AMERICAN CIVIL LIBERTIES UNION FOUNDATION

October 10, 2023

Raymond Windmiller
Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507
Attn: PWFA NPRM, RIN 3046-AB30

Submitted electronically

Re: Proposed Rule at 88 Fed. Reg. 54,714, RIN 3046-AB30,
"Regulations to Implement the Pregnant Workers Fairness Act"

Dear Mr. Windmiller,

The American Civil Liberties Union ("ACLU") submits these comments on the proposed rule published at 88 Fed. Reg. 54,714 (proposed Aug. 11, 2023), RIN 3046-AB30, with the title "Regulations to Implement the Pregnant Workers Fairness Act" (the "Proposed Rule" or "Rule").

For more than 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee to everyone in this country. With more than 3 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

The Proposed Rule meets the historic moment presented by the Pregnant Workers Fairness Act ("PWFA"), the first dedicated federal statute enacted in 45 years to address the civil rights of workers affected by pregnancy, childbirth, and related medical conditions. The statute recognizes the myriad ways in which pregnancy and capacity for pregnancy still impede equality, as well as the shortcomings of existing federal protections in addressing those barriers. Having litigated one of the first successful pregnancy accommodation cases under the 1978 Pregnancy Discrimination Act ("PDA"),[1] and having continued to litigate such cases both as

[1] *Lochren v. County of Suffolk*, No. 2:01-cv-3935 (ARL) (E.D.N.Y.); *see also* "Jury Finds Suffolk County Discriminates Against Pregnant Officers," ACLU Press Release (June 14, 2006), available at https://www.aclu.org/press-releases/jury-finds-suffolk-county-police-department-discriminates-against-pregnant-officers.

direct counsel and as *amicus* representing workers in fields ranging from law enforcement to retail to health care,[2] the ACLU understands the critical role the PWFA has to play in assuring that the roughly 3 million pregnant people in the workforce each year – and the millions more who are affected by related medical conditions – can stay on the on the job. It is our hope that the PWFA will help give rise to a new workplace model that integrates pregnancy as a normal condition of employment.

The Proposed Rule admirably advances these objectives in numerous respects, and provides much-needed guidance to employer and employees alike about the new law's wide-ranging provisions. To that end, we propose that the EEOC make the following changes in the Rule so as to maximize workers' ability to obtain the accommodations they need to continue their career trajectories, sustain their economic well-being, and remain healthy, while encouraging active employer engagement in identifying mutually-satisfactory solutions:

- Maintain abortion's inclusion in the definition of a "related medical condition," and explicitly add perimenopause and menopause to that definition;
- Clarify and expand the definition of the employee "communication" that is sufficient to make "known" their qualifying limitation;
- Revise the definition of "in the near future" and retain, and codify, the prohibition on combining periods of leave pre- and post-partum when calculating period of temporary suspension of essential functions;
- Revise the Proposed Rule with respect to leave as an accommodation and accommodation of lactation, and provide additional examples of "reasonable accommodations" in the Proposed Interpretive Guidance, including examples of reasonable lactation accommodations beyond the protections provided under the PUMP Act;
- Expand the accommodations deemed "predictable assessments of undue hardship" as well as clarify that certain additional employer defenses are insufficient bases for claiming undue hardship;
- Clarify and strengthen the processes and procedures employers must follow when engaging in the "interactive process" to identify and implement reasonable accommodations;

[2] *See*, *e.g.*, *Young v. United Parcel Serv., Inc.*, No. 12-226 (U.S.) (*amicus*); *Curlee v. AT&T Mobility Servs., LLC*, No. 23-10572 (11th Cir.) (direct counsel); *Durham v. Rural/Metro Corp.*, No. 18-14867 (11th Cir.) (direct counsel); *Equal Emp. Opportunity Comm'n v. Wal-Mart Stores East, L.P.*, No. 22-3202 (7th Cir.) (*amicus*); *Freyer v. Frontier Airlines, Inc.*, No. 1:19-cv-03468 (D. Colo.) (direct counsel); *Hicks v. City of Tuscaloosa*, 16-13003 (11th Cir.) (*amicus*); *LaCount v. South Lewis SH OPCO*, No. 17-5075 (10th Cir.) (*amicus*); *Luke v. CPlace Forest Park SNF, L.L.C.*, No. 16-30992 (5th Cir.) (*amicus*); *Hills v. AT&T Mobility Servs., LLC*, No. 3:17-cv-00556 (N.D. Ind.) (direct counsel); *Hodgkins v. Frontier Airlines, Inc.*, No. 1:19-cv-03469 (D. Colo.) (direct counsel).

- Lessen the burden on workers to provide supporting documentation to support their need for accommodation; and
- Retain the limited interpretation of the statute's exemption with respect to religious organizations' preferencing coreligionists in granting accommodation requests.

Although the following discussion chiefly focuses on those areas in which the ACLU believes the Rule can be improved, we reiterate our overriding approval of the Rule's rigorous, thoughtful approach to the complexity of workers' lives, as well as to the legitimate business needs of employers.

I. THE EEOC'S DEFINITIONS OF "LIMITATIONS" THAT RELATE TO, ARE AFFECTED BY, OR ARISE OUT OF "PREGNANCY, CHILDBIRTH, OR RELATED MEDICAL CONDITIONS" ARE APPROPRIATELY BROAD (SECTION 1636.3(b))

The EEOC's definitions of the "limitations" encompassed by the PWFA and of "pregnancy, childbirth, and related medical conditions" is admirably, and appropriately, expansive. The ACLU also applauds the EEOC's statement that its list of pregnancy-related conditions is "non-exhaustive," *see* Section 1636.3(b), 88 Fed. Reg. 54,767, and further, that the worker "does not have to specify a condition on this list or use medical terms to describe a condition in order to be eligible for a reasonable accommodation." *Id.* We especially appreciate the express recognition that a "limitation" may be "modest, minor, and/or episodic," Section 1636.3(a)(2), Fed Reg. 54,767, in light of the barriers faced under existing law by pregnant workers whose "related medical condition" constitutes a "normal" symptom of pregnancy, such as nausea and fatigue, and falls well short of qualifying as a disability under the Americans with Disabilities Act ("ADA").

Abortion is appropriately included as a "related medical condition." In particular, the ACLU strongly supports the inclusion of abortion among the list of pregnancy-related conditions that may appropriately require accommodation. Such inclusion is rooted in forty-five years of legislative, administrative, and judicial authority interpreting the PDA, the statute whose protections the PWFA seeks to expand.

Indeed, in enacting the PDA in 1978, Congress expressly confirmed its intent to protect workers from discrimination for obtaining abortion care, and the EEOC codified that intended reading.[3] Also from the time of the PDA's enactment, the EEOC was explicit that although the

[3] *See* H.R. Conf. Rep. No. 95-1786, at 4 (1978) ("Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion."). *See also Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Introduction (1979) (hereinafter, *Q&A on the PDA*) ("A woman is therefore protected against

statute does not require employers to provide health insurance for abortion care generally, it does require them to provide such coverage where the life of the pregnant person is endangered or where the person experiences medical complications arising from abortion, and further, that benefits like paid sick days must be extended to workers obtaining abortion if such benefits are provided for workers who are absent due to other medical conditions.[4] In its 2015 guidance on pregnancy discrimination, the EEOC reaffirmed that abortion is a "related medical condition" under the PDA and that the statute protects not just workers who have abortions, but also protects workers from being pressured by an employer to have an abortion in order to avoid adverse employment consequences.[5] Finally, as the Commission notes in the Proposed Interpretive Guidance, abortion consistently has been found to be encompassed within the PDA's scope. App. A, 88 Fed. Reg. 54,774 n.11.

In light of such extensive authority, the EEOC correctly recognizes that there is no basis to interpret "pregnancy, childbirth, or related medical conditions" differently under the PWFA. Indeed, in expressly seeking to supplement the protections currently afforded to workers under the PDA, the new statute is properly read to incorporate the caselaw and other authority interpreting the PDA's identical language.[6]

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such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion.").

[4] *Q&A on the PDA*, *supra* n.3, Introduction.

[5] U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015) ("Title VII protects women from being fired for having an abortion or contemplating having an abortion. . . . Title VII would similarly prohibit adverse employment actions against an employee based on her decision not to have an abortion. For example, it would be unlawful for a manager to pressure an employee to have an abortion, or not to have an abortion, in order to retain her job, get better assignments, or stay on a path for advancement." (internal citations omitted)).

[6] The inclusion of abortion as a "medical condition" related to pregnancy fits comfortably within the authority Congress delegated to the EEOC. Indeed, by providing examples of conditions that may require reasonable accommodations, the EEOC does precisely what Congress has authorized and directed it to do. *See* Sec. 2000gg-3(a) (the EEOC's regulations "*shall* provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions" (emphasis added)). That is not to say that the inclusion of abortion is not important. It is well established that agencies can and must resolve issues of public importance in implementing the statutes that Congress has delegated them the authority to interpret and enforce. As the Supreme Court recognized, that is "what [an administrative agency] does." *Biden v. Missouri*, 142 S. Ct. 647 (2022) (upholding the Secretary of Health and Human Service's vaccination mandate for facilities receiving Medicare and Medicaid funding where the Secretary was authorized to broadly to impose conditions on the program). Moreover, as discussed *supra*, in adopting the terms "pregnancy, childbirth, and related medical conditions" from the PDA, Congress gave no indication that it intended to alter their longstanding meaning,

Accommodation of abortion under the PWFA, including accommodation of the need for leave to obtain abortion care, could not be more critical to workers' health at this moment. As a consequence of the U.S. Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), hundreds of thousands of people seeking abortion will now need to take time off from work to obtain it, whether because they need to travel to another state, are required to make multiple visits to their provider, or both. Indeed, even before *Dobbs*, nearly ten percent of abortions – more than 80,000 in 2020 alone – were obtained by people who had to travel to see a provider outside of their home state.[7] As of this writing, fourteen states have total or near-total bans on abortion, and seventeen others have various other severe restrictions in place that range from bans well before viability, to laws requiring multiple, medically unnecessary trips to the provider to receive gratuitous and often inaccurate state-mandated "counseling," and onerous regulations that are shuttering clinics and thus further limiting access to care.[8]

The upshot of these policies has been the proliferation of abortion deserts in large swaths of the country, with people in abortion-restrictive states faced with the prospect of having to travel hundreds of miles to access care. For example, one study comparing average travel time for people seeking abortion care pre- and post-*Dobbs* documented dramatic increases in travel time for people in restrictive states. It demonstrates that in Louisiana, for instance, where a near-total ban is in effect (and, for those few categories of procedures that are permitted, imposes a requirement of two visits to the provider), the average one-way travel time increased from roughly fifty-five minutes to an average of roughly nine hours, while in Texas, another state with a near-complete ban and two-visit requirement, the average one-way travel time ballooned from approximately three hours to more than seven hours.[9]

Accordingly, although abortion is one of the safest medical procedures available, in the post-*Dobbs* landscape, obtaining abortion care will nevertheless necessitate significant time off for workers who must travel long distances. The ACLU is aware of certain critics who have cited state laws outlawing abortion as a basis for potentially diminishing workers' entitlement to leave

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which the EEOC has consistently interpreted to include abortion. *In re Nw. Airlines Corp*., 483 F.3d 160, 169 (2d Cir. 2007) ("We . . . assume that Congress passed each subsequent law with full knowledge of the existing legal landscape" (citing *Miles v. Apex Marine Corp*., 498 U.S. 19, 32 (1990).

[7] Guttmacher Inst., *Even Before Roe Was Overturned, Nearly One in 10 People Obtaining an Abortion Traveled Across State Lines for Care* (July 2022).

[8] *See*, *e.g.*, Guttmacher Inst., *Interactive Map: U.S. Abortion Policies and Access After Roe* (current Oct. 3, 2023).

[9] Benjamin Rader, *et al.*, *Estimated Travel Time and Spatial Access to Abortion Facilities in the U.S. Before and After the Dobbs v. Jackson Women's Health Decision*, 328 J. Am. Med. Assn. 2041 (Nov. 22/29, 2022).

as an accommodation under the PWFA, where such leave is sought to travel across state lines to receive abortion care in a state where it is legal and available.[10] But any attempt to premise denial of PWFA entitlement on state law runs afoul of numerous constitutional guarantees, including the right to travel, and would not be a permissible basis for denying an otherwise reasonable accommodation that does not impose an undue hardship.[11]

Despite these protections, prosecutors in abortion-hostile jurisdictions have threatened to investigate and criminalize abortion care even when that medical care was legally obtained. Because of these threats, employees who need an accommodation related to abortion care may decline to request one out of fear that providing this information could expose them to criminal liability. The Proposed Rule's narrow standards as to the supporting documentation that employers may permissibly seek in assessing an accommodation request – standards that, as we argue in Section VII, should be clarified and strengthened – are necessary not only to protect workers from their *employers'* value judgments about and potential interference with their medical decisions, but also to reduce the potential that a request for an accommodation might lead to unwarranted intrusions by the *government* into those decisions.

Perimenopause and menopause should be expressly included as "related medical conditions." We applaud the EEOC's inclusion of "menstrual cycles" as "related medical conditions" that employers are obligated to accommodate. Our reproductive lives last for decades, and our needs will differ at various points during those years, not to mention from pregnancy to pregnancy. Consistent with that reality, we urge the EEOC to add perimenopause and menopause to the list of "related medical conditions." While we recognize that the list of examples is non-exhaustive, and that both of these conditions arguably fall within a reasonable construction of "menstrual cycles," the documented dismissiveness that perimenopausal and menopausal women face from their employers demands eliminating any ambiguity and making those conditions' coverage explicit.[12] Like menstruation, like infertility, and like the use of birth

[10] Some critics also have raised the specter of an employer's facilitating a worker's travel for abortion care, pursuant to a fringe benefits scheme, while denying such travel to obtain other pregnancy-related services. While the ACLU is unaware of any such policies or practices, it would consider such disparate treatment to be a violation of both the PDA and PWFA.

[11] The U.S. Constitution protects the fundamental right of individuals to "travel freely" among the states. *Saenz v. Roe*, 526 U.S. 489, 500-01 (1999) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)). Indeed, the right to travel has been "firmly established" and "repeatedly recognized" in U.S. Supreme Court jurisprudence, and is so "fundamental" and "elementary" that it was "conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *Guest*, 383 U.S. at 757-58; *see also Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring) (even if a state may criminalize abortion within its borders, it may not criminalize "traveling to another State to obtain an abortion").

[12] The ACLU obtained a favorable settlement on behalf of one such employee, Aisha Coleman, after appealing the district court's ruling that Ms. Coleman's firing – after experiencing an

control – all of which are specifically included in the Proposed Rule – perimenopause and menopause are related to a worker's capacity for pregnancy, and expressly including them will provide valuable guidance to employers and the millions of affected workers.[13] Recent studies confirm what most of us already know: that these symptoms can last for years, and can interfere with work in myriad ways.[14] Without accommodation, these symptoms can and will prompt older workers to simply leave the workforce rather than continue to attempt to manage them on their own.

II. THE EEOC SHOULD CLARIFY AND EXPAND THE DEFINITION OF THE EMPLOYEE "COMMUNICATION" THAT IS SUFFICIENT TO MAKE "KNOWN" THEIR QUALIFYING LIMITATION (SECTION 1636.3(a)(1), (c), & (d); DIRECTED QUESTION NO. 1)

We applaud the Proposed Rule for recognizing that power imbalances and other workforce dynamics warrant an expansive definition of how a qualifying limitation may be "communicated" – and thereby made "known" – to their employer, as directed by the PWFA. Most people either are ill-informed about their workplace rights or reluctant to assert them, or both, but this is particularly true for low-wage workers, teenagers, immigrants, and non-native English speakers.

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unexpected period at work due to perimenopause – failed to state a claim under the PDA because perimenopause was not a "related medical condition." *Coleman v. Bobby Dodd Institute*, No. 17-13023 (11th Cir.).

[13] Indeed, given that irregular periods are a "hallmark" of perimenopause, and further that the transitional stage of perimenopause may last for years, the lines between "menstrual cycles," perimenopause, and menopause are hardly bright ones. Mayo Clinic, "Perimenopause," available at mayoclinic.org/diseases-conditions/perimenopause/symptoms-causes/syc-20354666.

[14] *See*, *e.g.*, Korn Ferry Inst. & Vera Health, *Understanding the Role of Menopause in Work and Careers* (Sept. 2023) (nearly half of participants reported six or more different perimenopause/menopause symptoms impacting them at work, while the majority felt that their perimenopause/menopause needs were not supported by their employers); Stephanie S. Faubion, MD, *et al.*, "Impact of Menopause Symptoms on Women in the Workplace," *Mayo Clinic Proceedings* (Apr. 26, 2023) (among study participants, roughly 15 percent had either missed work or reduced their hours because of menopause symptoms, with Black women and Latinas reporting the worst symptoms and adverse work outcomes); Carrot Fertility, *Menopause in the Workplace* (Sept. 27, 2022) (20 percent of study participants reported losing work hours because of menopause symptoms, and 70 percent had considered some form of work change, such as switching to a part-time schedule or retiring early, due to menopause symptoms). *See also* Marcy Lynn Karin, *Addressing Periods at Work*, 16 Harv. L. & Pol'y Rev. 449 (2022) (surveying medical and workplace effects of periods, perimenopause, and menopause).

Accordingly, we appreciate the Interpretative Guidance's specific direction that a worker, applicant, or their representative[15] need not use "magic words" or legalese to put their employer on notice of their need for reasonable accommodation (*e.g.*, "I need a reasonable accommodation of my pregnancy-related limitation"). Indeed, many of the illustrative examples in the Proposed Interpretive Guidance reflect the real-world circumstances in which a worker may notify their employer of a pregnancy-related need for accommodation (*e.g.*, "I'm having trouble getting to work at my scheduled starting time because of morning sickness." App. A, 88 Fed. Reg. 54,775, Ex. 1636.3 #1; "An employee tells a human resources specialist that they are worried about continuing to lift heavy boxes because they are concerned that it will harm their pregnancy." *Id.* #3.)

We also support the Proposed Rule's specific directive that an oral communication is sufficient to place the employer on notice, Section 1636.3(d)(1), 88 Fed. Reg. 54,767, and that the employer "may not require that the communication be in writing, in any specific format, or on any particular form in order to be considered 'communicated to the employer.'" *Id.*, Section 1636.3(d)(2).

In one key respect, however, the Rule's language is at odds with the letter and spirit of these provisions, and places too heavy a burden on the worker to set in motion the requisite interactive process. Section 1636.3(d) of the Rule states that "[c]ommunicated to the employer" means a worker "has made *the request for accommodation* to the covered entity . . . ." 88 Fed. Reg. 54,767 (emphasis added). The Rule states, in turn, in Section 1636.3(d)(3), that to "[r]equest an accommodation," the worker must "communicate to the covered entity that the employee . . . : (i) Has a limitation, and (ii) *Needs an adjustment or change* at work." Fed. Reg. 54,767 (emphasis added).

Framing the requisite communication as a "request" presupposes a worker's knowledge of their right to such modifications, and demanding that the worker convey a "need" for a modification similarly assumes that the worker even is aware of an entitlement to have their "needs" met by the employer. Both definitions place the burden on the worker to affirmatively ask for an accommodation, even if they have provided the employer with sufficient information to understand that an accommodation is needed. As illustrated by the above-cited examples in the Interpretive Guidance, in the normal course, a worker may simply inform the employer a problem posed by the pregnancy-related condition without proposing a solution to that problem, and the EEOC appears to agree that such notice is sufficient to make a limitation "known."

We further propose that the EEOC conform the language of the Rule – which currently requires that the worker make their limitation "known" to a "supervisor, manager, someone who has supervisory authority for the employee," Section 1636.3(d) – with the Interpretive Guidance,

[15] For simplicity, unless otherwise noted, any further references to "worker" or "employee" incorporates both "applicant" and a worker's "representative."

which appropriately states that employees may effectively communicate their needs to "the people who assign them daily tasks and whom they would normally consult if they had questions or concerns." Fed. Reg. 54,775.

For all of these reasons, a better approach would be to modify Section 1636.3(d) and Section 1636.3(d)(3), as follows:

> Section 1636.3(d). "Communicated to the employer" means an employee or applicant, or a representative of the employee or applicant, *has communicated to the covered entity that the employee or applicant*:
>
> (i) *Has a limitation* <u>*that*</u>
> *(ii)* <u>*Necessitates*</u> *an adjustment or change at work.*
>
> . . . .
>
> Section 1636.3(d)(3). *Communication with the covered entity means to communicate with a supervisor, manager, someone who* <u>*directs the employee's daily tasks*</u> ~~*has supervisory authority for the employee*~~ *(or the equivalent for the applicant), or human resources personnel, or by following the steps in the covered entity's policy to request an accommodation*.

Finally, we note that the Rule's definition of "representative" is circular – "a family member, friend, health care provider, or *other representative* of the employee or applicant" – and use of the term misleadingly suggests that a formal designation is required (e.g., "X has asked me to speak with you"). We propose that "other representative" be replaced with, "person who communicates to the employer the needs of the employee or applicant." Additionally, "co-worker" and "manager" should be added to the list of specific individuals who meet the definition of "representative." We also urge the inclusion of a requirement that the representative have the worker's permission to communicate the limitation.

III. THE EEOC SHOULD REVISE THE DEFINITION OF "IN THE NEAR FUTURE" AND SHOULD RETAIN, AND CODIFY, THE PROHIBITION ON COMBINING PERIODS OF LEAVE PRE- AND POST-PARTUM WHEN CALCULATING PERIODS OF TEMPORARY SUSPENSION OF ESSENTIAL FUNCTIONS (SECTION 1636.3(f)(2)(ii); DIRECTED QUESTION NO. 2)

We thank the EEOC for the thoughtful framework it has set out to determine whether an employee or applicant is "qualified" if they cannot perform one or more essential functions. Pregnancy's inherently temporary nature is a critical component in assessing the burdens posed by any accommodation, and accordingly, an appropriate basis for assessing whether a worker is "qualified," notwithstanding the temporary inability to perform an essential function of the job,

so long as that function may be performed "in the near future." Section 1636.3(f)(2)(ii).

We also agree that forty weeks is an appropriate outer limit for defining "in the near future for limitations arising prior to pregnancy and during pregnancy, for the reasons described in the Proposed Interpretive Guidance. App. A, 88 Fed. Reg. 54,777-78.

We recommend, however, that the definition of "in the near future" post-pregnancy be specifically changed in the Proposed Rule, from forty weeks to one year, for the reasons detailed in the Proposed Interpretive Guidance. *Id.* The EEOC cites to important medical findings and state policies extending Medicaid coverage post-partum, all of which highlight the importance of the one-year threshold,[16] particularly for pregnant people who are at a higher risk, including Black women, who are three times as likely to die of pregnancy-related causes than white women.[17]

We further recommend that the principle stated in the Proposed Interpretive Guidance with respect to restarting the time frame for excusing an essential function with respect to each "limitation" a worker may experience, both pre- and post-partum, be specifically stated in the Rule itself. The individualized approach adopted throughout the Proposed Rules militates in favor of considering each accommodation request, and each potential need to be excused from an essential function, based on the specific limitation and essential function at issue.

IV. THE EEOC SHOULD REVISE THE RULE REGARDING LEAVE AS A REASONABLE ACCOMMODATION, AND SHOULD SUPPLEMENT THE INTERPRETIVE GUIDANCE TO PROVIDE ADDITIONAL ILLUSTRATIVE EXAMPLES OF "REASONABLE ACCOMMODATIONS" (SECTION 1636.3(i)(3)(iii); APP. A, 88 FED. REG. 54,779–54,781; DIRECTED QUESTION NO. 5)

The ACLU is heartened by the exceptionally expansive list of examples of "reasonable accommodations" provided in the Rule, Section 1636.3(i), 88 Fed. Reg. 54,768, and in the Proposed Interpretive Guidance. *See* App. A, 88 Fed. Reg. 54,781. As discussed further below, we propose two modifications to the Rule with respect to leave as an accommodation, as well two additions to the Interpretive Guidance's examples of reasonable accommodations.

Leave as a reasonable accommodation. We are especially supportive of the many circumstances in which leave is cited as a "reasonable accommodation" – so long as it is sought by the worker, rather than mandated by the employer – given the deplorable statistics concerning the percentage of U.S. workers who lack any access to job-protected sick days or other job-protected leave, the duration and variety of pregnancy and post-partum symptoms, and the

[16] 88 Fed. Reg. 54724-25 (Aug. 11, 2023).
[17] *Working Together to Reduce Black Maternal Mortality*, Centers for Disease Control and Prevention (Apr. 4, 2023), https://www.cdc.gov/healthequity/features/maternal-mortality/index.html.

disabling nature of recovery from childbirth. For instance, due to eligibility requirements, only 38 percent of low-wage workers are covered by the Family and Medical Leave Act ("FMLA"), while 63 percent of higher-earning workers are covered.[18] For these workers, taking even a few hours off to attend medical appointments, let alone taking days or weeks off to properly heal from a medical procedure or childbirth, could put them at risk for penalty or even job loss. While a comprehensive national paid leave regime of course would be the best solution to this reality, in the meantime, assuring that workers' jobs are protected when they must take time off because of pregnancy, childbirth, or related medical conditions is a critical step forward.

In order to best protect workers' well-being when they must take leave as an accommodation, we propose a revision to Section 1636.3(i)(3): The Rule currently directs that a covered entity has "[t]he ability to choose whether to use paid leave . . . or unpaid leave *to the extent that the covered entity allows employees using leave not related to pregnancy . . . to choose* . . . ." 1636.3(i)(3)(iii) (emphasis added). We respectfully suggest that, under the PWFA, whether these potential accommodations should be provided turns on the question of undue hardship to the employer, not comparison to how other employees are treated. Indeed, it was the tethering of pregnant workers' accommodation rights to those enjoyed by others "similar in their ability or inability to work" under the PDA, 42 U.S.C. § 2000e(k), that so often transformed pregnant workers' accommodation requests into adjudications of which colleagues were sufficiently "similar" to trigger the statute's protections, and so often resulted in those requests' denials. We also note that the EEOC's guidance regarding leave as an accommodation under the ADA recognizes that making modifications to existing leave policies – including, notably, the provision of leave even where an employer does not offer job-protected leave to other workers – may be a reasonable accommodation.[19] Accordingly, we urge the EEOC delete Section 1636.3(i)(3)(iii)'s reference to other employees.[20]

Furthermore, in response to Directed Question No. 5, 88 Fed. Reg. 54,748, the ACLU recommends two additional examples of "reasonable accommodations" be added to the Interpretive Guidance:

"No fault" attendance policies. A wide range of employers, in a wide range of industries, utilize attendance policies that purport to impose uniform penalties with respect to instances of absence – lateness, early departures, and missed days – regardless of reason. These penalties typically take the form of demerits or "points"; when a worker reaches a certain points threshold, their employment is terminated. These so-called "no fault" attendance policies are

[18] Scott Brown, *et al.*, *Leave Experiences of Low-Wage Workers*, produced for U.S. Department of Labor (Nov. 2020).
[19] U.S. Equal Emp. Opportunity Comm'n, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016).
[20] Of course, if other employees receive a particular accommodation, that may be evidence of that it imposes no undue hardship.

especially common in low-wage fields, like health care and retail, and in higher-wage, often unionized fields, such as construction, janitorial services, and transportation. Although it is difficult to know how many workers are subject to such policies, it is safe to say the number is in the tens of millions; one study of 66 large corporate employers maintaining such policies, including Wal-Mart, FedEx, and Tyson Foods, estimated that 18 million workers were affected at those companies alone.[21]

The ACLU has represented and interviewed a number of women whose pregnancies have triggered adverse consequences under such policies.[22] One client's experiences at a large retail employer exemplifies these difficulties. She had not yet worked for a year when she became pregnant and therefore was not yet eligible for FMLA leave, and received "points" throughout her pregnancy for late arrivals and absences caused by severe "morning sickness" and fatigue, as well as routine pre-natal visits. She also received a "point" when she was denied her request to reschedule until after her due date an offsite training that was several hours from her home and medical providers. Although her employer's attendance policy allowed workers to be absent without penalty for reasons ranging from jury duty to bereavement leave to ADA-qualifying disability, her employer deemed those workers insufficiently "similar" to her under the PDA to warrant her being similarly excused. Accordingly, our client had no ability to avoid numerous points – not to mention profound anxiety about her job security – until nearly her due date, when she finally qualified for FMLA leave.[23]

Given the prevalence of "no fault" policies – policies that the EEOC has opposed on many occasions in the ADA context[24] – we urge inclusion in the Interpretive Guidance of at least one example concerning a pregnant worker who is subject to such a policy. Such an example would have the added benefit of illustrating leave-related accommodations that are unpredictable

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[21] Dina Bakst, *et al.*, *Misled and Misinformed: How Some U.S. Employers Use "No Fault" Attendance Policies to Trample on Workers' Rights* (June 2020).

[22] Indeed, in April 2022, the EEOC issued a probable cause determination with respect to one such ACLU client, finding that AT&T Mobility's nationwide attendance policy violated the PDA. Charge No. 410-2019-01706.

[23] Our client nevertheless was fired for two subsequent pregnancy-related absences in the final weeks before her due date, notwithstanding records proving she had received emergency room treatment due to pregnancy complications, because the company deemed her medical certifications defective and provided insufficient guidance as to how to cure those defects.

[24] *See*, *e.g.*, *Equal Emp. Opportunity Comm'n v. Agropur, Inc.*, No. 1:21-CV-00765 (W.D. Mich.); *Equal Emp. Opportunity Comm'n v. AT&T Corp.*, No. 1:12-cv-0402 (S.D. Ind.); *Equal Emp. Opportunity Comm'n v. AutoZone, Inc.*, No. 14-cv-3385 (N.D. Ill.); *Equal Emp. Opportunity Comm'n v. Lifecare Medical Services, Inc.*, No. 5:13-cv-01447 (N.D. Ohio); *Equal Emp. Opportunity Comm'n v. Stanley Black & Decker, Inc.* No. 1:18-cv-02525 (D. Md.); *Equal Emp. Opportunity Comm'n v. Verizon Maryland, Inc.*, No. 1:11-cv-10832 (D. Md.).

and intermittent, as commonly is the case with respect to pregnancy symptoms like nausea, fatigue, migraines, and joint pain.

Accommodation of lactation other than time and space to pump. The enactment of the PWFA shortly after passage of the Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP") brought a welcome dual victory on behalf of pregnant and parenting workers that was years in the making. Having been on the front lines of advocating for both statutes, the ACLU applauds the EEOC's explicitly incorporating PUMP as the appropriate standard for accommodation of lactating workers' need for time and space to pump, and for otherwise detailing appropriate accommodations of pumping. Sections 1636.3(i)(4)(i) & (ii), 88 Fed. Reg. 54,768.

The ACLU believes, however, that there is potential for confusion among employees and employers alike as to the PWFA's scope with respect to lactation, given that it is co-extensive with PUMP, while also broader in certain key respects. For this reason, we propose the EEOC add a new Section 3(i)(4)(iii): "Any other job modification, including those identified in 1636.3(i)(2), that would remove barriers to producing or expressing human milk, breastfeeding, or chestfeeding; avoid or alleviate lactation-related health complications; or reduce the risk of contaminating human milk produced by the employee."

We further propose that Proposed Interpretive Guidance include one or more examples of lactation accommodations not covered by PUMP and required by the PWFA, so long as they would not impose an undue hardship on the employer, such as:

- Jocelyn, a railway conductor, returns to work after having her baby. She discovers that, because she is continuing to breastfeed, her uniform no longer fits her larger chest and is sometimes even painful to wear. She asks to be provided with a larger shirt and jacket.

- Ryan, a retail clerk, develops severe mastitis while nursing their baby. Their doctor diagnoses a breast abscess and recommends surgery, which will require up to two weeks of recovery time. Ryan seeks to take leave for the procedure and healing.

V. THE EEOC SHOULD EXPAND THE ACCOMMODATIONS DEEMED "PREDICTABLE ASSESSMENTS OF UNDUE HARDSHIP" AS WELL AS CLARIFY THAT CERTAIN ADDITIONAL EMPLOYER DEFENSES ARE IMPERMISSIBLE BASES FOR CLAIMING AN UNDUE HARDSHIP (SECTION 1363.3(j); DIRECTED QUESTION NO. 7)

The ACLU supports the Proposed Rule's inclusion of four "predictable assessments," four types of pregnancy-related accommodations commonly requested by workers that will, in nearly all instances, fall well short of imposing an undue hardship. Section 1636.3(j)(4), 88 Fed. Reg. 54,769. In response to the EEOC's Directed Question No. 7, 88 Fed. Reg. 54,748, we urge the EEOC to (1) make clear that predictable assessments with respect to undue hardship should be extended to also include accommodations requested due to childbirth and related medical conditions, not just due to pregnancy (and accordingly, to change the language of the Rule from ". . . . they are reasonable accommodations that will not impose an undue hardship under the PWFA when they are requested as workplace accommodations by an employee or applicant who *is pregnant*" to "who has a known limitation under the PWFA")[25]; and (2) add the following accommodations to the list of predictable assessments:

- Modifications to uniforms or dress code
- Minor physical modifications to a workstation, such as a fan or chair
- Allowing rest breaks, as needed
- Moving a workstation, such as to be closer to a bathroom or lactation space, or away from toxins
- Providing personal protective equipment
- Access to closer parking
- Eating or drinking at a workstation
- Time off to attend healthcare appointments related to pre-natal and post-natal care

We also support the discussion in the Proposed Rule and Proposed Interpretive Guidance regarding elements that *cannot* form the basis of an undue hardship defense, and make these additional suggestions with respect to Section 1636.3(j)(5), Fed. Reg. 54,769:

Assumptions about other workers needing accommodation. We applaud the EEOC for stating in the Proposed Rule that an employer may not establish an undue hardship defense based on its "mere assumption or speculation that other employees might seek a reasonable

[25] For the same reason, the language in Section 1636.3(l)(iii), enumerating the circumstances in which a request for medical documentation is not "reasonable under the circumstances," should be revised as follows: ". . . . When the employee or applicant ~~is pregnant~~ has a known limitation under the PWFA and the reasonable accommodation is one of those listed in paragraphs (j)(4)(i) through (iv) of this section and the employee has provided a self-attestation."

accommodation, or even the same reasonable accommodation, in the future." *Id.* This language should be strengthened so it does not suggest that an employer can establish such a defense in situations where it has *more* than a "mere assumption or speculation" that other employees will request a future accommodation. Whether an employer's belief is speculative or well-founded, an employer should never be allowed to deny an accommodation requested by any individual employee based on fears that it will have to provide reasonable accommodations to other employees in the future. Each accommodation decision must be made based on the need of the individual employee requesting the accommodation and the circumstances at hand.

Balancing numerous accommodation requests. Relatedly, we applaud the EEOC for making clear that "a covered entity that receives numerous requests for the same or similar accommodation at the same time . . . cannot deny all of them simply because processing the volume of current or anticipated requests is, or would be, burdensome or because it cannot grant all of them." Section 1636.3(j)(5), 88 Fed. Reg. 54,786. This directive, however, could be read to be in conflict with the EEOC's statement that, "The covered entity may point to past and cumulative costs or burden of accommodations that have already been granted to other employees when claiming the hardship posed by another request for the same or similar accommodation." *Id.* In the usual course, an employer's experience identifying accommodations for other workers should be considered to *diminish* the hardship involved in identifying appropriate modifications for the pregnant worker. Moreover, to permit an employer to wield as a defense its provision of accommodations to others would subvert the legislative purpose of the PWFA – namely, to avoid replicating the shortcomings of PDA precedent under which pregnant people were denied accommodations even as employers accommodated numerous others "similar in their ability or inability to work." As the U.S. Supreme Court framed the inquiry in *Young v. United Parcel Service, Inc.*, 575 U.S. 206, 232 (2015), "[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?" And indeed, the Court in *Young* held that an employer's denial of a requested accommodation "normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates." *Id.* at 229.

To the extent, however, that Section 1636.3(j)(5)'s "past and cumulative costs or burden" language concerns the distinct situation where an employer has previously attempted to extend the same requested accommodation to a worker with the same or similar limitation, but ultimately determined that the accommodation imposed an undue hardship, the ACLU agrees that the employer should not be obligated to implement an accommodation it knows to be unworkable. So as to guard against accommodation denials that baselessly invoke some variation of "we already tried that and it didn't work," and to assure that each new accommodation request is assessed on its own merits, we propose that the EEOC clarify that even in these circumstances, the employer is obligated to engage in the interactive process with respect to the requested accommodation, and specifically to verify whether the same conditions under which the past provision of the same accommodation imposed an undue hardship still exist.

Other workers' biases or negative attitudes not permissible factors. We also encourage the EEOC to make clear that the undue hardship analysis may not consider (1) other employees' biases regarding the affected employee's pregnancy, childbirth, or related condition, or (2) the possibility that the accommodation may trigger negative attitudes among other employees. These examples are similar to examples explicitly included in the ADA's interpretive guidance. Social science long has documented the unfortunate reality that pregnant workers and mothers face negative stereotypes as incompetent and uncommitted in contrast to their male colleagues who become fathers[26]; permitting such attitudes to form the basis of an undue hardship defense runs directly counter to the PWFA's statutory purpose of assuring pregnant people's workforce participation. The EEOC should encourage employers to enlist co-workers in recognizing the benefits of accommodating pregnancy, childbirth, and related medical conditions, not defer to their resistance.

VI. THE EEOC SHOULD CLARIFY AND STRENGTHEN THE PROCESSES AND PROCEDURES EMPLOYERS FOLLOW IN IDENTIFYING AND IMPLEMENTING REASONABLE ACCOMMODATIONS (SECTIONS 1636.3(k), 1636.4(a)(1), & 1636.3(h))

The PWFA's express incorporation of the requirement that employers engage in an "interactive process" with the affected employee aimed at identifying mutually satisfactory reasonable accommodations and overcoming any potential hardship to the employer is a critical component of the new statute. Pregnant workers routinely face reflexive denials of accommodation requests – often grounded in the misguided belief that their physical limitations demand "light duty," an ill-defined concept suggestive of sedentary clerical work unavailable in many physical demanding fields like retail, health care, janitorial, and manufacturing – followed by the ultimatum that they must either continue working without modification, or leave their job.

The EEOC's extensive discussion of various reasonable accommodations in both the Proposed Rule and the Interpretive Guidance goes a long way toward assuring that workers and employers alike are armed with creative, often easily-implemented solutions to various pregnancy-related limitations. The below proposals aim to provide additional guidance for conducting the interactive process efficiently as well as assure that workers receive adequate interim accommodations while the dialogue progresses.

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[26] *See*, *e.g.*, Jeanine L. M. Skorinko, *et al.*, *Overlapping Stigmas of Pregnancy, Motherhood, and Weight: Policy Implications for Employment and Higher Education*, 7 Policy Insights from the Behavioral and Brain Sciences 123 (2022); Michelle J. Budig, *The Fatherhood Bonus and the Motherhood Penalty: Parenthood and the Gender Gap in Pay*, Third Way (Sept. 2, 2014), available at https://www.thirdway.org/report/the-fatherhood-bonus-and-the-motherhood-penalty-parenthood-and-the-gender-gap-in-pay.

Revise the definition of "interactive process." Section 1636.3(k) currently frames the interactive process as being triggered by the worker who is "seeking an accommodation" making a "request" for such a change. As discussed in Section II, above, this overly formulaic approach unduly burdens the worker and is inconsistent with the EEOC's otherwise expansive descriptions of the kinds of worker communications that are sufficient to make a qualifying limitation "known." The ACLU proposes the following revisions in order to harmonize Section 1636.3(k) with its proposed changes to the definition of "Communicated to the employer" in Section 1636.3(d):

> Interactive process means an informal, interactive process between the covered entity and the employee or applicant ~~seeking~~ *who needs* an accommodation under the PWFA. This process should identify the known limitation and the change or adjustment at work that is needed, if either of these are not clear ~~from the request~~, and potential reasonable accommodation. There are no rigid steps that must be followed.

Additionally, while the Proposed Interpretive Guidance helps provide some guidance about how the interactive process should be conducted, *see* App. A, 88 Fed. Reg. 54,786, but the ACLU urges more detail in the Rule itself:

- ***Expressly state that the interactive process should be conducted expeditiously.*** We propose the express incorporation of the Rule's prohibition on unnecessary delay: "Unnecessary delay, as defined in § 1634.4(a)(1), in the interactive process may result in a violation of the PWFA." The Interpretive Guidance already recognizes the importance of expediency in carrying out the interactive process, stating "a covered entity should respond *expeditiously* to a request for reasonable accommodation and act *promptly* to provide the reasonable accommodation." Section 1636.3(k), 88 Fed. Reg. 54,786 (emphasis added). The Rule itself should underscore this directive.

- ***Expressly state that the interactive process can be conducted without medical certification, and may be completed in a single conversation.*** As recognized in the Rule and the Interpretive Guidance, and as discussed here, many needed accommodations are relatively minor and involve minimal disruption, if any, to workplace operations. Put differently, the formal obligation to engage in an interactive process need not result in an unduly formalized or prolonged process. The Rule should reference the provisions concerning "reasonable accommodations," "predictable assessments," and "supporting documentation." Additionally, an example should be added to the Interpretive Guidance that illustrates how quick and informal the interactive process can be in the PWFA context, such as a scenario where an employee makes a simple request of her immediate supervisor – for instance, a request for a larger uniform, permission to carry a water bottle, or more frequent bathroom breaks – and her immediate supervisor agrees on the spot to make the requested change.

- ***Expressly identify concrete steps an employer should undertake to identify potential accommodations.*** Where more significant accommodations are necessary, the Rule should direct employers to undertake specific steps to identify appropriate solutions. All too often, employers expect workers to propose needed accommodations, only to veto those proposals as infeasible. While workers may be the best source for the scope of their limitations, and what tasks they feel they can and cannot do safely, employers possess superior information and institutional knowledge about how similar limitations may have been accommodated in the past, and of the entity's current and future operational needs. The Rule's enumerated list of factors in Section 1636.3(j)'s definition of "undue hardship" provides a helpful roadmap to the due diligence employers should undertake as part of the interactive process.

    - The employer should inquire about the "nature . . . of the accommodation needed" to address the particular limitation, Section 1636.3(j)(i);
    - The employer should identify the "net cost" of the accommodation, *id.*;
    - The employer should consider the options for accommodations in light of the "facility or facilities" maintained by the covered entity, Section 1636.3(j)(ii), (iv); and
    - The employer should consider the "composition, structure, and functions of the workforce." Section 1636.3(j)(iv).

Strengthen the definition of "unnecessary delay." We applaud the EEOC for recognizing that unnecessary delay is sufficient to support a failure-to-accommodate violation. However, we urge the EEOC to clarify that unnecessary delays at *any* point during the accommodation process may result in a violation, not just delays in "responding to a reasonable accommodation request." To that end, we recommend the EEOC amend Section 1636.4(a)(1) by supplementing, "An unnecessary delay in responding to a reasonable accommodation request" as follows: "An unnecessary delay in responding to a reasonable accommodation request, *engaging in the interactive process, or providing a reasonable accommodation*." This will clarify that employers cannot avoid a violation simply by providing an initial, prompt response to the employee's request, but must instead avoid delay during the entirety of the accommodation process.

Additionally, we agree that covered entities should provide "interim accommodations." However, we recommend that the EEOC remove from Section 1636.4(a)(1)(vi) the clause "delay by the covered entity is more likely to be excused" if an interim accommodation is provided. Putting in place an interim accommodation should not excuse employers from a finding of "unnecessary delay" if they then proceed to delay the provision of the ultimate accommodation the worker requests and needs.

We also appreciate the EEOC's inclusion of a variety of factors to be considered when evaluating whether an unlawful unnecessary delay has occurred. *See* Section 1636.4(a)(1)(i)-(vi). We recommend that the EEOC add two factors to this list:

(vii) "Expediency of engaging in the interactive process and providing a reasonable accommodation;
(viii) The urgency of the requested accommodation."

These two proposed additional factors, by emphasizing the urgency of pregnancy-related accommodation needs, will more clearly guide employers in responding and better assist the EEOC and courts in evaluating whether an unnecessary delay has occurred.

Add definition of "interim accommodation" in "reasonable accommodation" definition in order to prevent unnecessary delay. We urge the EEOC to define "interim reasonable accommodation" in the Proposed Rule by adding a new subsection 1636.3(h)(6): "Interim Reasonable Accommodation means any temporary or short-term measure put in place immediately or as soon as possible after the employee requests an accommodation that allows the employee to continue working safely and comfortably while the employer and employee engage in the interactive process or the employer implements a reasonable accommodation arrived at through the interactive process."

Amend provisions concerning "supporting documentation." Adopt the changes suggested in Section VII, below, to ensure employers do not impose burdensome and unnecessary medical certification requirements that often contribute to substantial delays in accommodation.

VII. THE EEOC SHOULD LESSEN THE BURDEN ON WORKERS TO PROVIDE SUPPORTING DOCUMENTATION (SECTION 1636.3(l); DIRECTED QUESTION 8)

We appreciate the EEOC's query, in Directed Question No. 8, as to whether the supporting documentation framework the agency sets out in Proposed Rule Section 1636.3(l) strikes the right balance between the needs of workers and employers. Preamble, 88 Fed. Reg. 54,749-50. As the EEOC recognizes in the Proposed Interpretive Guidance, many workers face barriers in obtaining appointments with health care providers in a timely way, or altogether, posing significant barriers to obtaining medical documentation. This is especially true for workers in rural areas and low-wage workers who may not have consistent access to health care and disproportionately lack control over their work schedules. Furthermore, women of color, particularly Black women, often face medical racism that may inhibit or delay their ability to secure their providers' support in navigating their workplace needs, including obtaining sufficient documentation. Additionally, some medical providers impose fees to fill out forms,

which can grow to significant amounts over time, as needs change and as employers request new or different documentation.

The PWFA recognizes the importance of workers obtaining accommodations in a timely fashion to protect their health. The Proposed Rule unfortunately permits undue employer discretion in seeking medical justifications for accommodation requests. Accordingly, we recommend the EEOC modify the supporting documentation framework to ensure documentation does not impose a barrier to accommodation and undermine the purpose of the PWFA.

Modify the definition of "reasonable documentation." We commend the EEOC for making clear that employers may only demand "reasonable documentation." Section 1636.3(l)(2). The definition provided, however – "[r]easonable documentation means documentation that is sufficient to describe or confirm the physical or mental condition" – is unnecessarily invasive. An employer should not be allowed to demand information about the employee's precise condition or a description of it. It should be sufficient for a health care provider to (1) describe the employee's limitation that necessitates accommodation, (2) confirm that the limitation is related to pregnancy, childbirth, or a related medical condition, and (3) state that they require an accommodation. For example, medical documentation need not state that a worker needs to attend a medical appointment related to a miscarriage, but can simply state that the employee needs to attend a medical appointment during the workday (the limitation) due to "pregnancy, childbirth, or a related medical condition," and thus a modified start time (the accommodation) is recommended.

Moreover, both the Rule and the Interpretive Guidance should specify that employers cannot require employees to submit any particular medical certification form, so long as the health care provider documents the requisite three pieces of information described above. Additionally, employers cannot require employees to complete ADA or FMLA certification forms in order to receive a PWFA accommodation, as such forms seek substantially more information than is "reasonable" under the PWFA.

No employer testing or other demand for confirmation of pregnancy. We urge the EEOC to clarify that under no circumstances may an employer require an employee to take any sort of test to confirm their pregnancy or to provide documentation or other proof of pregnancy. The EEOC should specify that self-attestations of pregnancy are sufficient.

Clarifying "obvious" needs. We agree with the Commission that employers should not be permitted to seek medical documentation when the limitation and the need for accommodation is "obvious." *See* Section 1636.3(l)(1)(i). We are concerned, however, that employers could unilaterally impose restrictions based on paternalistic stereotypes about what pregnant or postpartum people "obviously" need, or that the Proposed Rule could have the unintended consequence of making the employee's body the subject of invasive scrutiny as

employers consider whether their pregnancy is "obvious." For these reasons, we encourage the Commission to maintain this important concept in the final Rule, but to clarify how it is to be applied. We suggest replacing the current text of 1636.3(l)(1)(i) with the following: "When the employee has confirmed, through self-attestation, that they have a limitation related to pregnancy, childbirth, or a related medical condition, and the need for accommodation is obvious."

Additionally, we suggest providing guidance on how an employer may determine whether the need for accommodation is "obvious": "A need for accommodation is obvious if, in light of the pregnant employee's known limitation, the employer either knew or should have known that the employee would need or did need the accommodation." For example, if a pregnant employee self-attests to regular vomiting and requests temporary relocation of their workstation closer to the bathroom, the need for accommodation is "obvious" because the employer knows, or should have known, that the employee needs easy bathroom access. Similarly "obvious" would be a police officer who self-attests to pregnancy and whose uniform and bulletproof vest no longer fit due to her physical changes and asks for larger sizes.

Further, we encourage the Commission to warn employers in the Proposed Interpretive Guidance against imposing unwanted accommodations not requested by the employee based on assumptions that the need for accommodation is "obvious."

Expand the list of accommodations for which supporting documentation is not required. We applaud the agency for making clear that employers cannot seek supporting documentation for certain accommodation requests that are both predictable and impose little to no burden. *See* Section 1636.3(l)(1)(iii). We urge the EEOC to expand the list to also include:

- Modifications to uniforms or dress code
- Allowing rest breaks, as needed
- Eating or drinking at a workstation
- Minor physical modifications to a workstation, such as a fan or chair
- Moving a workstation, such as to be closer to a bathroom or lactation space, or away from toxins
- Providing personal protective equipment
- Reprieve from lifting over 20 pounds
- Access to closer parking
- Flexible scheduling or remote work
- Time off to attend healthcare appointments related to pre-natal and post-natal care
- Time off to recover from childbirth

We note that this amended list will diverge in some respects from the list of predictable assessments included in the "undue hardship" definition. There is some overlap, but there also are many types of accommodations for which a person should not have to prove a need through

supporting documentation, even though an employer may still permissibly claim those accommodations impose an undue hardship.

Make explicit that the medical certification may be submitted by the provider of the employee's choice, need not be from the treating physician, and need not be obtained through an in-person appointment. The ACLU applauds the long list of "appropriate health care provider[s]" whose certification will suffice under the Rule, as well as the fact that the list is expressly non-exhaustive. Section 1636.3(l)(3), 88 Fed. Reg. 54,769. But we urge the Commission to remove "*appropriate* health care provider *in a particular situation*" (emphasis added), as employers should not have the discretion to second guess the judgment of licensed healthcare providers due to an assumption that they are not "appropriate" for the situation. We also urge the EEOC to make clear in the Rule or Interpretive Guidance that employers must accept documentation from telehealth care providers.

Finally, we propose that this Section should be amended to include a specific directive that the provider who submits the certification need not be the treating provider. For instance, a primary care provider could provide certification that the employee needs time off for a medical procedure; the person who will be performing the procedure need not submit a certification. This provision is essential to protect the privacy of the employee, and – to the extent that the employee is obtaining services that may cause them to fear discrimination or retaliation by their employer, such as contraception, IVF, sterilization, or abortion – is essential to assure that the employee is able to get the care they need. The ACLU notes, for instance, that abortion providers' identities are routinely publicized by anti-abortion activists in order to facilitate "doxxing" and other forms of harassment.[27] A requirement that the abortion provider submit the certification thus could violate the employee's privacy and potentially impede their ability to obtain needed time off for care, even if the nature of the anticipated procedure is not disclosed.

VIII. THE EEOC IS CORRECT IN ITS INTERPRETATION OF THE RULE OF CONSTRUCTION (SECTION 1636.7(b); DIRECTED QUESTION NO. 12)

Section 702 only insulates religious employers from claims of religious discrimination. The EEOC appropriately recognizes that, since its enactment nearly 60 years ago, Section 702 of Title VII allows religious employers to preference workers who share the employer's religious beliefs without facing liability for religious discrimination, but it does not insulate those employers from claims of discrimination based on other protected characteristics. Preamble, Fed. Reg. at 54,746. *See* 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply to" a religious organization "with respect to the employment of individuals of a particular religion."). Title VII

[27] *See*, *e.g.*, Avi Asher-Schapiro & Anastasia Moloney, "U.S. Abortion Advocates Face Doxxing as Data Scavenged Online," *Reuters* (Aug. 1, 2023), available at https://www.reuters.com/article/usa-abortion-dataprotection/feature-us-abortion-advocates-face-doxxing-as-data-scavenged-online-idUSL8N39E8D3.

still applies, therefore, to a religious institution charged with discrimination on the basis of race, color, sex, or national origin – even when that discrimination is motivated by religious beliefs.[28]

Section 702's legislative history and purpose confirm the plain meaning of the statutory text. *See Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1167 (4th Cir. 1985). Congress repeatedly rejected proposals to expand Section 702 beyond claims for religious discrimination. The original 1964 bill passed by the House of Representatives would have provided a total exemption for religious organizations from all forms of discrimination barred by Title VII, but the Senate replaced it with a narrower exemption limited to employment of individuals of the employer's own religion. *See* EEOC, Legislative History of Title VII and XI of Civil Rights Act of 1964 at 1004, 3004, 3017 (1968) ("1964 Legis. Hist."). In 1972, Congress expanded Section 702 to cover all of a religious organization's activities (not merely its religious ones) but again rejected an amendment that would have covered all types of discrimination (not merely discrimination based on religion). *See EEOC v. Pac. Press Publ'g Ass'n*, 482 F. Supp. 1291, 1304 (N.D. Cal. 1979), *aff'd*, 676 F.2d 1272 (9th Cir. 1982) (collecting legislative history).[29]

As the EEOC notes in the Preamble, every circuit court to consider the question agrees: Section 702 indicates that religious institutions may choose to prefer "members *of their own religion* without fear of being charged with religious discrimination," not more. Fed. Reg. at 54,747 n.197 (emphasis added) (*citing Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410,

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[28] Opponents of this interpretation argue that the term "religion" is defined to include "belief," "observance," or "practice," quoting 42 U.S.C. § 2000e(j). Such an understanding decontextualizes the definition. The full definition states: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). "The intent and effect of this definition was to make it an unlawful employment practice . . . for an employer not to make reasonable accommodations . . . for the religious practices of his employees and prospective employees[]," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977), not to expand the scope of religion-based discrimination to subsume discrimination against all protected categories when motivated by religion.

[29] For this reason, we note that, with respect to the EEOC's Directed Question No. 12(B), 88 Fed. Reg. 54,749, the EEOC's language referencing the "religious organization's activities" is anachronistic and no longer relevant to the Section 702 legal analysis. To the extent that the EEOC is concerned with the right of religious employers to select those who perform religious functions, the First Amendment provides them such latitude. *See Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 195 (2012).

413 (6th Cir. 1996)); *accord Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993); *Equal Emp. Opportunity Comm'n v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982), *abrogation recognized by Alcazar v. Corp. of Cath. Archbishop of Seattle*, 598 F.3d 668 (9th Cir. 2010); *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972).

The ACLU urges that the EEOC interpret the religious exemption in the PWFA to operate similarly to the first religious exemption in the ADA, which provides: "This subchapter shall not prohibit a religious [organization] . . . from giving preference in employment to individuals of a particular religion." 42 U.S.C. § 12113(d)(1). That provision does not allow religious organizations to discriminate based on a person's disability (whether for religious reasons or otherwise). It merely provides reassurances that religious organizations are not prohibited "from giving preference in employment to individuals of a particular religion" over a qualified person with a disability. 42 U.S.C. § 12113(d)(1) (emphasis added). "Thus, assume that a Mormon organization wishes to hire only Mormons to perform certain jobs. If a person with a disability applies for the job, but is not a Mormon, the organization can refuse to hire him or her." H.R. Rep. 101-485 (II), 76, (1990) *as reprinted in* 1990 U.S.C.C.A.N. 303, 359.

Section 702 as applied to the PWFA provides the same protections: A Mormon organization wishing to hire only Mormons can refuse to hire a pregnant worker who is not Mormon. It does not excuse the employer from the statutory obligation to reasonably accommodate the pregnant worker, unless doing so would impose an undue hardship, as is true for nonreligious employers. If Congress had wanted a rule of statutory construction, it could have written such a provision. *Cf.* 42 U.S.C. § 12113(d)(2) (ADA provision permitting religious organizations to "require that all applicants and employees conform to the religious tenets of such organization").

Definition of "religious organization." The EEOC correctly recognizes that Section 702 by its plain terms applies only to "religious organizations." 88 Fed. Reg. at 54,747. Courts consider relevant facts on a case-by case basis to determine "whether the corporation's purpose and character are primarily religious." *E.E.O.C. v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 618-19 (9th Cir. 1988). As the EEOC notes, factors can include (but are not limited to): whether the business is for profit; whether its articles of incorporation state a religious purpose; whether it sells secular or religious products; whether it is affiliated with or supported by a church; whether it supports religious institutions; whether it holds itself out as secular or sectarian; and whether it regularly includes prayer or worship in its activities. 88 Fed. Reg. at 54,747; s*ee LeBoon v. Lancaster Jewish Comm. Ctr. Ass'n*, 503 F.3d 217, 226-31 (3d Cir. 2007); *Spencer v. World Vision, Inc.*, 570 F. Supp. 2d 1279, 1283-84 (W.D. Wash. 2008), *aff'd Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011); *Ginsburg v. Concordia Univ.*, 2011 WL 41891, at *2-4 (D. Neb. 2011). Courts have generally applied Section 702 only to non-profit organizations. *See, e.g.*, *Spencer*, 570 F. Supp. 2d at 1281; *LeBoon*, 503 F.3d at 221. The EEOC should not accept an employer's characterization of itself as a religious organization. Rather,

"each case must turn on its own facts" and "[a]ll significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious." *Townley*, 859 F.2d at 618; *see also LeBoon*, 503 F.3d at 227 (stating that "not all factors will be relevant in all cases, and the weight given each factor may vary from case to case").

Response to Directed Questions Nos. 12(A) and (C). Directed Question Nos. 12(A) and (C) ask what accommodations provided under the PWFA may or may not impact a religious organization's employment of individuals of particular faiths. Preamble, 88 Fed. Reg. 54,749. As to 12(A) and 12(C), we predict that the vast majority of requested accommodations will not be impacted by Section 702 of the PWFA, and we further agree that the EEOC should carefully consider, as it does in any case in which a Section 702 defense is raised, the particular facts of each case to determine whether the exemption applies. *See* Preamble, 88 Fed. Reg. at 54,746. Critically, Section 702 does not permit the employer to deny an employee a reasonable accommodation based on the employer's religious belief or based on any characteristic protected by Title VII.[30] Nor does it excuse the employer from its statutory obligation to reasonably accommodate *both* the coreligionist employee and the employee of a different religion, unless doing so would impose an undue hardship. In sum, though the employer may preference a coreligionist in granting a particular accommodation, it remains obligated to engage in an interactive process and find a reasonable accommodation for all employees who need one.

Response to Directed Questions Nos. 12(B) and (D). Directed Questions Nos. 12(B) and (D) concern the interplay between a religious organization's obligation to accommodate workers affected by pregnancy, childbirth, and related medical conditions, and to refrain from engaging in retaliatory or coercive conduct toward those workers, and the performance of the "religious organization's activities." Preamble, 88 Fed. Reg. 54,749. The ACLU respectfully submits that these questions are premised on an anachronistic reading of Section 702 that is no longer relevant to its interpretation. As noted *supra*, Congress in 1972 expanded Section 702 to cover

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[30] *See*, *e.g.*, *Equal Emp. Opportunity Comm'n v. Fremont Christian Sch.*, 781 F.2d 1362, 1365-67 (9th Cir. 1986) (religious school could not enforce the religious belief that men should be the head of the household by paying health benefits to married men but not to married women); *Herx v. Diocese of Fort Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168, 1176 (N.D. Ind. 2014) (Section 702 did not insulate religious school's refusal to renew contract of teacher undergoing IVF because teacher's "Title VII claim alleges sex discrimination, not religious discrimination"), *app. dismissed*, 772 F.3d 1085 (7th Cir. 2014); *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 807 (N.D. Cal. 1992) (Section 702 did not preclude Title VII claim by religious school's librarian fired for pregnancy resulting from adulterous relationship because "'although Congress permitted religious organizations to discriminate in favor of members of their faith, religious employers are not immune from liability for discrimination based on race, sex, national origin, or for retaliatory actions against employees who exercise their right under the statute'"), quoting *Pac. Press*, 676 F.2d at 1276.

all of a religious organization's activities, not merely its religious ones, while also refusing to expand the exemption to cover *all* discrimination claims, not just those alleging religious discrimination. To the extent that the EEOC is concerned with the right of religious employers to select those who perform religious functions, the First Amendment provides them such latitude. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 195 (2012).

Response to Directed Question No. 12(E). The EEOC asks, in Directed Question No. 12(E), whether it should provide "a more detailed interpretation of [the PWFA] that would inform the Commission's case-by-case consideration of whether [Section 702] applies to a particular set of facts." Preamble, 88 Fed. Reg. 54,749. As detailed in this Comment, the ACLU believes there are a number of ways in which the Proposed Rule and Proposed Interpretive Guidance can be improved. Its recommendations are based upon decades of representing employees needing pregnancy-related accommodations, drawn from fact patterns that consistently arise when workers seek, and often are denied, such modifications. But we do not believe that the Rule or Interpretative Guidance should be revised with respect to consideration of a defense under Section 702.

The factual scenarios put forward in Directed Question No. 12(E) should not be "expected to arise with such regularity that . . . the public would benefit from the Commission providing a more detailed interpretation of [the rule of construction." 88 Fed. Reg. 54,749. We are unaware of a single instance in which an employee's request for accommodation has been denied because of favor being shown to a coreligionist. Employers' stated reasons for refusing to accommodate pregnant workers overwhelmingly concern whether a desired accommodation is "reasonable," whether it would impose an undue hardship on the employer, and what obligations – in terms of paperwork and other preconditions – the pregnant worker must fulfill to be entitled to accommodation. The fact patterns proposed by the EEOC in this question are not, to our knowledge, the subject of any published decision and it is unnecessary and ultimately unhelpful to spell out all these unlikely scenarios.[31]

[31] Further, though no circuit court has ever found Section 702 to bar claims of discrimination on the basis of race, color, sex, or national origin, the scope of Section 702 is the subject of ongoing litigation. *See Billard v. Charlotte Cath. High Sch.*, No. 3:17–cv–00011, 2021 WL 4037431 (W.D.N.C. Sept. 3, 2021) (rejecting a Catholic school's argument that it was exempt from the plaintiff's sex-based discrimination claims under Section 702), *appeal filed* (4th Cir. Apr. 25, 2022); *Garrick v. Moody Bible Inst.*, 494 F. Supp. 3d 570, 576–77 (N.D. Ill. 2020) (rejecting religious educational institution's argument that it was exempt from the plaintiff's sex discrimination and retaliation claims under Section 702), *appeal filed* (7th Cir. Sept. 14, 2021). The EEOC cannot, and should not, expand the existing scope of Section 702 by construing it as permitting a religious entity to deny an accommodation that conflicts with the entity's religion, as suggested by Part (B) in the Directed Question. Such an interpretation not only unnecessarily wades into a contested issue being considered by federal appellate courts, but runs far afield of existing case law and the plain meaning of the statutory text.

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IX. CONCLUSION

The ACLU applauds the EEOC's ambitious, yet reasoned approach to assuring that the PWFA fulfills its long-overdue promise. The statute and these implementing regulations will protect the lives, and livelihoods, of millions of U.S. workers every year. The ACLU looks forward to collaborating with the EEOC and its partner law enforcement agencies to ensure that the PWFA's protections are realized for each and every worker who needs them.

Sincerely,

Louise Melling
Deputy Legal Director

Julie Sweet
Director, Policy and Government Affairs
Liberty Division
National Political Advocacy Department

Ria Tabacco Mar
Director
Women's Rights Project

Gillian Thomas
Senior Staff Attorney
Women's Rights Project

Vania Leveille
Senior Legislative Counsel
National Political Advocacy Department