule "does not regulate the provision of abortion services or affect whether and under what circumstances an abortion should be permitted." EEOC Br. at 27 (citing 89 Fed. Reg. 29,104). The PWFA, like the PDA, is a federal civil rights law that protects workers experiencing the full spectrum of pregnancy-related limitations, and the Rule simply adopts the well-established meaning of "pregnancy, childbirth, and related medical conditions" to include abortion.

When enacting the PDA, Congress confirmed its intent to protect workers from discrimination for obtaining abortion care.[9] Moreover, the PDA included an exception providing that employers were not required to provide health insurance for abortion care except where the pregnant person's life is endangered—an exception that would have been unnecessary if the PDA did not otherwise prohibit abortion-based discrimination. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation omitted).

[9] *See* H.R. Conf. Rep. No. 95-1786, at 4 (1978), *as reprinted in* 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766 ("Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.").

In 1979, after the PDA's enactment, the EEOC issued guidance confirming that "pregnancy, childbirth, or related medical conditions" includes abortion, which has been the agency's guiding interpretation for nearly fifty years. The guidance was explicit that the PDA requires employers to extend benefits like paid sick days to workers obtaining abortion if they provide such benefits for workers absent for other medical reasons.[10] In its 2015 guidance on pregnancy discrimination, the EEOC reaffirmed that the PDA protects workers who have abortions and workers pressured by an employer to have an abortion.[11] This longstanding interpretation warrants deference. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2258 (2024) (respect to agency's interpretation is "especially warranted" when it "was issued roughly contemporaneously with enactment of the statute and remained consistent over time").

The EEOC's consistent and longstanding interpretation of the PDA mirrors the Supreme Court's and lower courts' decisions delineating the statute's contours. Indeed, in *International Union, United Automotive, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*, 499 U.S. 187

---

[10] *See Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. § 1604, Appendix, Introduction (1979) ("A woman is therefore protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion.").

[11] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES, No. 915.003 (June 25, 2015) ("EEOC Pregnancy Guidance"), https://perma.cc/TQQ4-U87N.

(1991), the Court invalidated an employer policy barring workers from certain risky job assignments based on their mere *capacity* for pregnancy. The Court held that the employment relationship does not entitle employers to premise job opportunities on workers' reproductive decisions. *Id*. at 211.

Since *Johnson Controls*, courts have repeatedly construed "pregnancy, childbirth, and related medical conditions" broadly to protect workers from adverse employment decisions based on treatments, procedures, and conditions related to pregnancy—including lactation,[12] miscarriage,[13] abortion,[14] and expression of

[12] *See, e.g.*, *Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1258–61 (11th Cir. 2017); *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 429–30 (5th Cir. 2013); *Allen-Brown v. Dist. of Columbia*, 174 F. Supp. 3d 463, 478–80 (D.D.C. 2016); *Gonzales v. Marriott Int'l, Inc.*, 142 F. Supp. 3d 961, 977–78 (C.D. Cal. 2015).

[13] *See, e.g.*, *Harper v. Thiokol Chem. Corp*., 619 F.2d 489, 491–93 (5th Cir. 1980); *Tuttle v. Advanced Roofing Sys., Inc*., No. 1:14-cv-01257 (TWP) (DKL), 2016 WL 8716486, at *8–10 (S.D. Ind. Jan. 15, 2016); *Ingarra v. Ross Educ., LLC*, No. 13-cv-10882, 2014 WL 688185, at *4 (E.D. Mich. Feb. 21, 2014); *Gatten v. Life Time Fitness, Inc*., No. 11-2962, 2013 WL 1331231, at *4–6 (D. Minn. Mar. 29, 2013).

[14] *See, e.g.*, *Doe v. C.A.R.S. Prot. Plus, Inc*., 527 F.3d 358, 364 (3d Cir.), *order clarified*, 543 F.3d 178 (3d Cir. 2008); *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996); *Felts v. Nat'l Indoor RV Ctr.*, No. 3:22-cv-00531, 2024 WL 3381265, at *2–5 (M.D. Tenn. July 11, 2024); *DeJesus v. Fla. Cent. Credit Union*, No. 8:17-cv-2502-T-36TGW, 2018 WL 4931817, at *3–4 (M.D. Fla. Oct. 11, 2018); *Ducharme v. Crescent City Déjà Vu, L.L.C.*, 406 F. Supp. 3d 548, 555–57 (E.D. La. 2019); *see also Velez v. Novartis Pharms. Corp*., 244 F.R.D. 243, 267 (S.D.N.Y. 2007) (manager's encouraging pregnant worker to obtain abortion was anecdotal evidence supporting class claim of pregnancy discrimination).

intention to become pregnant.[15] The EEOC has likewise read the PDA to apply to the full range of reproductive health issues workers may face.[16]

In defining the scope of the PWFA to cover "pregnancy, childbirth, or related medical conditions," "Congress is presumed to be aware" of this extensive authority interpreting identical language in the PDA and the EEOC's longstanding interpretation of the terms. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009) (internal citation omitted). As the EEOC correctly recognized, there is no basis to exclude abortion from the PWFA's coverage.

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

The Final Rule reaffirms what employers, workers, and the courts all have understood for decades: employers may not take adverse action against workers who may seek abortion care. Enjoining the abortion-related provision of the Final Rule would force workers to risk their jobs to obtain needed treatment, invade their privacy, and create confusion about employers' obligations under the PWFA and related statutes. Such harms contravene Congress's purpose in adopting the PWFA

---

[15] *See, e.g.*, *Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55–56 (1st Cir. 2000).

[16] *See generally* EEOC Pregnancy Guidance; *Commission Decision on Coverage of Contraception*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Dec. 14, 2000), https://perma.cc/T3LF-FK92 (noting that the PDA prohibits discrimination "based on 'the whole range of matters concerning the childbearing process'").

and warrant denial of preliminary relief. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (courts must consider balance of hardships and public interest in deciding whether to issue an injunction).

A. An Injunction Would Endanger Pregnant Workers' Jobs and Health.

The Final Rule's affirmation that the PWFA protects workers seeking abortion care is paramount because abortion is an integral part of workers' pregnancy-related health care that cannot be cleanly separated from other forms of care. Workers' stories vividly illustrate how important it is for workers to have access to job-protected leave for the full spectrum of pregnancy-related care, including abortion. Enjoining the Final Rule's provisions with respect to accommodations for abortion would create confusion for workers and employers about their rights and obligations under the PWFA and will lead to denials of accommodations, including time off, for abortion care. Without access to the accommodations they may need, workers will be forced into the Hobson's choice of risking negative repercussions at work, including termination for "absenteeism," or forgoing needed care altogether,[17] a choice that endangers workers' jobs and their health. For example[18]:

[17] It also ensures that individuals residing in states that have banned or severely restricted abortion are able to exercise their constitutional right to travel across state lines to access abortion care in states where abortion is legal. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 346 (2022) (Kavanaugh, J., concurring) (noting that a state cannot prohibit residents from traveling to another state to access abortion care "based on the constitutional right to interstate travel").

[18] These stories all pre-date the Final Rule.

- Mylissa Farmer was working a low-wage job as a sales representative in Missouri when her water broke shortly before the eighteenth week of pregnancy. Doctors told Mylissa her fetus could not survive, and continuing her pregnancy could lead to complications including the loss of her uterus and even death. But although the care Mylissa needed should have qualified for the so-called "medical emergency" exception to the state's abortion ban, the hospital refused to treat her, claiming the ban tied its hands. After a hospital in Kansas also denied her care, Mylissa traveled 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 pressured her to return to work. She was prescribed two weeks of recovery, but Mylissa—fearing discipline by her employer—begged to be cleared for work after only two days. Although she managed to keep her job, her employer disciplined her on multiple occasions for absences related to her pregnancy loss.[19]

- Dr. Erin King, an abortion provider in Illinois, recounted treating a local patient whose fetus had been diagnosed with a rare fatal condition. Dr. King advised her to take a week off from work after her abortion because her warehouse job

[19] 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; Interview by Nat'l Women's Law Ctr. with M. Farmer (May 18–19, 2024).

involved prolonged standing, heavy lifting, and other strenuous tasks. But the patient told Dr. King that she had already taken so much time off for the diagnostic appointments that she felt compelled to return to work the next day, rather than take more time off and risk being fired.[20]

- Dr. Rebecca Simon, a physician practicing in Pennsylvania, reported treating a pregnant worker who had initially sought abortion care, but Dr. Simon suspected that the patient might have been experiencing an ectopic pregnancy. Because the patient could not take any additional time off from work, however, she was unable to get either the ultrasound or lab work needed to confirm whether the pregnancy was ectopic. By the time the ectopic pregnancy was diagnosed two weeks later, the patient was at substantial risk of a ruptured fallopian tube and required surgery.[21]

- A pregnant graphic artist in Pennsylvania informed her employer that a blood test had revealed some issues that necessitated further testing, requiring her to take a day off work. That testing revealed the need for additional analysis, and the employee sought a second day of leave for diagnostic testing. The following day, the employee learned that her fetus had severe anomalies, and with her physician, determined that an abortion was necessary. She told her employer that she would be receiving the abortion the following day and sought an additional week off to recover

[20] Dr. Erin King, M.D., Remarks at OIRA Meeting re: Regulations to Implement the Pregnant Workers Fairness Act (Feb. 15, 2024), https://perma.cc/7WU7-7REU.
[21] Interview by Nat'l Women's Law Ctr. with Dr. Rebecca Simon (May 15, 2024).

from the procedure. Although she had been allowed to take time off for the diagnostic testing, her employer terminated her while she was on leave recovering from the abortion—a procedure she needed as a result of that testing—citing absenteeism.[22]

As these stories make clear, abortion is "pregnancy-related" care, and a person's pregnancy-related needs can change over time—often under emergent circumstances. An injunction that excludes abortion, or abortion in certain circumstances, from the Final Rule's protection is unworkable and will result in confusion about when leave is required as a reasonable accommodation. Such an injunction puts workers at risk of being disciplined for obtaining needed care, forces workers to weigh their health needs and their job security, and will put affected workers' health, economic security, and employment opportunities in the crosshairs—precisely the result Congress sought to remedy by passing the PWFA.

B. An Injunction That Excludes Abortion From the PWFA Would Create Confusion About and Inconsistency With Employers' Obligations Under the PWFA and Under Other Federal Laws.

Allowing employers to refuse leave and other accommodations for abortion care under the Final Rule conflicts with longstanding PDA interpretation, which will also confuse workers, employers, and courts about the scope of PWFA coverage as well as employers' other statutory obligations. As detailed above, the

[22] These facts are drawn from *Doe*, 527 F.3d at 362–63.

PDA has long prohibited adverse employment actions based on workers' obtaining, or even considering, abortion. Carving out abortion from the Final Rule would mean that, while employers could not fire or otherwise discriminate against an employee for having an abortion, they could deny them the time off they need to obtain such care—a result that is inconsistent with the PDA. Moreover, under the PDA's framework for assessing accommodation denials, employers must treat workers affected by "pregnancy, childbirth, and related medical conditions," including abortion, "the same" as others "similar in their ability or inability to work," 42 U.S.C. § 2000e(k). Denying workers time off for abortion, while granting leave to workers needing time off for other reasons, would therefore state an independent violation of the PDA. *See Young*, 575 U.S. at 229–32.

Employers seeking to comply with a modified Final Rule also will face potential liability under other statutes. For instance, as noted *supra*, many pregnancy complications, including those that may necessitate abortion care, are recognized as ADA-qualifying disabilities that employers are obligated to accommodate,[23] including by providing job-protected leave.[24] Similarly, abortion also has been recognized as a "serious medical condition" entitled to FMLA

[23] *See* EEOC Pregnancy Guidance, Section II.
[24] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016), https://perma.cc/WSC9-CBCQ.

leave.[25] Thus, employers that deny leave for abortion under the PWFA may violate their independent obligations under the ADA and the FMLA to provide such leave.

Finally, to the extent Appellants now suggest that an injunction could be limited to accommodations for "elective" abortions, such a distinction is untenable.[26] It would allow employers to interrogate workers about the reason for their requested accommodations and require them to parse which abortions are "non-elective"—a distinction not rooted in medical practice. *See* ACOG Br. at 6–12. In the process, employers would grievously invade workers' privacy, inject prolonged delay into the process of obtaining needed care, and issue decisions that will irrevocably affect workers' health and well-being. *See, e.g.*, Section II.A.; Brief of Small Business Majority et al. as Amici Curiae in Support of Defendant-Appellee, *Tennessee v. Equal Emp. Opportunity Comm'n*, No. 24-2249, at 3–10 (8th Cir. Aug. 30, 2024); ACOG Br. at 6–12. Indeed, permitting an employer to make such inquiries would be inconsistent with the Final Rule's provisions—drawn from the ADA—that prohibit invasive employer inquiries into workers' diagnoses and details of their treatment.[27] Congress passed the PWFA precisely to

[25] *See Call v. Fresenius Med. Care Holdings, Inc.*, 534 F. Supp. 2d 184, 194–97 (D. Mass. 2008).
[26] Appellants have also forfeited any such argument by not raising it below. *See Shanklin v. Fitzgerald*, 397 F.3d 596, 601–02 (8th Cir. 2005) (internal citations omitted).
[27] *See* 29 C.F.R. §§ 1636.3(l)(1)-(2); *see also* 42 U.S.C. § 2000gg(2)(f); 29 C.F.R. § 1636.5(f)(2); 29 C.F.R. § 1636, Appendix A, Section V, ¶¶ 14–17.

close gaps in the existing legal framework that had too often enabled employers to deny workers accommodations for pregnancy and the full range of pregnancy-related care. Enlisting employers to, once again, be the arbiters of which reproductive decisions are and are not worthy of accommodation thus subverts the PWFA's animating purpose.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Dated: August 30, 2024

Respectfully submitted,

By: */s/ John C. Williams*

John C. Williams (Ark. #2013233)
ACLU OF ARKANSAS FOUNDATION
904 W. 2nd St.
Little Rock, AR 72201
Tel: (501) 374-2842
john@acluarkansas.org

Gillian Thomas
Ming-Qi Chu
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2500
gthomas@aclu.org
mchu@aclu.org

Katherine Sandson
Gaylynn Burroughs
Leila Abolfazli
Elizabeth Theran
NATIONAL WOMEN'S LAW CENTER
1350 I Street NW, Suite 700
Washington, D.C. 20005
Tel: (202) 588-5180
ksandson@nwlc.org
gburroughs@nwlc.org
labolfazli@nwlc.org
etheran@nwlc.org

CERTIFICATE OF COMPLIANCE WITH RULE 32

Pursuant to Fed. R. App. P. 32(g), I certify as follows:

1. This Brief of Amici Curiae in Support of Plaintiffs-Appellees complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 3,679 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365, namely 14-point Times New Roman font.

Dated: August 30, 2024

By: */s/ John C. Williams*
John C. Williams

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 (ACLU 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. ABB

submitted an extensive comment to the EEOC, informed by hundreds of workers who had called its legal 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. The **American Civil Liberties Union of Iowa (ACLU of Iowa)** is a statewide nonprofit and nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution. Founded in 1935, the ACLU of Iowa is the fifth oldest state affiliate of the national American Civil Liberties Union. The ACLU of Iowa has a longstanding interest in protecting the rights of women in the workplace and has accumulated knowledge and expertise in this area. Since the 1980's, the ACLU of Iowa has prioritized work to advance the equality of women in the workplace, bringing large scale discrimination suits and achieving court victories that paved the way for many modern employment anti-discrimination efforts in Iowa. Ending pregnancy discrimination is essential to this equality. The proper resolution of this case is a matter of substantial interest to the ACLU of Iowa and its members.

6. The **American Civil Liberties Union of Minnesota (ACLU-MN)** is a non-partisan, non-profit organization dedicated to protecting the liberties guaranteed by the U.S. Constitution, the Minnesota Constitution, and state and

federal civil rights laws. The ACLU-MN is an affiliate of the national ACLU and has over 21,000 members and supporters in the state of Minnesota. As an organization dedicated to protecting civil rights and liberties of all Minnesotans, the ACLU-MN has a particular interest in ensuring that the rights of pregnant workers—including those who seek abortion care—are fully protected.

7. The **ACLU of Missouri Foundation** is an affiliate of the national American Civil Liberties Union, a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU of Missouri has more than 11,000 members in the state. In furtherance of their mission, the ACLU and its affiliates engage in litigation, by direct representation and as amici curiae, to encourage the protection of rights guaranteed by the federal and state constitutions. The ACLU of Missouri has a particular interest in ensuring the right to reproductive freedom, which includes ensuring that the rights of pregnant workers who seek abortion care are fully protected.

8. The **American Civil Liberties Union of Nebraska (ACLU Nebraska)** is a non-profit, non-partisan organization that has worked for over fifty years to defend and strengthen the individual rights and liberties guaranteed in the United States and Nebraska Constitutions through policy advocacy, litigation, education, and community empowerment. The ACLU Nebraska represents thousands of members and supporters in Nebraska. The ACLU Nebraska works to

ensure that all Nebraskans can make their own decisions about whether and when to have a child without undue political interference. Through litigation, advocacy, and public education, the ACLU Nebraska strives to ensure that every Nebraskan has the opportunity to make the decisions that are right for their family and the ability to get the care they need.

9. The **American Civil Liberties Union of North Dakota, South Dakota, and Wyoming** is a non-profit, non-partisan membership organization devoted to protecting basic civil rights and civil liberties for all Americans. The ACLU of North Dakota, South Dakota, and Wyoming regularly litigates questions involving civil liberties in state and federal courts, helping to establish constitutional jurisprudence. Among the liberty interests crucial to the ACLU of North Dakota, South Dakota, and Wyoming and its members are gender justice and the legal rights and protections of workers. Preserving these rights is essential to the preservation of our democracy and a core mission of the ACLU of North Dakota, South Dakota, and Wyoming.

10. **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 1913, 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.

11. 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**.**

12. **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. AFSCME is 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. As many pregnant employees work well into their pregnancies, at times in physically demanding and hazardous frontline jobs, the Final Rule stems from 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.

13. 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 its 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.

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

15. 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 curiae.

16. **Legal Aid at Work (formerly known as the Legal Aid Society – Employment Law Center) (LAAW)** 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.

17. The **National Center for Law and Economic Justice (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. NCLEJ's 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.

18. The **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 in 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 and the Final Rule, which offer critical support to educators and other workers who may have pregnancy-related needs, including pregnancy loss and termination, over the course of their careers.

19. 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, 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 impact 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, state courts, and the U.S. Supreme Court, addressing the importance of compliance with workplace protections.

20. The **National Nurses United (NNU)**, with 225,000 members nationwide, 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 NNU has 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 nursing is 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.

21. The **National Partnership for Women & Families (National Partnership)** 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 its mission, the National Partnership supports the Pregnant Worker Fairness Act and its regulations, which play a critical role in clarifying the law for employers and protecting pregnant working people. The PWFA protects the 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.

22. **One Fair Wage** is dedicated to raising wages, 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.

23. **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 opportunities 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 opportunities for women, girls, and gender expansive people.

24. 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, fast-food industries, and the public sector. SEIU's 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 for 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.

25. The **United Food and Commercial Workers International Union (UFCW)** is a labor union that represents over 1.2 million workers. UFCW members stand hours on their feet each day behind a cash register, in warehouses climbing ladders and stacking heavy boxes, under stressful conditions in

healthcare, and 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 its members benefit from the protection of a collective bargaining agreement, UFCW believes these rules provide important clarity for both workers and employers and will fulfill the law's purpose of ensuring that people with known limitations related to pregnancy, childbirth, or related medical conditions, including abortion care, can remain healthy and working.

CERTIFICATION OF COMPLIANCE WITH EIGHTH CIRCUIT RULE 28A(H)

Pursuant to this Court's Rule 28A(h), I hereby certify that the electronic version of this Brief of Amici Curiae in Support of Plaintiffs-Appellees has been scanned for viruses and is virus-free.

Dated: August 30, 2024

By: */s/ John C. Williams*
John C. Williams

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system, pursuant to Eighth Circuit Rule 25A.

Dated: August 30, 2024

By: */s/ John C. Williams*
John C. Williams

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Maureen W. Gornik
Acting Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

September 04, 2024

Leila Abolfazli
Gaylynn Burroughs
Katherine Sandson
Elizabeth Ellen Theran
NATIONAL WOMEN'S LAW CENTER
Suite 700
1350 I Street, N.W.
Washington, DC 20005

Ming-Qi Chu
Gillian L. Thomas
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
18th Floor
125 Broad Street
New York, NY 10004-2400

John Charles Williams
AMERICAN CIVIL LIBERTIES UNION
ACLU of Arkansas
Suite 1
904 W. Second Street
Little Rock, AR 72201-5727

RE: 24-2249 State of Tennessee, et al v. EEOC

Dear Counsel:

The amicus curiae brief of A Better Balance, Actors' Equity Association, American Civil Liberties Union, American Civil Liberties Union of Arkansas, American Civil Liberties Union of Iowa, American Civil Liberties Union of Minnesota, American Civil Liberties Union of Missouri, American Civil Liberties Union of Nebraska, American Civil Liberties Union of South Dakota, North Dakota and Wyoming, AFL-CIO, AFSCME, AFT, Center for WorkLife Law, CWA, Legal Aid at Work, National Center for Law and Economic Justice, National Education Association, National Employment Law Project, National Nurses United, National Partnership for Women and Families, National Women's Law Center, One Fair Wage, Public Counsel, SEIU and United Food and Commercial Workers International Union has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may

only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Maureen W. Gornik
Acting Clerk of Court

HAG

Enclosure(s)

cc: Virginia N. Adamson
Philip J. Axt
Laura Bakst
James A. Barta
Nicholas J. Bronni
Curtis R. Capehart
Natalie Christmas
Joshua Divine
Carrie Y. Flaxman
Grant Michael Flynn
Kelsey Fraser
Erin B. Gaide
Garry M. Gaskins II
Kaitlyn A. Golden
Whitney D. Hermandorfer
Alan M. Hurst
Dylan L. Jacobs
Eric Nieuwenhuis Kniffin
Lincoln J. Korell
Edmund G. LaCour Jr.
Stephanie Robin Marcus
Lesley R.F. McColl
Molly Meegan
Joshua Daniel Minchin
Urja Mittal
Rachel N. Morrison
Ester Murdukhayeva
Francisco Maria Negron Jr.
Kimberly A. Parker
Stephen John Petrany
Gabrielle N. Piper Joseph
Stanford Purser
Michael Raab
James Matthew Rice
Daniel Schwei
Jonathan Skrmetti
Reed Neal Smith
Lance F. Sorenson
Joseph David Spate

Asher Steinberg
Joshua N. Turner
Eric H. Wessan
Alexandra Widas
Michael Ray Williams

District Court/Agency Case Number(s): 2:24-cv-00084-DPM