FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

APR 25 2024

TAMMY H. DOWNS, CLERK
By: ______________ DEP CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
DELTA DIVISION

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,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendant.

Civil Action No. 2:24-cv-84-DPM

This case assigned to District Judge Marshall
and to Magistrate Judge Ervin

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. The Pregnant Workers Fairness Act of 2022, 42 U.S.C. § 2000gg, fills a gap in federal employment law by ensuring pregnant women receive workplace accommodations to protect their pregnancies and unborn children. A diverse coalition of lawmakers, business groups, and nonprofit organizations supported that pro-family aim and secured the law's bipartisan support and passage. Yet in a new rule, a bare 3-2 majority of unelected commissioners at the Equal Employment Opportunity Commission (EEOC) seeks to hijack these new protections for *pregnancies* by requiring employers to accommodate workers' *abortions*—something Congress did not authorize. *See* Ex. A, EEOC, *Implementation of Pregnant Workers Fairness Act*, 89 Fed. Reg. 29,096 (Apr. 19, 2024). If the rule stands, Tennessee, its co-plaintiff States, and many others must facilitate workers' abortions or face federal suit—even those elective abortions of healthy

pregnancies that are illegal under state law. Plaintiffs now bring this Complaint to invalidate EEOC's unprecedented and unlawful abortion-accommodation mandate.

INTRODUCTION

2. Nationally, about 46.8% of the workforce consists of women,[1] and in Tennessee and Arkansas, more than half of eligible women (54.2% and 53.1%, respectively) participate in the labor force.[2] Each year, millions of employed women will be pregnant. Federal law has long protected women from adverse employment actions related to pregnancy. But until recently, it did not require employers to provide simple, low-cost accommodations to pregnant employees. To protect women who may need accommodations to maintain healthy pregnancies, a bipartisan coalition in Congress passed the Pregnant Workers Fairness Act of 2022 (PWFA or the Act).

3. The PWFA requires employers to accommodate "known limitations" arising from a worker's "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000gg-1.

4. Supporters of the PWFA noted this language would require "commonsense accommodations"—like extra restroom breaks or the ability to work while seated—"to ensure a healthy pregnancy and a healthy baby."[3] The PWFA's pro-family aim garnered support from a spectrum of civic organizations, including pro-life groups such as the United States Conference for Catholic Bishops. One co-sponsor of the PWFA remarked that she could not think of anything "less controversial" than the PWFA's protections for the health of mothers and their unborn babies.[4]

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[1] Women's Bureau, *Working Women: A Snapshot*, U.S. Department of Labor Blog (Feb. 28, 2022), https://perma.cc/358T-X7RM.

[2] The Economics Daily, *Labor force participation rate for women highest in the District of Columbia in 2022*, U.S. Bureau of Labor Statistics (Mar. 7, 2023), https://perma.cc/WZC9-YVHF.

[3] Bob Casey, *Casey, Cassidy Introduce Bipartisan Pregnant Workers Fairness Act, Propose Protections Against Workplace Discrimination* (Apr. 29, 2021), https://perma.cc/J2NQ-J8AA.

[4] 168 Cong. Rec. S7049 (daily ed. Dec. 8, 2022) (statement of Sen. Murray).

5. Ultimately, the PWFA enjoyed broad bipartisan sponsorship and passage. Congress directed EEOC to issue an implementing rule "provid[ing] examples of reasonable accommodations" by December 2023. 42 U.S.C. § 2000gg-3(a).

6. In response, EEOC proposed a PWFA rule in August 2023. *See* EEOC, *Regulations to Implement the Pregnant Workers Fairness Act*, 88 Fed. Reg. 54,714 (Aug. 11, 2023) (Proposed Rule). In that Proposed Rule, EEOC claimed that the PWFA's reference to "pregnancy, childbirth, or related medical conditions" meant employers must accommodate pregnant workers' abortions—whether or not the procedure was medically related. *Id.* at 54,721. Such accommodations, EEOC noted, could include providing abortion-related leave—even for elective abortions made illegal by state law. *See id.*

7. EEOC's sudden proposal to expand the PWFA to cover abortions encountered substantial resistance. Tens of thousands of commenters opposed EEOC's abortion-accommodation mandate.[5] Many argued that the inclusion of abortion accommodations exceeded the purview of the PWFA, which nowhere mentions abortions. Others noted that the PWFA's drafting history forecloses abortion coverage.

8. Among those objecting was Senator Bill Cassidy, the Republican co-sponsor of the PWFA in the Senate, who accused EEOC of "substitut[ing] its views on abortion for those of Congress."[6] Senator Cassidy cited remarks of Democratic cosponsor Bob Casey, who confirmed on the Senate floor that "under the [PWFA] . . . the EEOC, could not—*could not*—issue any regulation that requires abortion leave . . . [or] require employers to provide abortions in violation of State law."[7] Senator Mike Braun, for his part, noted that EEOC's interpretation of the PWFA

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[5] Comments on EEOC's Proposed Rule are available at regulations.gov, https://perma.cc/Z4UU-UBS7.

[6] Sen. Bill Cassidy, Comment Letter on Proposed Rule to Implement Pregnant Workers Fairness Act, https://perma.cc/L4F8-K2K6 (Sept. 29, 2023).

[7] 168 Cong. Rec. S7050 (daily ed. Dec. 8, 2022) (statement of Sen. Casey), https://perma.cc/LX9A-BBGV.

raised significant Eleventh Amendment issues as applied to abrogate States' sovereign immunity.[8] Those concerns reiterate legal problems under Section 5 of the Fourteenth Amendment that the Department of Justice flagged in the lead-up to the PWFA's passage.

9. Tennessee, joined by nineteen co-signing States, filed a comment stressing that EEOC's proposed coverage of abortion violated the PWFA. *See* Ex. B, Tennessee *et al.*, Comment Letter on Regulations to Implement the Pregnant Workers Fairness Act (Oct. 10, 2023) (Tenn. Comment). Elective abortions, Tennessee noted, are not themselves "medical conditions" arising from pregnancy, but instead voluntary procedures that terminate pregnancy. Tennessee pointed out that such procedures end pregnancy and fetal life and are illegal in Tennessee and many other States except in certain circumstances—including as necessary to address or protect against specified risks to maternal life or health. Tennessee also asserted that the Proposed Rule likewise flouted limits of the U.S. Constitution and the Administrative Procedure Act (APA). Tennessee urged EEOC to reconsider its approach.

10. Despite this outpouring of opposition, EEOC's Final Rule includes a mandate that employers—including States where abortion is generally prohibited—provide abortion accommodations to their workers. *See* Ex. A, 89 Fed. Reg. 29,096 (Final Rule). Like the Proposed Rule, EEOC's Final Rule requires accommodating all abortions—even those performed exclusively to end a healthy pregnancy and terminate an unborn child's life.

11. The Supreme Court has recognized that States have many legitimate interests in regulating abortion, including "respect for and preservation of prenatal life at all stages of development," "the elimination of particularly gruesome or barbaric medical procedures," and "the prevention of discrimination on the basis of race, sex, or disability," among others. *Dobbs v.*

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[8] Sen. Mike Braun, Comment Letter on Proposed Rule to Implement Pregnant Workers Fairness Act, https://perma.cc/7YMZ-JXEF (Oct. 10, 2023).

Jackson Women's Health Org., 597 U.S. 215, 301 (2022). EEOC's Rule vitiates these interests by requiring the Plaintiff States in their sovereign capacity to facilitate elective abortions they have chosen to proscribe or else face federal lawsuits for money damages and injunctive relief.

12. Plaintiffs now seek preliminary and permanent relief. They ask the Court to stay the effective date of the Final Rule pending judicial review, *see* 5 U.S.C. § 705, as well as to preliminarily enjoin EEOC's enforcement of the Final Rule's abortion-accommodation mandate against the States. And Plaintiffs request that this Court declare unlawful, set aside and vacate, and permanently enjoin the Final Rule's abortion-accommodation mandate.

PARTIES

13. Plaintiff the State of Tennessee is a sovereign State of the United States of America and an employer subject to the requirements of the challenged EEOC rule. Tennessee currently employs about 42,000 people, and over 21,000 women, excluding employees at public higher education institutions, in various capacities across every county in the State.[9]

14. The Tennessee Constitution expressly excludes any personal "right to abortion or [to] the funding of an abortion." Tenn. Const. Art. 1, § 36. In Tennessee, the Legislature has declared that Tennessee has an interest in "protect[ing] maternal health" and "preserv[ing], promot[ing], and protect[ing] life and potential life throughout pregnancy." Tenn. Code Ann. § 39-15-214 (2020). Tennessee law makes it a felony to provide an abortion with intent other than to increase the probability of a live birth; to preserve the life or health of the child after live birth; to terminate an ectopic or molar pregnancy; or to remove a dead fetus. *Id.* § 39-15-213(b). Abortion is also permitted if a "physician determined, using reasonable medical judgment, based upon the facts known to the physician at the time, that the abortion was necessary to prevent the

[9] *Tennessee 2023 State of the State Employee Annual Report*, https://perma.cc/53EZ-EPR5.

death of the pregnant woman or to prevent serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman." *Id.* § 39-15-213(c)(1)(A). And "[n]o state funds shall be expended to perform abortions," except for certain exceptions for rape, incest, or to protect the life of the mother. *Id.* § 9-4-5116. The State of Tennessee currently does not provide workplace accommodations to allow employees to seek elective abortions, the provision of which is criminal under state law. Jonathan Skrmetti, the Attorney General and Reporter of Tennessee, is authorized by statute to try and direct "all civil litigated matters . . . in which the state . . . may be interested." *Id.* § 8-6-109(b)(1).

15. Plaintiff the State of Arkansas is a sovereign State of the United States of America and an employer subject to the requirements of the challenged EEOC rule. Arkansas currently employs roughly 30,200 people in various capacities across every county in the State, more than half of whom are women.[10] Tim Griffin is the Attorney General of Arkansas. General Griffin is authorized to "maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts." Ark. Code Ann. § 25-16-703.

16. The Arkansas Constitution makes it the "policy of Arkansas . . . to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution." Ark. Const. amend. LXVIII, § 2. Consistent with that command, Arkansas statutes prohibit "[p]erforming or attempting to perform an abortion" and makes doing so "an unclassified felony" subject to up to a $100,000 fine and ten years' imprisonment. Ark. Code Ann. § 5-61-304(b) (Arkansas Human Life Protection Act); Ark. Code Ann. § 5-61-404(b) (Arkansas Unborn Child Protection Act). That prohibition, however, does not prohibit procedures necessary to save the life of the mother, to remove an ectopic pregnancy, or to remove a deceased unborn child

[10] *See Full Employee Salaries Data*, Transparency.Arkansas.gov (Apr. 10, 2024), https://perma.cc/FP6F-AKLY.

caused by spontaneous abortion. *See id.* §§ 5-61-303, 304, 403, & 404. Moreover, the Arkansas Constitution prohibits the use of "public funds . . . to pay for any abortion, except to save the mother's life." Ark. Const. amend. LXVIII, § 3. Arkansas thus does not provide workplace accommodations to allow employees to seek elective abortions and doing so would violate the State's constitution.

17. Plaintiff the State of Alabama is a sovereign State of the United States of America and an employer subject to the requirements of the challenged EEOC rule. Alabama employs around 30,000 employees, and over half are women.[11] Steve Marshall, the Attorney General of Alabama, is authorized to bring "all civil actions and other proceedings necessary to protect the rights and interests of the state." Ala. Code § 36-15-12.

18. The Alabama Constitution makes it the State's "public policy" to "recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life" and to "ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate." Ala. Const. Art. I, § 36.06(a), (b). Similarly, "[n]othing in [the Alabama] constitution secures or protects a right to abortion or requires the funding of an abortion." *Id.* § 36.06(c). In Alabama, intentionally providing an abortion is a felony unless it "is necessary in order to prevent a serious health risk" to the mother. Ala. Code §§ 26-23H-4(b), 23H-6(a). That prohibition does not cover procedures in certain circumstances if done to protect the mother or child or with the intent to remove a deceased unborn child. *See id.* § 26-23H-3(1). Nor does it include procedures involving "an ectopic pregnancy" or an "unborn child" with a "lethal anomaly." *Id.* The legislature has found that Alabamians "oppose the use of public funds … to pay for abortions." *Id.* § 26-23C-2(a)(7). Accordingly, Alabama does not provide workplace

[11] Alabama State Personnel Department, *2022 Annual Report* at 13, 18, https://perma.cc/G49N-NBR7.

accommodations to allow employees to seek elective abortions.

19. Plaintiff the State of Florida is a sovereign State of the United States of America and an employer subject to the requirements of the challenged EEOC rule. Florida employs over 160,000 people. Effective May 1, 2024, Florida law prohibits abortions after six weeks, subject to certain exceptions. § 390.0111, Fla. Stat. Florida law also prohibits using state funds "*in any manner* for a person to travel to another state to receive services that are intended to support an abortion." § 286.31(2), Fla. Stat. (emphasis added). The statute, however, allows the expenditure of state funds where "required by federal law." § 286.31(2)(a), Fla. Stat. Ashley Moody, the Attorney General of Florida, is authorized by statute to "appear in and attend to" suits in which the State is "a party . . . or in anywise interested." § 16.01(4)–(5), Fla. Stat.

20. Plaintiff the State of Georgia is a sovereign State of the United States of America and an employer subject to the requirements of the challenged EEOC rule. Georgia prohibits abortions after a fetal heartbeat has been detected, except in cases of rape, incest, futility, or where a procedure is necessary to protect the health of the mother. *See* Ga. Code Ann. § 16-12-141. The State of Georgia does not provide workplace accommodations to allow employees to seek abortions that are criminal under state law. Georgia brings this suit through its Attorney General, Christopher Carr. He is the chief legal officer of the State of Georgia and has the authority to represent the State in federal court.

21. Plaintiff the State of Idaho is a sovereign State of the United States of America and an employer that employs women and that is subject to the requirements of the challenged EEOC rule. Idaho law generally prohibits elective abortion, as well as the use of public funds for abortion. *See* Idaho Code § 18-8701 *et seq.* Idaho does not currently provide accommodations for workers

to obtain elective abortions. Idaho brings this lawsuit through its Attorney General, Raúl R. Labrador, who has the authority to sue on the State's behalf. *See id.* § 67-1401.

22. Plaintiff the State of Indiana is a sovereign State of the United States of America and an employer subject to the requirements of the challenged EEOC rule. Indiana currently employs large numbers of women. Theodore E. Rokita is the Attorney General of Indiana. General Rokita is authorized to "represent the state in any matter involving the rights or interests of the state." Ind. Code § 4-6-1-6. By law, Indiana "prefer[s], encourage[s], and support[s]" childbirth "over abortion." *Id.* § 16-34-1-1. It prohibits most abortions, including all elective abortions. *Id.* § 16-34-2-1(a). It also prohibits "the state" and "any political subdivision of the state" from "mak[ing] a payment from any fund under its control for the performance of an abortion" unless necessary to save a woman's life or avert a serious health risk. *Id.* § 16-34-1-2.

23. Plaintiff the State of Iowa is a sovereign State of the United States of America and an employer subject to the requirements of the challenged EEOC rule. Iowa currently employs about 72,000 people, and tens of thousands of women, in various capacities across the State.[12] Iowa law places various restrictions on the availability of elective abortions. *See*, *e.g.*, Iowa Code §§ 146A, 146B, 146D, 146E. The State of Iowa does not have a policy of providing workplace accommodations to allow employees to seek elective abortions. Brenna Bird is the Attorney General of Iowa. She is authorized by Iowa law to sue on the State's behalf under Iowa Code § 13.2. Iowa sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. The Attorney General believes Iowa will be harmed by the Final Rule and therefore joins as a Plaintiff in this suit.

24. Plaintiff the State of Kansas is a sovereign State of the United States of America

[12] *All Employees: Government: State Government in Iowa*, *FRED*, *available at* https://perma.cc/T8NR-R7FH (last accessed 04/22/2024).

and an employer subject to the requirements of the challenged EEOC rule. Kansas currently employs tens of thousands of women. Kris Kobach is the Attorney General of Kansas. General Kobach is the chief legal officer of the State of Kansas and has the authority to represent Kansas in federal court. Kan. Stat. Ann. § 75-702(a). Kansas law provides that "[n]o moneys appropriated from the state general fund or from any special revenue fund shall be expended for any abortion." *Id.* § 65-6733(a).

25. Plaintiff the State of Missouri is a sovereign State of the United States of America and an employer subject to the requirements of the challenged EEOC rule. Missouri currently employs tens of thousands of women. The Missouri Constitution recognizes a "natural right to life" for "all persons," including persons who have not yet been born. Mo. Const. art. I, § 2. Consistent with this, Missouri law prohibits elective abortions and does not permit state agencies or employees to facilitate or support abortion. Mo. Rev. Stat. §§ 188.017, .205, .210, .215. Andrew Bailey is the Attorney General of Missouri. General Bailey is authorized to "institute, in the name and on behalf of the state, all civil suits and other proceedings at law or equity requisite or necessary to protect the rights and interests of the state." *Id.* § 27.060.

26. Plaintiff the State of Nebraska is a sovereign State of the United States of America and an employer that employs women and is subject to the requirements of the challenged EEOC rule. Michael T. Hilgers is the Attorney General of Nebraska. General Hilgers is authorized to appear for the State in any civil matter in which the State has an interest. Neb. Rev. Stat. § 84-203. Nebraska law prohibits abortion after 12 weeks' gestation except in cases of medical emergency or a pregnancy resulting from sexual assault or incest. *Id.* § 71-6915. Nebraska law does not currently provide accommodations for workers to obtain elective abortions.

27. Plaintiff the State of North Dakota is a sovereign State of the United States of America and an employer subject to the requirements of the challenged EEOC rule. North Dakota currently employs over 15,000 individuals across the state, many of whom are women.[13]

28. It is the "policy of the state of North Dakota that normal childbirth is to be given preference, encouragement, and support by law and by state action, it being in the best interests of the well-being and common good of North Dakota." N.D.C.C. § 14-02.3-01(1). Consistent with this interest in promoting the common good of North Dakota, the State provides an "alternative-to-abortion" program. *Id.* §50-06-26. While funds can be used for that alternative program, state law is clear that public funds may not be used for elective abortions, providing that "no funds of [North Dakota], or any agency, county, municipality, or any other subdivision thereof and no federal funds passing through the state treasury or a state agency may be used to pay for the performance, or for promoting the performance, of an abortion." *Id.* § 14-02.3-01(3). That includes using those funds as "family planning funds by any person or public or private agency which performs, refers, or encourages abortion." *Id.* § 14-02.3-02. Health insurance contracts, plans, and policies are specifically disallowed from providing coverage for elective abortions. *Id.* § 14-02.3-03. Additionally, it is a class C Felony for any person to perform an elective abortion in North Dakota. *Id.* § 12.1-19.1-02. Mandating that the State of North Dakota provide workplace accommodations for abortion would therefore cause North Dakota to violate its own laws. North Dakota brings this suit through its Attorney General, Drew H. Wrigley, who has the authority to represent the State in federal court.

29. Plaintiff the State of Oklahoma is a sovereign State of the United States of America and an employer subject to the requirements of the challenged EEOC rule. Oklahoma currently

[13] *See Team ND Benefits & Extras*, https://perma.cc/W4JN-ZCKL.

employs thousands of women. Oklahoma criminal law prohibits the provision of abortion except as necessary to preserve a pregnant woman's life. OKLA STAT. tit. 21, § 861. Oklahoma does not currently provide workplace accommodations for abortions that are illegal under state law. Oklahoma brings this suit through its Attorney General, Gentner Drummond, who has the authority to represent the State in federal court.

30. Plaintiff State of South Carolina is a sovereign State of the United States of America and an employer subject to the requirements of the challenged EEOC rule. South Carolina currently employs almost 60,000 people in various capacities across every county in the State,[14] and over half are women.[15]

31. "[T]here is no fundamental constitutional right to abortion" under the privacy provision of the South Carolina Constitution. *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 481, 892 S.E.2d 121, 130 (2023), *reh'g denied* (Aug. 29, 2023). And the State of South Carolina has an "interest in protecting unborn life . . . ." *Id.*, 440 S.C. at 490, 892 S.E.2d at 135. South Carolina law makes it a felony to provide an abortion after detection of an unborn child's fetal heartbeat, with limited exceptions for "medical emergency" or "to prevent the death of the pregnant woman or to prevent the serious risk of a substantial and irreversible impairment of a major bodily function, not including psychological or emotional conditions;" if the pregnancy is the result of rape or incest "and the probable gestational age of the unborn child is not more than twelve weeks;" or the "existence of a fatal fetal anomaly." S.C. Code Ann. § 44-41-630(B); *see also id.* at §§ 44-41-640, 650, and 660. Subject to those same exceptions, "[n]o funds appropriated by the State for employer contributions to the State Health Insurance Plan may be expended to

[14] South Carolina Department of Administration, *Employees by County – Updated April 17, 2024*, https://perma.cc/W7KH-X5GS.
[15] South Carolina Department of Administration, *Workforce – County, Gender and Ethnic Origin*, March 2024, https://perma.cc/EK95-JGPY.

reimburse the expenses of an abortion . . . ." *Id.* § 44-41-90(A). Further, "[n]o state funds may, directly or indirectly, be utilized by Planned Parenthood for abortions, abortion services or procedures, or administrative functions related to abortions." *Id.* § 44-41-90(B).

32. Alan Wilson, the Attorney General of South Carolina, is the chief legal officer of the State of South Carolina and has the authority to represent South Carolina in federal court. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 239–40, 562 S.E.2d 623, 627 (2002) (the South Carolina attorney general "'may institute, conduct and maintain all such suits and *proceedings* as *he deems* necessary for *the enforcement of the laws of the State,* the *preservation of order,* and the *protection of public rights.*'" (emphasis in original)) (quoting *State ex rel. Daniel v. Broad River Power Co.*, 157 S.C. 1, 68, 153 S.E. 537, 560 (1929), *aff'd* 282 U.S. 187 (1930)).

33. Plaintiff the State of South Dakota is a sovereign State of the United States of America and an employer subject to the requirements of the challenged EEOC rule. South Dakota currently employs tens of thousands of women. Marty J. Jackley is the Attorney General of South Dakota. General Jackley is authorized "to appear for the state and prosecute or defend, in any court or before any officer, any cause or matter, civil or criminal, in which the state may be a party or interested." SDCL § 1-1-1(2). South Dakota law prohibits elective abortions and does not permit state agencies or employees to facilitate or support abortion.

34. Plaintiff the State of Utah is a sovereign State of the United States of America and an employer subject to the requirements of the challenged EEOC rule. Utah currently employs thousands of women. Sean Reyes is the Attorney General of Utah. He is authorized to sue on Utah's behalf. *See, e.g.*, Utah Const. art. VII, sec. 16; Utah Code § 67-5-1(1)(b). Utah law recognizes that "unborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution." Utah Code § 76-7-

301.1(1). Utah also has a "compelling interest in the protection of the lives of unborn children." *Id.* § 76-7-301.1(2). Utah law therefore prohibits abortions subject to three statutorily defined exceptions. *Id.* § 76-7a-2. And Utah forbids the use of public funds by the State, its institutions, or its political subdivisions to directly or indirectly pay for any abortions prohibited by law. *Id.* § 76-7-331(2).

35. Plaintiff the State of West Virginia is a sovereign State of the United States of America and an employer subject to the requirements of the challenged EEOC rule. West Virginia currently employs thousands of women. The West Virginia Constitution provides that "[n]othing in this Constitution secures or protects a right to abortion or requires the funding of abortion." W. Va. Const. art. VI, § 57. West Virginia law prohibits abortion except when the fetus is nonviable, the pregnancy is ectopic, or a medical emergency exists and in the case of rape or incest. W. Va. Code § 16-2R-3. West Virginia criminal law prohibits the provision of abortion by anyone other than a licensed medical professional. *Id.* § 61-2-8. West Virginia does not provide workplace accommodations for elective abortions. West Virginia brings this lawsuit through its Attorney General, Patrick Morrisey, who has the authority to represent the State in federal court. *Id.* § 5-3-2.

36. Defendant EEOC is a federal agency charged with promulgating regulations under the PWFA, *see* 42 U.S.C. § 2000gg-3(a), and with enforcing the PWFA and related agency guidelines and rules, *id.* § 2000gg-2. EEOC also may issue "right-to-sue" letters that allow private individuals to sue their employers for violating the PWFA or EEOC's final PWFA rule. *See id.* § 2000e-5(b), f(1). EEOC qualifies as an agency for purposes of the Administrative Procedure Act. *See, e.g.*, *Tennessee v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807, 818 (E.D. Tenn. 2022).

JURISDICTION & VENUE

37. This Court has jurisdiction under 28 U.S.C. § 1331 (action arising under the laws of the United States), and 28 U.S.C. § 1346 (agencies and employees of the federal government).

38. An actual controversy exists between the parties under 28 U.S.C. § 2201(a).

39. This Court may grant declaratory relief, injunctive relief, and other relief pursuant to 28 U.S.C. §§ 2201-02, 5 U.S.C. §§ 705-06, and its inherent equitable powers.

40. Venue is proper under 28 U.S.C. § 1391(e)(1) because the State of Arkansas resides in this District for purposes of the venue laws. In addition, Defendant's challenged actions adversely affect Arkansas's employment operations and would require state officials and employees to engage in conduct specifically prohibited by the State's constitution. That harm would occur throughout the State.

41. This Court has the authority to grant Plaintiffs the relief they request under the Administrative Procedure Act, 5 U.S.C. §§ 705-06; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02; and 28 U.S.C. § 1361.

FACTUAL ALLEGATIONS

I. Lawmakers Pass the PWFA to Promote Safe Employee Pregnancies, Not Abortions.

42. Over the course of the past decade, a bipartisan coalition of lawmakers has proposed bills that would expressly guarantee pregnant workers the right to seek workplace accommodations. These efforts prompted the 2022 passage of the PWFA.

A. Before the PWFA, federal law did not specifically require employers to accommodate pregnant workers.

43. Before the PWFA's passage, a patchwork of federal employment laws left pregnant workers with limited legal means to seek affirmative workplace accommodations.

44. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on sex, among other protected characteristics. 42 U.S.C. § 2000e, *et seq*. As amended by the Pregnancy Discrimination Act of 1978 (PDA), Title VII's prohibition on discrimination "because of . . . sex" includes actions taken "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). Title VII further specifies that women "affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." *Id.* EEOC does not have substantive rulemaking authority to implement Title VII, but it has sometimes issued sub-regulatory guidance setting out the agency's position on the statute's reach.

45. Under Title VII and the PDA, a pregnant worker seeking accommodations for her pregnancy must show that the employer provides the accommodation to comparator workers who are limited in their ability to work for reasons unrelated to pregnancy. *See Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 229-30 (2015). Without this showing, Title VII does not require employers to affirmatively accommodate workers' pregnancies, childbirth, or pregnancy-related medical conditions.

46. The Americans with Disabilities Act (ADA), for its part, does require employers to offer affirmative accommodations to workers experiencing a qualifying disability. 42 U.S.C. § 12112(a). But only certain pregnancy-related conditions are pervasive or severe enough to qualify for such status. Normal, uncomplicated pregnancies do not constitute a protected disability, leaving many pregnant workers outside the ADA's scope. *See Spees v. James Marine, Inc.*, 617 F.3d 380, 396 (6th Cir. 2010) (collecting cases); *McCarty v. City of Eagan*, 16 F. Supp. 3d 1019, 1027 (D. Minn. 2014) ("reviewing case law in this and other circuits" and concluding

"the fact of pregnancy itself" is not a disability "within the meaning of the ADA"); *Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970, 975 (S.D. Iowa 2002) (similar).

47. The Family Medical Leave Act (FMLA) allows eligible employees to take up to twelve weeks of unpaid leave during a twelve-month period "[b]ecause of a serious health condition," such as pregnancy or childbirth. 29 U.S.C. § 2612(a)(1)(D). But the FMLA only applies to employees who have been employed "for at least 12 months by the employer with respect to whom leave is requested . . . and . . . for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A). Furthermore, an "employer may terminate" an employee who has "exhaust[ed] FMLA leave" and does not return to work after the statutory period. *Hasenwinkel v. Mosaic*, 809 F.3d 427, 432 (8th Cir. 2015); *accord Hearst v. Progressive Foam Techs., Inc.*, 682 F. Supp. 2d 955, 964 (E.D. Ark. 2010) ("If an employee fails to return, prior to, or immediately upon, the expiration of qualified FMLA leave, the right to reinstatement dissipates." (internal quotation marks omitted)).

48. In short, before the PWFA, federal employment law did not require employers to affirmatively accommodate limitations and conditions related to many workers' pregnancies. And although many States, including Tennessee, *see* Tenn. Code Ann. § 50-10-101, *et seq.*, and Arkansas, *see* Ark. Code Ann. §§ 16-123-102(1), 16-123-107(a), have enacted laws requiring employers to accommodate worker pregnancies, *see* 89 Fed. Reg. at 29,170-71 tbl.1 (collecting statutes), nearly half have not.

B. Lawmakers pass the PWFA to promote safe worker pregnancies while stressing no abortion coverage.

49. These gaps in consistent employment protections for pregnant workers across the country prompted federal lawmakers to propose, debate, and ultimately pass the PWFA. As the

debate over the law and enacted text make clear, the PWFA's protections for pregnancy do not authorize EEOC to require employers to accommodate elective abortions.

50. The statutory history of the PWFA overwhelmingly cuts against EEOC's abortion-mandate position. After years of attempts at advancing pregnancy accommodations, in 2021-2022, the U.S. House and Senate each considered and advanced bipartisan legislation that would later be enacted as the PWFA. These proposals required employers to accommodate limitations related to a worker's pregnancy, childbirth, or related medical conditions. Both likewise tasked EEOC with adopting regulations "providing examples" of reasonable accommodations to help implement the statute. Pregnant Workers Fairness Act of 2021, H.R. 1065, 117th Cong. § 4 (2021); Pregnant Workers Fairness Act of 2021, S. 1486, 117th Cong. § 4 (2021).

51. Throughout debate on the PWFA, lawmakers expressed agreement on the PWFA's singular intent—to accommodate pregnant workers to ensure healthy pregnancies and childbirth. After the PWFA's advancement from the Senate Health, Education, Labor, and Pensions Committee, Committee Chair Patty Murray stated that "[n]o one should be forced to decide between a healthy pregnancy and staying on the job—so we must pass the [PWFA] without delay."[16] Similarly, PWFA cosponsor Lisa Murkowski expressed her support for the bill's "commonsense accommodations . . . to ensure a healthy pregnancy and a healthy baby."[17]

52. Sponsoring lawmakers in the House emphasized that the PWFA would help ensure that women would not need to sacrifice continued employment for safe pregnancies. *See, e.g.*,

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[16] *Senate HELP Committee Advances Bipartisan Bills to Improve Suicide Prevention, Protect Pregnant Workers, and Support People with Disabilities*, S. Comm. on Health, Educ., Labor, & Pensions (Aug. 3, 2021), https://perma.cc/BP7Y-YYD9.

[17] Bob Casey, *Casey, Cassidy Introduce Bipartisan Pregnant Workers Fairness Act, Propose Protections Against Workplace Discrimination* (Apr. 29, 2021), https://perma.cc/J2NQ-J8AA.

167 Cong. Rec. H2346 (daily ed. May 14, 2021) (statement of Rep. Carolyn Maloney) ("No pregnant worker should have to choose between their and their baby's health or their job.").

53. Lawmakers supporting the PWFA also noted that the accommodations required—like providing a stool, or a water bottle, or additional bathroom breaks—would take little or no effort or expense by covered employers. *See, e.g.*, 168 Cong. Rec. S10081 (daily ed. Dec. 22, 2022) (statement of Sen. Bob Casey); 168 Cong. Rec. E1360 (Dec. 27, 2022) (statement of Rep. Suzanne Bonamici during extension of remarks). Senator Murray described the PWFA's purpose as "to provide basic, common sense, low cost, and even no cost accommodations," indicating that she could not "think of anything less controversial."[18]

54. Lawmakers' consideration of the PWFA likewise demonstrates that the legislation was *not* intended to accommodate abortions. Senator Bob Casey, the Senate sponsor of the bill, expressly rejected EEOC's current position: "under the Pregnant Workers Fairness Workers Act, the [EEOC] could not—could not—issue any regulation that requires abortion leave, nor does the act permit the EEOC to require employers to provide abortions in violation of State law." 168 Cong. Rec. S7050 (daily ed. Dec. 8, 2022). Senator Steve Daines echoed that statement, adding, "Senator Casey's statement reflects the intent of Congress in advancing the [PWFA] today. This legislation should not be misconstrued by EEOC or Federal courts to impose abortion-related mandates on employers, or otherwise to promote abortions, contrary to the intent of Congress." 168 Cong. Rec. S10081 (daily ed. Dec. 22, 2022). Senator Cassidy likewise "reject[ed] the characterization that [the PWFA] would do anything to promote abortion." 168 Cong. Rec. S7050 (daily ed. Dec. 8, 2022). On the House side, proponents consistently billed the PWFA as giving "pregnant workers basic accommodations like an extra bathroom break and stool to sit on," 168

[18] *Republican Senator Blocks Murray-Casey-Cassidy Effort to Pass Pregnant Workers Fairness Act*, S. Comm. on Health, Educ., Labor, & Pensions (Dec. 8, 2022), https://perma.cc/WKP2-H4MS.

Cong. Rec. E1360 (Dec. 27, 2022) (statement of Rep. Suzanne Bonamici during extension of remarks), not forcing employers to accommodate employee abortions.

55. In debate, some lawmakers expressed concern that the PWFA as proposed lacked any express provisions protecting employers' religious exercise. *See, e.g.*, 166 Cong. Rec. H4512, H4515 (daily ed. Sept. 17, 2020) (statement of Rep. Virginia Foxx); 167 Cong. Rec. H2227 (daily ed. May 12, 2021) (statement of Rep. Guy Reschenthaler). These lawmakers pointed out that other employment laws, like Title VII, included carveouts to permit employers to engage in practices related to their religious beliefs.

56. In response, the PWFA's chief sponsors questioned how the law's accommodation requirement could implicate religious practice. *See, e.g.*, *H.R. 2547—Comprehensive Debt Collection Improvement Act; H.R. 1065—Pregnant Workers Fairness Act: Hearing before the House Rules Comm.*, 117th Cong. (2021), at 1:12:40-1:13:13 (statement of Rep. Jim McGovern, Committee Chair). Lawmakers emphasized that the PWFA did not and could not be read to require employers to accommodate employees' abortions. The PWFA's inapplicability to abortion could not be clearer from the lead-up to the statute's passage.

57. The broad spectrum of support that the PWFA received from civic organizations also supports the law's exclusion of elective abortion coverage. During PWFA's consideration in Congress, a wide range of organizations, including not only Planned Parenthood, NARAL, and the ACLU (pro-abortion groups), but also the pro-life U.S. Conference of Catholic Bishops and March of Dimes, supported the PWFA through congressional testimony, public statements, and open letters. *See* 168 Cong. Rec. S10081 (daily ed. Dec. 22, 2022) (statement of Sen. Bob Casey). This commentary generally stressed agreement with the PWFA's core purpose to ensure women

could safely continue working while pregnant.[19] None of these organizations contended that the PWFA would, or even could, require accommodations for abortion.

58. Shortly after these debates, in December 2022, the House and Senate passed and President Biden signed the PWFA as part of the year-end consolidated appropriations package. *See* Consolidated Appropriations Act, 2023, div. II, Pub. L. 117-328 (2022), 136 Stat. at 6084.

59. Tracking the PWFA's drafting history, the enacted text shows that the law does not cover the accommodation of elective abortions. As enacted, the PWFA requires employers to accommodate any "known limitation[s] ... related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000gg-1. The PWFA then defines "known limitation" as a "*physical or mental condition* related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions." *Id.* § 2000gg(4) (emphasis added).

60. The PWFA makes it unlawful for "covered" employers to discriminate against an employee with a "known limitation." Such discrimination includes: (1) refusing to provide reasonable accommodations; (2) forcing an employee to accept an accommodation that is not reasonable; (3) denying employment opportunities because of the employee's need for a reasonable accommodation; (4) forcing an employee to take paid or unpaid leave rather than providing a reasonable accommodation; or (5) taking an adverse employment action against an employee because they requested a reasonable accommodation. *Id.* § 2000gg-1. The statute nowhere mentions a need to accommodate elective abortions—let alone when such procedures are illegal within an employer's State.

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[19] *See, e.g.*, *PWFA Letter to Congress*, United States Conference of Catholic Bishops (Aug. 9, 2021), https://perma.cc/VEK8-MBNH (emphasizing that the PWFA "will make the workplace a safer environment for nursing mothers, pregnant women, and their unborn children").

61. The purpose of the PWFA is clear from its text: the law is intended to protect pregnant workers and their babies by directing that women receive workplace accommodations for "pregnancy, childbirth, or related medical conditions." *Id.*

II. EEOC Proposes a PWFA Rule That Would Require Employers to Accommodate Workers' Elective Abortions.

A. EEOC construes pregnancy related "medical conditions" to include abortion.

62. Congress charged EEOC with adopting a rule to implement the PWFA. Contrary to the statute's text and lawmakers' express rejection of the idea that the PWFA could mandate abortion accommodations, EEOC proposed a rule that would require covered employers—including States—to accommodate abortions, including elective abortions illegal under state law. 88 Fed. Reg. 54,714 (Aug. 11, 2023).

63. The Proposed Rule stated that "having . . . an abortion" constitutes an "example[] of pregnancy, childbirth, or related medical condition[]." *Id.* at 54,774. The implications of mandating abortion accommodations are immense: covered employers would be required to support and devote resources, including by providing extra leave time, to assist employees' decision to terminate fetal life. *Id.* at 54,730.

64. The PWFA and EEOC's Proposed Rule apply to "covered entities," which include public or private employers with fifteen or more employees, unions, employment agencies, and the Federal Government. *Id.* at 54,719; *see also id.* at 54,754 ("covered entities" under the PWFA and proposed rule "include all employers covered by Title VII and the Government Employee Rights Act of 1991"). That encompasses about 117 million employees of private employers, 18.8 million State and local government employees, and 2.3 million federal employees. *Id.* at 54,755.

65. Given the PWFA's expansive coverage, EEOC had to acknowledge that the Proposed Rule would increase costs for employers. *Id.* at 54,759. But the agency offered no "data

on the average cost of reasonable accommodations related specifically to pregnancy, childbirth, or related medical conditions." *Id.* Instead, EEOC's estimate of the Proposed Rule's cost rested on two inapt data sets—data about the number of U.S. workers who *give birth* to a child annually (not all workers who become pregnant) and data about the cost of accommodating individuals with disabilities (not including the cost of abortion accommodations). *Id.* at 54,747-59.

66. EEOC neither identified nor attempted to quantify *any* costs associated with accommodating abortions. Instead, it predicted that compliance obligations would be "simple and no-cost like access to water, stools, or more frequent bathroom breaks"—*i.e.*, costs associated with maintaining a healthy pregnancy, not terminating one. *Id.* Similarly, EEOC speculated that non-zero expenses would "involve durable goods such as additional stools, infrastructure for telework, and machines to help with lifting," with each accommodation costing $60 per year. *Id.*

67. Based on these underinclusive assumptions, EEOC estimated that annual accommodation costs would amount to between $6 million and $18 million for private employers, between $0.8 million and $2.4 million for state and local governments, and between $0.3 million and $0.8 million for the federal government. *Id.* Those numbers didn't include administrative costs associated with "rule familiarization, posting new equal employment opportunity posters, and updating EEO policies and handbooks," which the Commission estimated would amount to $300.39 million for all covered employers. *Id.* at 54,760-61. And EEOC estimated "one-time" compliance costs, ignoring the continuing costs associated with accommodating abortions. *Id.*

68. As for the Proposed Rule's application to religious employers, EEOC recognized that "[r]eligious entities *may* have a defense to a PWFA claim under the First Amendment or the Religious Freedom Restoration Act (RFRA)." *Id.* at 54,746 (emphasis added). But EEOC also asserted that RFRA does not apply in suits involving only private parties, read the ministerial

exception narrowly, and suggested that the PWFA incorporates Title VII's religious exemption but does "not categorically exempt religious organizations from making reasonable accommodations" under the PWFA. *Id.* at 54,747. The Proposed Rule also failed to acknowledge that First Amendment protections sweep beyond religious organizations to all employers with religious objections, *cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), creating a potential free-exercise problem.

69. The Proposed Rule's list of examples of reasonable accommodations only highlighted the proposal's discordance with conscience rights and religious expression, as well as with state laws outlawing or restricting abortions. A reasonable accommodation could also include "paid" leave "for medical treatment," *id.* at 54,781-82, 54,791, which EEOC's proposal reads to include time off to obtain an elective abortion. In fact, the Proposed Rule made clear that an employer could not deny the use of paid leave to terminate a pregnancy if it generally allowed employees to use paid leave for reasons unrelated to obtaining an abortion. *Id.* at 54,728 & n.90.

70. EEOC also failed to acknowledge that abortion is generally illegal in many States that are covered employers. Instead, it devoted one brief paragraph to addressing the Proposed Rule's "federalism implications," concluding it has *none*. *Id.* at 54,765.

71. Tracking the statute, EEOC's Proposed Rule subjects States and other covered employers to liability under the same regime that governs Title VII claims. *Id.* at 54,745; *see also id.* at 54,772 (purporting to abrogate States' Eleventh Amendment immunity). Ultimately, an employee may sue and seek money damages from her state employer for failure to accommodate an elective abortion. *Id.* at 54,770-72.

72. In 2021, the Department of Justice warned that this purported waiver of state sovereign immunity presented "constitutional concerns" because "Congress's authority to

abrogate state sovereign immunity is limited" under Section 5 of the Fourteenth Amendment. Ex. C, Ltr. From U.S. Dep't of Justice, Office of Leg. Affairs, to The Hon. Robert C. Scott, Chairman, Cmte. on Educ. & Labor 1 (May 3, 2021) (DOJ Section 5 Letter). DOJ noted that while the PWFA raised "substantial litigation risk," a focus on "the right against gender discrimination" could help "bolster" the law's "constitutionality." *Id.* at 4. Yet EEOC's Proposed Rule did not explain how subjecting States to suit for failing to accommodate illegal, elective abortions could satisfy Section 5 muster in light of DOJ's warnings. Nor could it, given the U.S. Supreme Court's recognition that "a State's regulation of abortion is not a sex-based classification." *Dobbs*, 597 U.S. at 236.

B. Commenters point out the Proposed Rule's significant legal defects.

73. The Proposed Rule's inclusion of abortion accommodations generated opposition in over 54,000 comments. 89 Fed. Reg. at 29,104.

74. Plaintiff Tennessee's comment letter, joined by nineteen co-signing States, argued that the Proposed Rule lacked statutory authority, violated the U.S. Constitution, and was arbitrary and capricious in violation of the APA. *See generally* Ex. B, Tenn. Comment. Tennessee later echoed these concerns to the Office of Information and Regulatory Affairs at a March 12, 2024 meeting regarding EEOC's proposed rule.

75. *First*, Tennessee contended that the PWFA's text, structure, purpose, and drafting history made clear that the statute does not authorize EEOC to require employers to accommodate employee abortions. *Id.* at 2-4. Nor could EEOC's interpretation overcome the major-questions doctrine and constitutional avoidance principles. *Id.* at 5.

76. *Second*, Tennessee highlighted three constitutional barriers to EEOC's interpretation. It argued that the Proposed Rule exceeded federalism limits by conscripting state employees and funds to support a pro-abortion agenda that conflicts with state laws. Tennessee further objected that the Proposed Rule threatened to infringe employers' First Amendment rights

by compelling pro-abortion speech and indirect funding of abortion. Third, Tennessee urged that EEOC is unconstitutionally structured because the insulation of its leaders from at-will removal violates Article II. *Id.* at 6-8.

77. *Finally*, Tennessee argued that EEOC had violated the APA by neglecting several important aspects of the regulatory problem, such as forcing pro-life States that have generally prohibited abortion to affirmatively accommodate it, and by glossing over any costs associated with implementing the abortion-accommodation mandate. *Id.* at 8-9.

78. Several commenters agreed that the PWFA's text, structure, context, and drafting history did not support the Proposed Rule.[20]

79. Other commenters focused on religious or conscience-based objections to the Proposed Rule. Democrats for Life of America, for example, argued that the rule could subject it to a host of legal requirements that would "undermine its very existence as a pro-life organization," such as requiring the organization to offer its employees abortion leave.[21] Other organizations, such as the Christian Employers Alliance, highlighted the Proposed Rule's failures to include "any conscience and free-speech exemptions" or to clarify the contours of its religious exemption, predicting that the Proposed Rule could chill speech and religious expression.[22] A group of Catholic medical associations argued the Proposed Rule's use of the "vague phrase, 'related medical condition,'" and "'non-exhaustive'" list of such conditions "extend[ed] far beyond

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[20] *See, e.g.*, Alliance Defending Freedom, Comment at 4-9 (Oct. 2, 2023) (arguing, for example, that EEOC's interpretation of "related medical conditions" to encompass "any aspect of sexual or reproductive health" would render the term "childbirth" superfluous), https://perma.cc/2C7Q-GH3T; Heritage Foundation, Comment at 3-9 (Oct. 10, 2023) ("Abortion is not a 'medical condition,' rather it is the immoral and intentional ending of an innocent human life[.]"), https://perma.cc/WS2Y-2NRU.

[21] Comment at 3 (Oct. 10, 2023), https://perma.cc/8K8E-JU2Z.

[22] Comment at 2 (Oct. 10, 2023), https://perma.cc/6XAQ-PTQK; *see also* U.S. Conference of Catholic Bishops & The Catholic Univ. of Am., Comment at 8-18 (Sept. 27, 2023) ("[T]he proposed regulations do not adequately implement language in the Act that exempts religious organizations from any obligation to make an accommodation that conflicts with their religious beliefs."), https://perma.cc/P9Y5-7CUY.

medical conditions actually related to pregnancy" to "activities for which there exist [federal] conscience protections."[23]

80. Still others objected to EEOC's failure to consider the "extensive costs of its proposal," especially the accommodation of an "expansive list of conditions," including abortions and "often complex, lengthy, and unsuccessful" fertility treatments, as well as the cost of providing equivalent benefits for pregnancy and disability if employers offer abortion benefits.[24]

81. Members of both congressional houses likewise objected that EEOC was exceeding the authority granted to it under the PWFA by imposing an illegal abortion mandate. The PWFA's lead Republican co-sponsor in the Senate, Bill Cassidy, highlighted the pre-passage agreement of his Democrat co-sponsor, Bob Casey, that "under the act, . . . the EEOC, could not—could not—issue any regulation that requires abortion leave" or "require employers to provide abortions in violation of State law."[25] By acting otherwise, Senator Cassidy commented, EEOC had "ignored the statute and substituted its views on abortion for those of Congress."[26] Similarly, the U.S. House of Representatives' Committee on Education and the Workforce commented that the "PWFA [d]oes [n]ot [a]pply to [a]bortions" and rebuked EEOC for "issu[ing] regulations contrary to the statute itself."[27]

82. Senator Braun likewise objected to EEOC's proposed extension of its abortion-accommodation mandate to States.[28] Noting that the Supreme Court in *Dobbs* "reserve[d] to the States the ability" to regulate abortion, Senator Braun urged EEOC to "harmonize the Eleventh

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[23] Nat'l Catholic Bioethics Ctr., Catholic Med. Ass'n, & Nat'l Ass'n of Catholic Nurses, USA, Comment at 4 (Oct. 10, 2023) (quoting 88 Fed. Reg. at 54,720), https://perma.cc/TS6N-65HL.
[24] *See* Ethics & Public Policy Ctr., Comment at 37-38 (Oct. 10, 2023), https://perma.cc/35AF-JXCJ.
[25] Comment at 2 (Sept. 29, 2023) (quoting 168 Cong. Rec. S7050 (daily ed. Dec. 8, 2022)), https://perma.cc/L4F8-K2K6.
[26] *Id.* at 1.
[27] The Hon. Virginia Foxx, Comment at 1-2 (Oct. 10, 2023), https://downloads.regulations.gov/EEOC-2023-0004-97966/attachment_1.pdf.
[28] *See* The Hon. Mike Braun, Comment (Oct. 10, 2023), https://perma.cc/7YMZ-JXEF.

Amendment" with its proposal by "revis[ing] any interpretation" that "would compel States or entities within States to violate law that protects life."[29]

III. EEOC Finalizes Its Abortion-Accommodation Rule Over Widespread Opposition.

83. By a divided vote of 3 to 2, EEOC issued its final rule for publication on April 19, 2024. *See* Ex. A, EEOC, *Implementation of Pregnant Workers Fairness Act*, 89 Fed. Reg. 29,096 (Apr. 19, 2024).[30] Despite overwhelming public criticism and disapproval of EEOC's proposal to cover elective abortions, EEOC's Final Rule enshrines a new mandate requiring employers to accommodate employees' elective abortions. *See id.* at 29,104 (discussing "inclusion of abortion in the definition of 'pregnancy, childbirth, or related medical conditions'" (capitalization altered)).

84. The Final Rule acknowledges that the statute is silent on abortion. *See id.* at 29,111. It nonetheless sources EEOC's authority to require abortion accommodations in employers' duties to "make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee." *Id.* at 29,183 (citing 42 U.S.C. § 2000gg-1(1)). The Final Rule defines "reasonable accommodation" to include an employee's right to use paid or unpaid leave to address a "known limitation under the PWFA," as well as the right to choose "whether to use paid leave ... or unpaid leave to the extent" such leave is available for non-PWFA reasons. *Id.* at 29,185 (29 C.F.R. § 1636.3(i)(3)).

85. As EEOC notes, the PWFA defines "known limitation" as a "physical or mental *condition* related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions." *See id.* (29 C.F.R. § 1636.3(a) (emphasis added)). Yet rather than address the plain meaning of the phrase "medical condition," EEOC asserts that the phrase might include "an

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[29] *Id.* at 4.

[30] Riddhi Setty, *Final EEOC Protections for Pregnant Workers Cover Abortion*, Bloomberg Law (Apr. 15, 2024), https://perma.cc/W52Q-L9Y6.

impediment or problem"—a category EEOC defines to capture an employee who "has a need or a problem related to maintaining their health" or "seek[s] health care related to pregnancy." *See id.* (29 C.F.R. § 1636.3(a)(2)). With this understanding, the Final Rule asserts that "having or choosing not to have an abortion" is a "medical condition." *Id.* at 29,101; *see also id.* at 29,183 (29 C.F.R. § 1636.3(b)). EEOC nowhere addresses how a voluntary procedure that terminates a pregnancy for non-medical reasons could constitute a "medical condition."

86. Instead, to justify this reading, EEOC states that a few courts in a span of decades have interpreted anti-discrimination language in Title VII, as amended by the PDA, to bar employers' taking adverse actions against employees because they "contemplated having, or chose to have, an abortion." *Id.* at 29,110, 29,152 n.296. EEOC also cites informal guidance it has issued interpreting Title VII to prohibit discrimination based on a woman's choice to obtain an abortion. *E.g.*, *id.* at 29,152 n.296. From there, EEOC reasons that this prior interpretation of Title VII is "settled," such that Congress must have intended to carry it forward in an accommodation statute. *Id.* at 29,106; *accord id.* at 29,191 n.23.

87. EEOC's prior-meaning argument nowhere grapples with the fact that relevant Title VII language is different—most notably because it goes beyond covering "medical condition[s]" to bar discrimination against any woman "affected by pregnancy." *See* 42 U.S.C. § 2000e(k). Nor does EEOC dispute that its "settled" judicial consensus comprises only a small handful of pre-*Dobbs* lower court cases or that the agency's prior Title VII guidance was merely informal because EEOC lacks authority to issue substantive rules interpreting Title VII. Otherwise, EEOC does not cite any support, textual or otherwise, for its view that Congress was aware of and intended to implement EEOC's view about the prior meaning of different language in the PDA to mandate

abortion accommodations in the PWFA. To the contrary, EEOC acknowledges that multiple sponsors of the bill insisted it would *not* require abortion accommodations. 89 Fed. Reg. at 29,109.

88. The Final Rule acknowledges the prospect that its abortion-accommodation mandate would conflict with state laws limiting abortion. But rather than view this as reason to question its expansive reading, EEOC says any such "interaction or conflict between PWFA and State laws ... will be addressed on a case-by-case basis." *Id.* at 29,112. The Final Rule likewise declines to confront the ways in which its abortion-accommodation mandate might infringe employers' and employees' protected religious-liberty or free speech rights, opting instead to relegate constitutional defenses to "a case-by-case analysis." *Id.* at 29,144, 29,148, 29,151, 29,220 n.206. Yet in predicting how that analysis might proceed, EEOC suggests that enforcing the Final Rule to further accommodations would constitute a "compelling interest" sufficient to override employers' protected rights. *Id.* at 29,150 & n.261.

89. The Final Rule purports to calculate the costs associated with EEOC's new mandate. But it declined to account for *any* added expenses in States with existing "PWFA-type statutes." *Id.* at 29,159. Instead, EEOC simply assumed that the Final Rule would impose *no added costs* on employers in those States. *Id.* at 29,173-74 tbls.3-4. EEOC dismissed Tennessee's comment that this approach "did not account for the fact that these State statutes do not permit accommodations for abortions" as unsupported "with data or case law." *Id.* at 29,159. EEOC did not explain what data or case law could have been offered to prove this negative or why the Tennessee Attorney General's comment and state laws prohibiting the funding and provision of abortion were not sufficient bases to substantiate Tennessee's concern.

90. Because of this accounting, the Final Rule excludes any costs associated with its expansive PWFA mandate as applied to 11.5 million State and local governmental employees

(61% of State and local governmental employees in total) and 61.2 million private sector employees (52% of covered private sector employees in total). *Id.* at 29,173-74 tbls.3-4. The result undercounts the Final Rule's coverage costs by many millions. *Id.* And in assessing compliance and implementation costs, the Final Rule presumes that human resource officers in States with "PWFA-type statutes" will need less than an hour to understand the lengthy Final Rule's novel federal requirements. *Id.* at 29,176 tbl.9. The Final Rule further presumes that covered entities will not "need legal advice," *id.* at 29,160, even while acknowledging throughout that the Rule's application could raise particular factual, constitutional and state-law concerns that will require analysis on a "case by case" basis, *supra* ¶¶ 88, 91. Even so, the Final Rule predicts that covered employers will incur total one-time administrative costs of over $450 million. 89 Fed. Reg. at 29,176 tbl.9.

91. EEOC concluded that the Final Rule "does not have 'federalism implications.'" 89 Fed. Reg. at 29,182. Yet elsewhere, EEOC acknowledges that requiring States to accommodate abortions could create conflicts with state laws that it would address "on a case-by-case basis." *Id.* at 29,112.

92. EEOC did not address comments questioning its constitutional power to subject States to money damages and other remedies for failing to accommodate elective abortions. *Id.* at 29,113. Instead, the Final Rule states only that "Congress did not vote to remove the section of the PWFA that waives State sovereign immunity." *Id.* EEOC's Final Rule confirms that States "will not be immune under the 11th Amendment to actions brought under the PWFA" and will be liable "both at law and in equity" to "the same extent [as] any other public or private entity." *Id.* at 29,182.

93. EEOC's Final Rule has a 60-day effective date, meaning it will take effect on June 18, 2024. *Id.* at 29,096.

94. Commissioner Lucas dissented from the issuance of the Final Rule and issued a statement criticizing the Commission majority's "controversial" and "misguided" decision and use of "linguistic gymnastics" to "broaden the scope of the statute in ways that ... cannot reasonably be reconciled with the text." Ex. D, Andrea R. Lucas, Comm'r, Equal Emp. Opportunity Comm'n, Statement re: Vote on Final Rule to Implement the Pregnant Workers Fairness Act (Apr. 15, 2024), at 1, 16.

95. The Commission erred from the start, Commissioner Lucas stated, by "skipping straight to" selected "interpretive canons instead of first resolving whether any textual ambiguity exists." *Id.* at 5. On the text, Commissioner Lucas pointed out that the "ordinary meaning" of the term "condition" is a "state of health" or "malady or sickness," meaning the PWFA requires only "accommodation of medical conditions—states of health or illness—that are created or aggravated by pregnancy and childbirth." *Id.* at 10-11. "[C]ontrary to the final rule's definition, a medical 'condition' is not the same as medical 'procedures.'" *Id.* at 11. Commissioner Lucas thus disagreed with the Final Rule's interpretation of the term "medical *condition*" to include "specific treatments, medications, or medical procedures," and EEOC's broader "attempt[] to transform the PWFA into an omnibus female reproduction disability statute." *Id.* at 11 n.11.

96. Separately, Commissioner Lucas rejected EEOC's "misleading[]" characterization of the prior regulatory and judicial interpretations of the phrase "pregnancy, childbirth, or related medical conditions." *Id.* at 4, 16. EEOC marshaled only "thin support" for its interpretation, which Commissioner Lucas reasoned was "not sufficient to show a 'settled consensus' such that Congress should be presumed to have known of and endorsed it." *Id.* at 6.

97. Members of Congress likewise objected to the Final Rule's coverage of abortion accommodations. Rep. Virginia Foxx stated that "[a]dding this controversial provision into the PWFA is wrong. Period. Abortion is not a medical condition related to pregnancy; it is the opposite."[31] Sen. Bill Cassidy criticized the Final Rule's decision to "inject abortion into a law specifically aimed at promoting healthy childbirth" as "shocking and illegal."[32]

PLAINTIFFS' IMPENDING IRREPARABLE HARM

98. With around 42,000 employees, of whom more than half are women,[33] the State of Tennessee regularly has pregnant employees. Although the State offers many benefits and accommodations to its pregnant workers, including parental leave as well as paid sick leave that may be used for medical reasons, the State does not offer accommodations for employees to pursue elective abortions that are illegal under state law.

99. The State of Arkansas employs roughly 30,200 people, more than half of whom are women.[34] Like Tennessee, Arkansas too offers many benefits and accommodations for its pregnant employees and new mothers, including sick and medical leave. But Arkansas does not offer leave or travel accommodations for employees to pursue elective abortions that are illegal under state law. Indeed, the Arkansas Constitution specifically prohibits the State from offering leave or travel accommodations for employees to pursue elective abortions.

100. Other Plaintiff States likewise employ substantial numbers of women; regulate abortion by, among other things, generally prohibiting abortion except in specified medical

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[31] Breccan F. Thies, *Biden Administration Finalizes Pregnant Workers' Rule with Abortion 'Political Agenda'*, Wash. Examiner (Apr. 15, 2024), https://perma.cc/Z5D4-W5WS.

[32] *Id.*

[33] Tenn. Dep't of Hum. Res., Tenn. State Gov't, *2023 State of the State Employee Annual Report*, https://perma.cc/53EZ-EPR5 (indicating that 21,591 women work in the state executive branch).

[34] *See* Transparency.Arkansas.gov, Ark. Dep't of Fin. and Admin, *Full Employee Salaries Data* (Apr. 10, 2024), https://perma.cc/FP6F-AKLY.

circumstances; and either do not provide or prohibit the provision of leave or other accommodations for employees to obtain elective abortions. *See supra* pp. 5-14.

101. Requiring that States create unprecedented accommodations for women seeking abortions, irrespective of whether a woman has a pregnancy related medical condition, would irreparably harm Tennessee, Arkansas, and their co-plaintiff States.

102. *First*, EEOC's Final Rule will imminently force the Plaintiff States to incur various costs, including those associated with lost productivity, shift covering, and provision of additional leave days, among others. Additionally, the Plaintiff States would incur human resources and other compliance costs related to managing these accommodations, informing employees about available benefits, and updating employee materials to reflect the accommodation for abortions.

103. To the extent any of the above costs could be rectified with money damages, the Plaintiff States expect that EEOC will assert sovereign immunity, making such damages unrecoverable and creating "irreparable" harm. *See Commonwealth v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023); *Wages & White Lion Invs., LLC. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015); *see also* 5 U.S.C. § 704.

104. *Second*, on top of unrecoverable compliance costs, EEOC's abortion-accommodation mandate fundamentally infringes on the sovereignty of the States. The citizens of Tennessee, Arkansas, and several co-Plaintiff States, through their respective elected representatives, have prohibited or limited abortion with rare exceptions. *See, e.g.*, *supra* pp. 5-14. And both Tennessee law and the Arkansas Constitution prohibit using public funds to finance the provision of or otherwise support elective abortions. *See* Tenn. Code Ann. § 9-4-5116; Ark. Const. amend. LXVIII, § 3. The Supreme Court has recognized that States may regulate abortions to further their legitimate interests. Such interests include:

> respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

Dobbs, 597 U.S. at 301.

105. By coercing States to facilitate abortions, the Rule forces Tennessee, Arkansas, and their co-plaintiff States to violate their policies of regulating abortion to protect unborn life and the interests above, creating irreparable harm. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (a state suffers "irreparable injury" where it is prevented "from effectuating statutes enacted by representatives of its people") (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020) ("Prohibiting the State from enforcing a statute properly passed . . . would irreparably harm the State."); *Kentucky v. Biden*, 23 F.4th 585, 611 n.19 (6th Cir. 2022) ("[I]nvasions of state sovereignty . . . likely cannot be economically quantified, and thus cannot be monetarily redressed."); *Tennessee v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807, 840-41 (E.D. Tenn. 2022) (collecting cases recognizing similar sovereignty harms). Indeed, preventing "a state from enforcing laws enacted by the people's representatives—and" particularly preventing Arkansas from enforcing and abiding by "constitutional provisions approved by the people themselves—amounts to a well-recognized variant of irreparable injury." *Sinner v. Jaeger*, 467 F. Supp. 3d 774, 786 (D.N.D. 2020).

106. Additionally, requiring the Plaintiff States to adopt policies facilitating abortions unconstitutionally impairs their interests in protecting their messaging with respect to the primacy of protecting fetal life and the damages caused by abortion. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (*NIFLA*) ("By requiring petitioners to inform women how

they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of petitioners' speech."); *cf. Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 216 (2015) ("With respect to specialty license plate designs, Texas is not simply managing government property, but instead is engaging in expressive conduct.").

CLAIMS FOR RELIEF
CLAIM I
Violation of APA, 5 U.S.C. § 706(2)(A), (C)
The Rule Contravenes the Pregnant Workers Fairness Act

107. Plaintiffs repeat and incorporate by reference the preceding allegations.

108. EEOC is a federal agency within the meaning of the APA.

109. The Final Rule is a final agency action within the meaning of 5 U.S.C. § 704, Plaintiff States lack another adequate remedy to challenge the Final Rule in court, and no rule requires that the States appeal to a superior agency authority prior to seeking judicial review.

110. The APA requires courts to set aside agency action that is "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

111. The Final Rule contravenes the governing statutory provisions in the Pregnant Workers Fairness Act, Pub. L. 117-328 (2022), 136 Stat. 6084, as well as the structure of the statute, and its drafting history. *See U.S. ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) (setting aside regulations beyond statutory authority).

112. *First*, on the text, the PWFA requires employers to accommodate any "known limitation[s]," defined as a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions." *See* 42 U.S.C. § 2000gg(4). An elective abortion is neither a known limitation nor a medical condition, but a voluntary, time-limited

procedure intended to terminate a pregnancy. Under the *ejusdem generis* canon, moreover, the general term "related medical condition" is best read to refer to conditions like the specific terms—"pregnancy" and "childbirth"—that it follows. Interpreting "related medical condition" to include a procedure that terminates pregnancy and prevents childbirth—*i.e.*, extending coverage to the opposite concept from the specifically listed terms—thus conflicts with the provision's text. *See Ark. Times LP v. Waldrip*, 37 F.4th 1386, 1393 (8th Cir. 2022) (en banc) (applying *ejusdem generis* canon to limit reading of similar general provision).

113. *Second*, on structure, EEOC's interpretation conflicts with the federal statutory prohibitions on abortion funding—including those passed alongside the PWFA. For instance, in around one dozen provisions that Congress passed with the PWFA, Congress barred appropriated monies and federal entities from supporting, requiring, performing, or facilitating abortions. *See* Ex. B, Tenn. Comment, at 3 n.1 (collecting statutes). Title VII similarly specifies that employers need not offer abortion coverage through their insurance plans. 42 U.S.C. § 2000e(k). The longstanding Hyde and Weldon Amendments likewise limit the federal government's ability to fund or mandate the provision of abortions outside of certain medically related scenarios. *See* Consol. Appropriations Act of 2022, Pub. L. No. 117-103, §§ 506-507, 136 Stat. 49, 496; Consol. Appropriations Act of 2010, Pub. L. No. 111-117, § 508(d)(1), 123 Stat 3034, 3280. These contextual considerations belie the Final Rule's view that EEOC has authority to force States to effectively subsidize abortions sought by their workers. By construing the PWFA to encourage, and even coerce States and private employers to facilitate, abortions, EEOC's Rule conflicts with a clear federal policy of limiting federal involvement in abortions.

114. *Third*, the PWFA's drafting history forecloses EEOC's attempt to add abortion accommodations to its ambit. As detailed above, key sponsors of the PWFA uniformly rejected

any notion that EEOC could require employers to accommodate abortions—let alone do so irrespective of medical need and in States where elective abortion procedures are generally illegal.

115. Nor, for several reasons, can EEOC permissibly claim deference to its interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). EEOC does not identify—let alone purport to resolve—any ambiguity with respect to the meaning of "related medical conditions." *Supra* ¶¶ 85-86. And EEOC's interpretation flouts the major-questions doctrine, which requires "clear congressional authorization" before an agency may decide an issue of great "economic and political significance." *West Virginia v. EPA*, 597 U.S. 697, 721, 723 (2022). That rule bars EEOC's interpretation here, as the Supreme Court has recognized that abortion regulations "concern matters of great social significance and moral substance," yet EEOC lacks clear power to enshrine abortion rules. *Dobbs*, 597 U.S. at 300. So too, the Supreme Court's "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (per curiam) (citation and quotation marks omitted). Again, the PWFA lacks the clarity EEOC needs before upending States' traditional prerogative to regulate abortion issues. In addition, "[c]onstitutional avoidance trumps . . . *Chevron*." *Union Pac. R. Co. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885, 893 (8th Cir. 2013). And here EEOC's interpretation raises a panoply of constitutional problems. *See infra* Claim II.

116. Even if this Court applied the *Chevron* framework to the PWFA, EEOC still could not smuggle novel abortion-accommodation requirements into employment law nationwide. At so-called Step Two of the *Chevron* inquiry, courts ask if the agency's construction is reasonable. *See City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013) (noting that agency construction must

be "within the bounds of reasonable interpretation"). Accordingly, "an agency interpretation that is 'inconsisten[t] with the design and the structure of the statute as a whole' . . . does not merit deference." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)). Here, the PWFA's language and structure, as well as the unrefuted statements of congressional members about its purpose, indicate that Congress designed the PWFA to promote healthy pregnancies, not elective abortions.

117. Alternatively, to the extent EEOC's abortion-accommodation mandate would survive review under the *Chevron* doctrine, the *Chevron* doctrine should be reconsidered. *Cf. Loper Bright Enters. v. Raimondo* (U.S. No. 22-451) (cert. granted May 1, 2023) (presenting question "[w]hether the Court should overrule Chevron").

118. In short, EEOC's abortion-accommodation mandate exceeds the agency's statutory authority and is thus invalid under the APA. Allowing EEOC to enforce this invalid rule would cause irreparable harm to the Plaintiff States. The abortion-accommodation mandate should be enjoined and ultimately "set aside" on this basis. 5 U.S.C. § 706(2).

CLAIM II
Violation of U.S. Constitution and 5 U.S.C. § 706(2)(B)
The Final Rule Violates Federalism, State Sovereignty, and the First Amendment

119. Plaintiffs repeat and incorporate by reference the preceding allegations.

120. EEOC's Final Rule is "contrary to constitutional right [or] power," 5 U.S.C. § 706(2)(B), in at least three independent respects.

121. *First*, EEOC's Rule transgresses the U.S. Constitution's federalism limits. "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Reflecting this "fundamental principle," *id.*, the Tenth Amendment to the U.S. Constitution provides that "[t]he powers not

delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," U.S. Const. amend. X. The federal government "may not conscript state governments as its agents," *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 472 (2018), including by "dictat[ing] what a state legislature may and may not do," *id.* at 474. And while Congress may regulate the States as employers, it cannot do so in a way "that is destructive of state sovereignty." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985). EEOC's Final Rule violates these principles by strongarming States into promoting and implementing a federal preference for abortions that are illegal under state law.

122. *Second*, by subjecting States to damages suits for failing to accommodate abortions contrary to state law, the Final Rule violates Section 5 of the Fourteenth Amendment. Congress's Section 5 power to abrogate sovereign immunity "extends *only* to 'enforc[ing]' the provisions of the Fourteenth Amendment." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Citing this limit, DOJ warned lawmakers that the PWFA's abrogation of state sovereign immunity presented "significant litigation risk" because pregnancy discrimination is not sex discrimination *per se*. *See* DOJ Section 5 Letter, at 1-2. That reasoning precludes EEOC's ability to abrogate States' sovereign immunity for failure to accommodate elective abortions, since neither the Due Process Clause, nor the Equal Protection Clause, nor any other provision of the Constitution confers heightened protection of abortion rights. *See Dobbs*, 597 U.S. at 292; *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974).

123. *Third*, EEOC's Final Rule contradicts the First Amendment's protection of speech and religious liberty. The Final Rule's requirement that employers accommodate elective abortions requires employers and their employees to speak and affirmatively engage in conduct in a way that facilitates abortion, even if contrary to regulated parties' viewpoints and deeply held

religious beliefs. The Final Rule's anti-interference provisions likewise risk penalizing States for carrying out policies and messaging that aim to protect fetal life and discourage abortion. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 596 (2023) ("No government . . . may affect a speaker's message by forcing her to accommodate other views." (cleaned up)). EEOC does not dispute this; instead, it shirks its obligation to address these patent concerns in the rulemaking by stating religious-liberty considerations can be addressed later, on a "case-by-case" basis. *See supra* ¶ 88.

124. Plaintiffs therefore seek an order declaring that the PWFA cannot constitutionally be read to authorize the Final Rule's required abortion accommodations as well as an order enjoining and setting aside the Rule's abortion-accommodation mandate and any related anti-interference provisions.

CLAIM III
Violation of APA, 5 U.S.C. § 706(2)(A)
The Final Rule Is Arbitrary and Capricious

125. Plaintiffs repeat and incorporate by reference the preceding allegations.

126. Agency actions are arbitrary and capricious when they "entirely fail to consider an important aspect of the problem or offer an explanation for its decision that runs counter to the evidence before it." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 682 (2020) (cleaned up) (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)). In promulgating the Final Rule, EEOC violated this requirement of reasoned agency decision-making.

127. *First*, EEOC has overlooked several important aspects of the regulatory problem. Among other things, EEOC has not addressed the federalism concerns associated with forcing States to accommodate and effectively fund abortions, including those that are illegal under state law. EEOC concedes that an "action taken by an employer pursuant to the PWFA could

potentially implicate State law," and that such conflicts "will be addressed on a case-by-case basis." 89 Fed. Reg. at 29,113. Such case-by-case adjudication of a State's "legitimate interests" in regulating abortion invites courts to "'substitute their social and economic beliefs for the judgment of legislative bodies.'" *Dobbs*, 597 U.S. at 300, 301 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)). Still, EEOC asserts the Final Rule "does not have 'federalism implications.'" 89 Fed. Reg. at 29,182.

128. *Second*, EEOC has not meaningfully assessed the ways in which its inclusion of abortion in the PWFA's scope would infringe employers' and employees' protected religion and speech rights. EEOC recognizes that the Final Rule could implicate employers' and employees' rights under the First Amendment's Free Exercise Clause or the Religious Freedom Restoration Act. *Supra* ¶ 88. But EEOC sweeps aside such conflicts for resolution later on a "case-by-case basis." *Id.* (collecting citations). And while EEOC at one point disputes that its Final Rule implicates speech at all, 89 Fed. Reg. at 29,152, elsewhere EEOC notes a workplace statement about an employee's requested accommodation could give rise to liability for "harass[ment]," *id.* at 29,148 & 29,218. Blackletter administrative-law principles required EEOC to grapple with these considerations before finalizing the Rule. Yet EEOC failed to do so, and nowhere justified the legality of its proposal in light of the serious constitutional issues it presents.

129. *Third*, EEOC severely underestimates the costs associated with implementing the abortion-accommodation mandate. EEOC's economic analysis assumes that the Final Rule will impose no added costs in the many States, like Tennessee and Arkansas, that already protect pregnant workers. *Supra* ¶¶ 89-90. But Tennessee, Arkansas, and other cited States do not extend their protections to accommodating elective abortions; indeed, in Arkansas's case, the State's constitution specifically prohibits providing such accommodations, while Tennessee law also

forbids the funding of abortion except in limited circumstances. Nowhere does EEOC attempt to quantify the costs associated with extending pregnancy-accommodation provisions to the number of women who obtain abortions annually—a figure pro-abortion groups have estimated at 860,000 per year. *E.g.*, Br. of *Amici Curiae* Am. College of Obstetricians & Gynecologists *et al.* 9, *Dobbs*, 597 U.S. 215. Nor does EEOC adequately account for the far different compliance obligations and costs the Final Rule will require of human resources officials in these States.

130. EEOC's failure to consider these important aspects of the regulatory problem renders the abortion-accommodation mandate arbitrary and capricious under the APA and warrants enjoining and setting aside the Final Rule in relevant part.

CLAIM IV
Violation of U.S. Constitution and 5 U.S.C. § 706(2)(B)
EEOC's Independent Structure Violates Article II and the Separation of Powers

131. Plaintiffs repeat and incorporate by reference the preceding allegations.

132. EEOC's putative status as an "independent federal agency"—*i.e.*, whose heads are insulated from at-will removal by the President—violates Article II and the Separation of Powers.

133. Article II of the Constitution vests "'the executive Power'—all of it"—in the President. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. Const. art. II, § 1). As a corollary, the Constitution demands that the President maintain the ability "to remove those who assist him in carrying out his duties." *Id.* (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513-14 (2010)).

134. This requirement of at-will removal applies to all "multimember expert agencies" that "wield substantial executive power." *Id.* at 2199-200 (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)). If "an agency does important work," Article II demands its leaders to be removeable by the President—full stop. *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021).

135. Courts and EEOC itself have interpreted the agency's governing statute—which provides for five-year terms for Commissioners, 42 U.S.C. § 2000e-4(a)—as allowing removal only for cause. *See, e.g.*, *Lewis v. Carter*, 436 F. Supp. 958, 961 (D.D.C. 1977). This means the President lacks power to remove EEOC Commissioners based on policy disagreement; instead, only instances of malfeasance, inefficiency, or neglect of duty would qualify. *See, e.g.*, 12 U.S.C. § 5491(c)(3), *held unconstitutional by Seila Law*, 140 S. Ct. 2183.

136. EEOC, however, wields an array of "quintessentially executive power[s]," including the authority to issue binding regulations and pursue enforcement actions in federal court on behalf of the United States. *Cf. Seila Law*, 140 S. Ct. at 2200; *see also Collins*, 141 S. Ct. at 1785-86. EEOC's sweeping abortion-accommodation mandate in the Final Rule, which will bind most of the Nation's employers, is just one example.

137. EEOC's independent-agency structure thus violates the Constitution, which permits application of removal protections only to those multimember bodies who "perform[] legislative and judicial functions and [are] said not to exercise any executive power." *Seila Law*, 140 S. Ct. at 2199. Alternatively, as a matter of constitutional avoidance, this Court should declare that EEOC's organic statute, which provides only for a term-of-years appointment, does not implicitly confer for-cause-removal protection. *See, e.g.*, *Calcutt v. FDIC*, 37 F.4th 293, 337-39 (6th Cir. 2022) (Murphy, J., dissenting), *rev'd on other grounds by* 598 U.S. 623 (2023) (per curiam).

138. EEOC's unlawful structure renders its rules unlawful and requires setting aside the Final Rule as void. *See Seila Law*, 140 S. Ct. at 2196; *see also Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023) (being subjected to "unconstitutionally insulated" agency decisionmaker is "here-and-now injury").

CLAIM V

Relief Under the Declaratory Judgment Act, 28 U.S.C. § 2201 and 5 U.S.C. § 706

Claim for Declaratory Judgment Against EEOC

139. Plaintiffs repeat and incorporate by reference the preceding allegations.

140. The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a).

141. This case presents an actual controversy. The Final Rule operates on Plaintiff States directly in their capacity as employers, meaning the Final Rule's requirements affect Plaintiffs' legal rights and obligations. Moreover, the imminent enforcement of the Final Rule against Plaintiffs would subject them to money damages and other relief for failure to provide abortion accommodations that conflict with state law and policy.

142. This controversy arises in this Court's jurisdiction, as it relates to questions of federal law. Venue is proper, as Plaintiff the State of Arkansas resides in this District and the Final Rule affects employment operations in this District. 28 U.S.C. § 1391(e).

143. Through this Complaint, the Plaintiff States have filed an appropriate pleading to have their rights declared. The Court can resolve this controversy by declaring that the PWFA does not authorize EEOC to impose the Final Rule's abortion-accommodation mandate.

PRAYER FOR RELIEF

An actual controversy exists between the parties that entitles the Plaintiff States to declaratory and injunctive relief. Plaintiffs request that this Court:

a) Enter a judgment declaring the Final Rule's abortion-accommodation mandate to conflict with the Pregnant Workers Fairness Act and setting aside the Rule as unlawful under 5 U.S.C. § 706;

b) Enter a judgment declaring the Final Rule's abortion-accommodation mandate to be *ultra vires* and invalid under the U.S. Constitution and the APA and setting aside the Rule as unlawful under 5 U.S.C. § 706;

c) Enter a judgment declaring the Final Rule's abortion-accommodation mandate to be arbitrary and capricious under the APA and vacating and remanding the Rule to EEOC under 5 U.S.C. § 706;

d) Enter a judgment declaring the Final Rule to be *ultra vires* and invalid under the U.S. Constitution and the APA because EEOC's independent commission structure violates Article II and the Separation of Powers and setting aside the Rule as unlawful under 5 U.S.C. § 706;

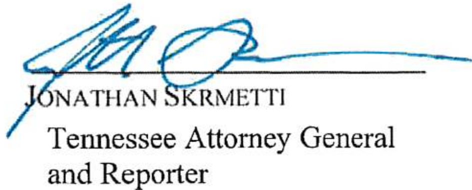
e) Enter a preliminary injunction enjoining EEOC, and any other agency or employee of the United States, from enforcing or implementing the Final Rule's abortion-accommodation mandate pending this Court's issuance of a Final Judgment on Plaintiffs' claims and/or enter a stay of the Final Rule's effective date under 5 U.S.C. § 705;

f) Vacate and set aside the Final Rule as unlawful under 5 U.S.C. § 706 and permanently enjoin EEOC, and any other agency or employee of the United States, from enforcing or implementing the Final Rule's abortion-accommodation mandate; and

g) Grant any other equitable or nominal relief the Court deems just and proper, as well as reasonable attorneys' fees and the costs of this action.

Dated: April 25, 2024

Respectfully submitted,



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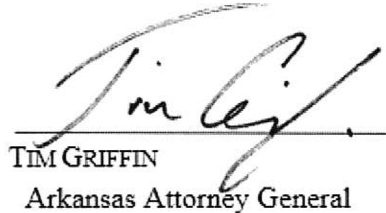

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