

NOTES & COMMENTS

A SCOPE FOR SURVIVAL: CREATING A PATH FOR THE PREGNANT WORKERS FAIRNESS ACT UNDER A CONSERVATIVE ADMINISTRATION AND SUPREME COURT BENCH

by
Emily Easton*

The Pregnant Workers Fairness Act (PWFA) requires employers to provide reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions, representing a bipartisan congressional effort to fill the gaps in workplace protections afforded to pregnant workers. However, the Equal Employment Opportunity Commission's (EEOC) final rules interpreting the PWFA have generated significant legal and political controversy—especially around the broad interpretation of the definition of related medical conditions to include lactation, “elective” abortions, menstruation, infertility, and contraception.

Given the current political and legal climate presented by a conservative federal administration and Supreme Court bench, this Note proposes a pragmatic path forward for the EEOC's final rules that balances clearly defined, equally enforced worker protections with anticipated judicial skepticism and diminished deference to agency interpretative authority

* Recent Juris Doctorate graduate from Lewis & Clark Law School. This Note was originally written as part of a seminar course, *Current Issues in Work Law*, taught by Professor Cunningham-Parmeter. The Author wishes to thank Professor Cunningham-Parmeter for his guidance in the writing of this Note. The Author also thanks her husband and her now nine-month-old daughter for their part in making this Note happen. The Author was inspired to write this Note after having a miscarriage and then shortly thereafter becoming pregnant again the month before the seminar course began. While navigating her own loss, anxiety, sickness, physical changes, and joy surrounding pregnancy as a law student, she wrote this Note with the goal of outlining a way forward for the PWFA to protect and accommodate other pregnant workers in the future.

following Loper Bright Enterprises v. Raimondo and the polarized political climate surrounding reproductive rights. In making this policy argument, this Note seeks to create a path toward stability for the PWFA and uniformity in pregnant workers’ rights across the nation as a means of furthering gender equity in the workplace.

This Note goes on to explain how the current debate surrounding “elective” abortions is distracting from the PWFA’s clear statutory purpose, and how abortion law is irrelevant to the protections afforded under the PWFA. Instead, using the text of the PWFA, this Note explains why pregnancy-related medical conditions include abortion, whether “elective” or otherwise. Recognizing, however, that the term abortion is highly contentious, this Note proposes the sole use of the term termination of pregnancy as broad enough to subsume “elective” abortions, miscarriage, and stillbirth, while specific enough to allow workers to indicate their known limitation to their employer without further invasion of their medical privacy.

In addition, to avoid further challenges to the EEOC’s interpretive authority under a major questions doctrine analysis, this Note proposes removing as overbroad menstruation, infertility, and contraception as pregnancy-related medical conditions, using the statutory text and legislative history of the PWFA as support.

Introduction 183

I. The Historical Underpinnings of the PWFA and its Text 189

 A. Title VII, as Amended by the PDA 189

 B. The ADA 192

 C. The PWFA 194

II. The EEOC’s Final Rules as Currently Implemented and Controversies 198

 A. Arguments Against Menstruation and Lactation as Pregnancy-Related Medical Conditions 202

 B. Arguments Against Infertility and Contraception as Pregnancy-Related Medical Conditions 205

 C. Arguments Against “Elective” Abortion as a Pregnancy-Related Medical Condition 207

III. A Path Forward for the PWFA Under a Conservative Regime 211

IV. Addressing Potential Criticisms of a Pragmatic Path Forward for the PWFA 215

 A. Forcing Employers to Compromise Their Religious Freedoms 216

 B. Undermining Gender Equity and Causing Unintended Consequences 217

Conclusion 218

INTRODUCTION

Request denied—that was the response Michelle Durham received from her employer when she asked her manager for a modified-duty job assignment after receiving a doctor’s order to not lift more than 50 pounds during her pregnancy.¹ Durham, an EMT who loved her job and was three months pregnant with her first child, had expected that, given her employer had given modified-duty job assignments to other EMTs with lifting restrictions and there were dispatcher jobs currently available to fill, she would be accommodated.² Instead, Durham was told that she would have to take an unpaid leave of absence for the next six months because she was not injured on the job.³ This left Durham wondering: how was she “supposed to live for six months without income of any sort” and “supposed to prepare for [her] son to come home?”⁴ Ultimately, Durham was unemployed for seven months, couldn’t pay rent, racked up credit card debt and medical bills, gave birth without any health coverage, and never returned to the EMT field in which she had invested considerable time and money to become certified.⁵

Durham’s story is not unique.⁶ Even though Durham sued her employer, arguing—under Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act (PDA)—that she was discriminated against on the basis of her pregnancy, Durham’s employer’s denial of the accommodations of light duty or a dispatcher position was ultimately deemed not illegal.⁷ The District Court for the Northern District of Alabama determined that Durham’s employer’s policy of denying light duty to employees unless they were injured on the job was not pretext for discrimination against pregnant workers.⁸ The court also

¹ *Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694): Hearing Before the Subcomm. on C.R. & Hum. Servs., Comm. on Educ. & Lab.*, 116th Cong. 14–15 (2019) [hereinafter *Long Over Due*] (statement of Kimberlie Michelle Durham).

² *Id.* at 15.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ CARLY MCCANN & DONALD TOMASKOVIC-DEVEY, CTR. FOR EMP. EQUITY, PREGNANCY DISCRIMINATION AT WORK: AN ANALYSIS OF PREGNANCY DISCRIMINATION CHARGES FILED WITH THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 8–9 (2021) (estimating, conservatively, that 250,000 women are denied accommodations related to their pregnancies each year). For further statistics on pregnancy discrimination, see Ben Gitis, Emerson Sprick & Adrienne Schweer, *BPC—Morning Consult: 1 in 5 Moms Experience Pregnancy Discrimination in the Workplace*, BIPARTISAN POL’Y CTR. (Feb. 11, 2022), <https://bipartisanpolicy.org/blog/bpc-morning-consult-pregnancy-discrimination/> [<https://perma.cc/H5ZP-BHNZ>].

⁷ *Durham v. Rural/Metro. Corp. (Durham II)*, No. 4:16-CV-01604, 2021 WL 4477623, at *1 (N.D. Ala. Sep. 30, 2021).

⁸ *Durham v. Rural/Metro Corp. (Durham I)*, No. 4:16-CV-01604, 2020 WL 7024892, at *3–4 (N.D. Ala. Nov. 30, 2020).

found that Durham did not show that her employer's policy of denying light duty to employees unless injured on the job made it so that "the burden of losing income is particular to pregnant workers, nor that the burden outweighs [Durham's employer's] reasons for offering light duty only to workers injured on the job."⁹ At trial on the remaining issue of the denial of a dispatcher position as an accommodation, the jury found that Durham's pregnancy was not a motivating factor for the employer's refusal.¹⁰ While Durham sought a new trial, her request was denied.¹¹ Thus, Durham, like many of her fellow pregnant workers, fell through the safety net provided by the legal system at the time.¹²

Since Durham's experiences, Congress passed the Pregnant Workers Fairness Act (PWFA), which requires employers to offer workers "reasonable accommodations" for "known limitations" related to "pregnancy, childbirth, or related medical conditions" unless the accommodation would result in an "undue hardship" for the employer.¹³ The PWFA supplements existing protections against workplace discrimination—which exist under Title VII, as amended by the PDA, and the Americans with Disabilities Act (ADA)—for those who are pregnant.¹⁴ These previous protections were not sufficient to protect Durham from adverse employment consequences as a result of her pregnancy, and the PWFA is aimed at rectifying that gap in protection.¹⁵

⁹ *Id.* at *4.

¹⁰ *Durham II*, 2021 WL 4477623, at *1.

¹¹ *Id.*

¹² Gillian Thomas & Vania Leveille, *The Historic New Law Protecting Fairness for Pregnant Workers*, ACLU: FLA. (June 27, 2023), <https://www.aclufl.org/en/news/historic-new-law-protecting-fairness-pregnant-workers> [<https://perma.cc/4PFA-MAPX>] (noting that despite the Supreme Court's 2015 ruling in *Young v. United Parcel Service, Inc.* that clarified employers must have a compelling reason to deny accommodations to pregnant workers while granting them to others, employers and judges continued to deny these accommodations); see also DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE: IT IS TIME FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT 5 (2019), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf> [<https://perma.cc/S7XM-7YF6>] (finding that courts upheld denials of accommodations to pregnant workers under the PDA in over two-thirds of cases brought post-*Young*).

¹³ *What You Should Know About the Pregnant Workers Fairness Act*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act> [<https://perma.cc/TTS3-DYNH>] (last visited Mar. 31, 2026) (quoting Pregnant Workers Fairness Act (PWFA), Pub. L. No. 117-328, § 103, 136 Stat. 6084, 6085 (2022) (codified at 42 U.S.C. § 2000gg-1)).

¹⁴ *Pregnancy Discrimination and Pregnancy-Related Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/pregnancy-discrimination> [<https://perma.cc/SPL9-NN2E>] (last visited Mar. 12, 2026).

¹⁵ See Gillian Thomas, *Final 'Pregnant Workers Fairness Act' Regulations Were Released—And It's Great News for Women*, ACLU OR. (Apr. 21, 2024, at 15:15 PT), <https://www.aclu-or.org/en/news/final-pregnant-workers-fairness-act-regulations-were-released-and-its-great-news-women> [<https://perma.cc/GW8C-WUVF>].

While it is still not clear how claims under the PWFA will be approached by courts, it is reasonable to assume that Durham's treatment would likely be different under the additional protections provided by the PWFA.¹⁶

However, despite the statute receiving bipartisan support,¹⁷ the final rules

¹⁶ See *id.* The Equal Employment Opportunity Commission (EEOC) has announced six lawsuits—two of which are pending and four of which have settled—for claims under the PWFA. Since none have reached a final court ruling, it remains unclear how the PWFA's protections will be handled by the judiciary. See Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Sues Wabash National for Pregnancy Discrimination (Sep. 10, 2024), <https://www.eeoc.gov/newsroom/eeoc-sues-wabash-national-pregnancy-discrimination> [<https://perma.cc/KW58-MGUP>] (discussing *EEOC v. Wabash National Corporation*, involving a pregnant employee denied the accommodation of a transfer to a role that did not require lying on her stomach); Press Release, U.S. Equal Emp. Opportunity Comm'n, ABC Pest Control, Inc. Conciliates Pregnant Workers Fairness Act Charge (Sep. 11, 2024), <https://www.eeoc.gov/newsroom/abc-pest-control-inc-conciliates-pregnant-workers-fairness-act-charge> [<https://perma.cc/JW5Q-XQAQ>] (discussing the settlement of *EEOC v. ABC Pest Control, Inc.*, involving a pregnant employee fired after requesting a reasonable accommodation to attend monthly medical appointments); Christine Bestor Townsend & Zachary V. Zagger, *EEOC Ramps Up Enforcement of Pregnancy Discrimination Under PWFA*, OGLETREE DEAKINS (Nov. 5, 2024), <https://ogletree.com/insights-resources/blog-posts/eeoc-ramps-up-enforcement-of-pregnancy-discrimination-under-pwfa/> [<https://perma.cc/X5AB-63TM>] (discussing *EEOC v. Polaris Industries, Inc.*—involving a pregnant worker not excused for medical appointments and absences due to her “pregnancy-related conditions such as nausea, swelling in her feet, aching joints, and suspected gestational diabetes” and forced to work overtime despite medical orders not to work more than 40 hours per week; along with *EEOC v. Urologic Specialists of Oklahoma, Inc.*—involving a pregnant worker with “placental insufficiency” and “substantial swelling, pain, and discomfort in her feet, legs, and abdomen” who was refused reasonable accommodations, forced to take unpaid leave, refused lactation breaks after the birth of her child, and eventually terminated from her employment); Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Sues Two Employers Under the Pregnant Workers Fairness Act (Sep. 26, 2024), <https://www.eeoc.gov/newsroom/eeoc-sues-two-employers-under-pregnant-workers-fairness-act> [<https://perma.cc/5LKY-5BU7>] (discussing *EEOC v. Polaris Industries, Inc.* and *EEOC v. Urologic Specialists of Oklahoma, Inc.*); Press Release, U.S. Equal Emp. Opportunity Comm'n, Polaris Industries to Pay \$55,000 in EEOC Pregnancy Suit (July 23, 2025), <https://www.eeoc.gov/newsroom/polaris-industries-pay-55000-eeoc-pregnancy-suit> [<https://perma.cc/36J5-FLD9>] (reporting that Polaris Industries, Inc. has settled this matter for \$55,000); Press Release, U.S. Equal Emp. Opportunity Comm'n, Kurt Bluemel Inc. to Pay \$40,000 in EEOC Pregnancy Discrimination Suit (Apr. 3, 2025), <https://www.eeoc.gov/newsroom/kurt-bluemel-inc-pay-40000-eeoc-pregnancy-discrimination-suit> [<https://perma.cc/G79F-P4UW>] (discussing the settlement of *EEOC v. Kurt Bluemel*, involving a pregnant worker who requested maternity leave, but was told no work was available upon her return even though the employer hired new, non-pregnant employees); Townsend & Zagger, *supra* (discussing the settlement of *EEOC v. Lago Mar Properties Inc.*, involving an employee who had a stillbirth and was fired after providing her employer a doctor's note stating she could not return to work for “approximately six (6) weeks to recuperate and to grieve”).

¹⁷ 167 CONG. REC. H2321–42 (daily ed. May 14, 2021) (roll call vote no. 143). See *Roll Call 143* | *Bill Number: H.R. 1065*, U.S. HOUSE OF REPS.: CLERK (May 14, 2021, at 11:03 PT),

promulgated by the Equal Employment Opportunity Commission (EEOC) under the PWFA are controversial and have been legally challenged and prevented from being fully implemented across the country.¹⁸ The EEOC's final rules for the statute define *related medical conditions* broadly to include pregnancy, birth, lactation, abortion, miscarriage, menstruation, infertility, and contraception, among other conditions.¹⁹ States that have imposed strict restrictions on abortions have especially focused on "elective" abortions being included as a pregnancy-related medical condition.²⁰

In addition, under the current conservative Supreme Court bench, a move away from *Chevron* deference under *Loper Bright Enterprises v. Raimondo* and toward the major questions doctrine may lead to significant limitations on the scope of the current EEOC's final rules as being overly broad.²¹ This tendency to limit the scope of statutory authority and agency interpretations coincides with the change to a

<https://clerk.house.gov/Votes/2021143> [<https://perma.cc/6ARG-XJQ9>] for a list of the 216 Democrat representatives and nearly half of all Republican representatives who voted for the PWFA.

¹⁸ The EEOC final rules have been successfully challenged in the following cases: (1) *Louisiana v. EEOC*, 705 F. Supp. 3d 643, 661, 664 (W.D. La. 2024) (issuing a preliminary injunction blocking enforcement of the EEOC's final rules in Louisiana and Mississippi on the grounds the EEOC exceeded its statutory authority by requiring employers to provide accommodations for elective abortions that are not medically necessary); (2) *Texas v. Garland*, 719 F. Supp. 3d 521, 535, 582, 597 (N.D. Tex. 2024) (issuing a permanent injunction on the grounds that the PWFA had been enacted unconstitutionally and blocking enforcement of the PWFA in Texas), *rev'd, vacated sub nom.*, *Texas v. Bondi*, 149 F.4th 529 (5th Cir. 2025), *vacated, reh'g en banc granted*, 164 F.4th 446 (5th Cir. 2026); and (3) *Tennessee v. EEOC (Tennessee II)*, 129 F.4th 452, 456 (8th Cir. 2025) (reversing the District Court for the Eastern District of Arkansas's finding that 17 states did not have standing to challenge the lawfulness of the EEOC's final rules requiring reasonable accommodations for elective abortions and remanding to the lower court for further proceedings on the states' claims).

¹⁹ 29 C.F.R. § 1636.3(b) (2026); see *Implementation of the Pregnant Workers Fairness Act*, 89 Fed. Reg. 29096, 29182 (Apr. 19, 2024) (codified at 29 C.F.R. pt. 1636) (promulgating the final rules).

²⁰ See, e.g., *Louisiana*, 705 F. Supp. 3d at 653–54 (describing how both Mississippi and Louisiana have passed laws to prohibit elective abortions); *Tennessee v. EEOC (Tennessee I)*, 737 F. Supp. 3d 685, 692–93 (E.D. Ark. 2024) ("The States challenge only how the regulation addresses what the States call elective abortion."); *Tennessee II*, 129 F.4th at 456, 458 (documenting how the 17 states challenging the PWFA "refuse to accommodate state employees who seek elective abortions").

²¹ Craig E. Leen & Michael A. Pavlick, *Loper Bright's Potential Effect on Federal Labor and Employment Law: Possible Consequences for Agencies and Practitioners*, NAT'L L. REV. (Oct. 1, 2024), <https://natlawreview.com/article/loper-brights-potential-effect-federal-labor-and-employment-law-possible> [<https://perma.cc/J7CY-8ZM6>]. See generally *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (providing a framework under which courts generally grant administrative agencies deference in rulemaking when there is ambiguity in the authorizing statute), *overruled in part*, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

Republican-controlled administration and to new EEOC leadership opposed to the final rules as currently defined.²² With this context, it is anticipated that either the EEOC will eventually amend these rules to be more narrowly defined or the Supreme Court will strike down portions of the final rules as overbroad, whichever happens first.²³

Anticipating and responding to the current legal challenges and political shifts trending toward limiting the scope of the PWFA, this Note proposes a path forward for limiting the EEOC final rules while maintaining strong pregnant worker protections. First, this Note proposes changing the reference to the pregnancy-related medical condition of abortion to solely *termination of pregnancy* without the need to explicitly mention “having or choosing not to have an abortion.”²⁴ Termination of pregnancy has the benefit of being specific enough to protect known limitations regarding pregnancies that have ended in a loss, while remaining broad enough to be understandable and encompass the medical definitions of “spontaneous” and “elective” abortions and Intrauterine Fetal Demise (i.e., a stillbirth where a fetus dies in the uterus after the 20th week of pregnancy).²⁵ It also has the benefit of allowing employees to not be forced to categorize or further explain the type of loss to their employer to qualify. The term also avoids the contentious debate about the morality of abortion or its place in healthcare because it is irrelevant to the reasonableness of accommodations.

This Note further proposes removing as overbroad menstruation, infertility, and contraception from the definition of *pregnancy-related medical conditions* to avoid further litigation alleging that the EEOC exceeded its statutory authority under the PWFA. Given the current Supreme Court’s skepticism toward implied agency authority following *Loper Bright*, limiting the EEOC’s final rules to providing accommodation to pregnant workers on issues directly and immediately linked to pregnancy—but not issues related to women’s gynecological health in general, regardless of pregnancy, or temporarily distinct from pregnancy—protects the EEOC’s final rules from further legal challenges, delayed implementation, or inconsistent implementation depending on the state. On the other hand, the PWFA’s purpose of protecting pregnant workers with pregnancy-related conditions from adverse employment actions and requiring reasonable accommodations logically pairs with pregnancy, birth, abortion, miscarriage, and lactation and is

²² Cindy Schmitt Minniti, Alexandra Manfredi & Corrie Buck, *Anticipating President Trump’s Impact on the Pregnant Workers Fairness Act*, REED SMITH (Feb. 6, 2025), <https://www.employmentlawwatch.com/2025/02/articles/employment-us/anticipating-president-trumps-impact-on-the-pregnant-workers-fairness-act/> [https://perma.cc/9S4D-J6R4].

²³ See *id.*; Leen & Pavlick, *supra* note 21.

²⁴ 29 C.F.R. pt. 1636 app. A(III)(18).

²⁵ Riley Gill, Jennifer Weida & Beverly A. Mikes, *Stillbirth*, NAT’L LIBR. OF MED.: STATPEARLS (June 24, 2025), <https://www.ncbi.nlm.nih.gov/books/NBK557533/> [https://perma.cc/652V-X9TZ].

supported when analyzed under *Loper Bright* and the text of the PWFA. By striking a balance between the purpose and mandate of the PWFA, the statutory authority granted to the EEOC under a stricter *Loper Bright* analysis, and current arguments raised surrounding elective abortions, this Note seeks to create stability and consistency in the interpretation of the PWFA and its protections to allow pregnant workers across the country to experience the benefits of its protections equally.

This Note proceeds in four parts. Part I discusses the history of the PWFA, its purpose in being passed, and the PWFA's statutory text. Part II focuses on the current climate, including a discussion of the EEOC's final rules, as well as the controversies and legal challenges to said rules. Part III outlines a path toward the stability and equal implementation of the PWFA under a conservative presidency and a Supreme Court that is likely to be skeptical of the current breadth of protection the EEOC has promulgated under the PWFA in its final rules. Utilizing both a legislative history and textualist analysis, Part III offers justification for the EEOC's final rules to include protections for known limitations due to the termination of pregnancy, including "elective" abortions.²⁶ In addition, utilizing a textualist and *Loper Bright* analysis, Part III argues related medical conditions should include pregnancy, birth, abortion, miscarriage, and lactation, but not menstruation, infertility, and contraception. Part III identifies these protections as a pragmatic solution for avoiding further controversy over the PWFA's final rules in the current political and legal climate, while offering robust protections to pregnant workers in the United States. Finally, Part IV addresses likely criticisms of this approach, including that protections for elective abortions will force employers to compromise their religious freedoms, and that the pragmatic approach for eliminating menstruation, infertility, and contraception as pregnancy-related medical conditions will have unintended consequences and hamper progress toward gender equity in the workplace.

²⁶ I have chosen to use the term "elective" abortions, as this is the terminology used by commentators on the final rules and in the legal challenges regarding the issue of induced abortion and the PWFA. The idea behind the term is that much like with elective surgery, those who have an elective abortion are choosing to have an abortion without an immediate, life-threatening need for the procedure, as opposed to a "spontaneous" abortion (i.e., miscarriage) where there is no choice to have an abortion. However, I flag the phrase here because the term is controversial and potentially stigmatizing, as it assumes that all medically induced abortions are made equally freely, willingly, and happily, since the abortion was a planned procedure. In doing so, it places an implicit moral judgment on that choice. However, the context for an induced abortion is often complex and emotionally charged, such that those seeking an elective abortion may not see themselves as having much choice. See generally Elizabeth Janiak & Alisa B. Goldberg, Commentary, *Eliminating the Phrase "Elective Abortion": Why Language Matters*, 93 CONTRACEPTION 89 (2015) ("Contemporary usage of the word 'elective' in reference to abortion implies a broad consensus regarding when an abortion is required to preserve women's health and lives, where in fact none exists.").

I. THE HISTORICAL UNDERPINNINGS OF THE PWFA AND ITS TEXT

To fully understand the PWFA and its intended purpose, one must look at its sister statutes: Title VII, as amended by the PDA, and the ADA. With these historical underpinnings, the congressional intent and purpose for the PWFA to fill a perceived gap in the protections and accommodations afforded to pregnant workers becomes clear.

A. *Title VII, as Amended by the PDA*

In 1978, in response to the Supreme Court ruling in *General Electric Co. v. Gilbert* that Title VII did not protect against an employer excluding from its disability plan conditions that arise from pregnancy, Congress passed the PDA to prevent discrimination of workers based on “pregnancy, childbirth, or related medical conditions.”²⁷ Specifically, the PDA adds a new definition for *sex discrimination* under Title VII to include “because of or on the basis of pregnancy, childbirth, or related conditions.”²⁸ The PDA also mandates that workers affected by “pregnancy, childbirth, or a related medical condition” shall be treated the same as other employees “similar in their ability or inability to work” and that the termination of an employee due to pregnancy is illegal.²⁹

Some courts are careful to make clear the distinction between conduct that violates the Title VII provisions prohibiting sex discrimination and conduct that violates the provisions added by the PDA; others conflate the two statutes and simply state the discriminatory conduct violated either Title VII or the PDA on the basis of sex.³⁰ Because of this murkiness in approaches, it can be difficult at times to determine which part of the definition of *on the basis of sex* a court is focusing on.³¹ After all, all pregnancy discrimination is sex discrimination, but not all sex discrimination is pregnancy discrimination.³² Gendered language further

²⁷ William G. Phelps, Annotation, *What Constitutes Termination of Employee Due to Pregnancy in Violation of Pregnancy Discrimination Act Amendment to Title VII of Civil Rights Act of 1964* (42 U.S.C.A. § 2000e(k)), 130 A.L.R. Fed. 473 (1996) (quoting 42 U.S.C. § 2000e(k)) (citing *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)).

²⁸ 42 U.S.C. § 2000e(k).

²⁹ *Id.*

³⁰ See generally Phelps, *supra* note 27 (discussing cases in various jurisdictions which handled the issue of what conduct violates the PDA specifically).

³¹ See, e.g., *Goss v. Exxon Off. Sys. Co.*, 747 F.2d 885, 888 (3d Cir. 1984) (affirming the ruling that an employee had been “sacrificed . . . rather than [another employee], a male, and that this decision was based on Goss’ sex and pregnancy”); *Dodson v. Flying Dove, Inc.*, 794 F. App’x 778, 783–85 (10th Cir. 2019) (affirming *Dodson* was unable to show that her employer’s reasons for terminating her were pretext for either her sex or pregnancy discrimination claims).

³² See *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1045 (7th Cir. 1999) (“This Court said long ago that in Title VII, ‘Congress intended to strike at the *entire spectrum* of disparate treatment

undermines clarity in court discussions of claims under the PDA, especially when discussing whether a policy is “gender-specific” or “gender-neutral.”³³ For example, courts routinely conflate sex, gender, pregnancy capacity, and actual pregnancy status.³⁴ Because of these ambiguities, some courts have come to opposite conclusions on whether a claim is covered under Title VII or not.³⁵

Under Title VII, cases for discrimination on the basis of pregnancy, childbirth, or related conditions are typically brought under either a “disparate impact theory” or “disparate treatment theory.”³⁶ The two theories each involve roughly three steps. For disparate impact cases in the context of pregnancy discrimination, the plaintiff first must identify a facially neutral employment practice that has a significant adverse impact on pregnant workers compared to others.³⁷ The employer can then defend the practice as a justified “business necessity” that is job related for the position in question.³⁸ Finally, the plaintiff can counter this justification by proving an alternative, non-discriminatory practice would serve the defendant’s

of men and women resulting from sex stereotypes.’ Discrimination on the basis of pregnancy is part of discrimination against women, and one of the stereotypes involved is that women are less desirable employees because they are liable to become pregnant. This was one of Congress’ concerns in passing the Pregnancy Discrimination Act.” (internal citation omitted) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

³³ See, e.g., *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008) (concluding an employee was terminated for the “gender-specific quality of childbearing capacity” and not “the gender-neutral condition of infertility”).

³⁴ See, e.g., *Abraham v. Graphic Arts Int’l Union*, 660 F.2d 811, 817–18 (D.C. Cir. 1981) (“Pregnancy and childbirth are, of course, phenomena shared only by women, and only female employees are susceptible to employment losses which may be tied to either. So, if an employer grants employees leave for any and all temporary physical disabilities except pregnancy, and restoration to the employee’s former job upon the expiration of leave, it is apparent that women employees are subject to ‘a substantial burden that men need not suffer.’ Title VII outlaws any detrimental visitation on employees of either sex ‘because of their differing roles in “the scheme of human existence;”’ by the same token, Title VII cannot be read ‘to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role.’” (footnotes omitted) (quoting *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977))).

³⁵ Beth A. Rubenstein, *It Will Take More Than Hall v. Nalco Co. to Eradicate the Ambiguities of the Pregnancy Discrimination Act of 1978: When Will the Law Overcome Its Impotency?*, 25 ABA J. LAB. & EMP. L. 73, 74 (2009).

³⁶ Phelps, *supra* note 27 (“Disparate impact cases involve employment practices that are facially neutral in their treatment of different groups, but have a significantly adverse effect on a protected group . . . compared to others.”).

³⁷ Wesley Kobylak, Annotation, *Disparate Impact Test for Sex Discrimination in Employment Under Title VII of Civil Rights Act of 1964* (42 U.S.C.A. § 2000e et seq.), 68 A.L.R. Fed. 19 (1984); Phelps, *supra* note 27.

³⁸ Kobylak, *supra* note 37; Phelps, *supra* note 27.

objective equally well.³⁹ For disparate treatment cases in the context of pregnancy discrimination, the plaintiff must show they are a protected worker (in this case, pregnant); they suffered an adverse employment outcome (e.g., termination); there was no legitimate reason for the adverse employment outcome (such as poor performance); and other workers were not treated the same way (e.g., if a non-pregnant worker was hired as the pregnant worker's replacement).⁴⁰

In 2006, Peggy Young, a part-time driver for United Parcel Service (UPS), became pregnant and received doctor's orders not to lift more than 20 pounds during the first half of her pregnancy and to not lift more than ten pounds in the second half of her pregnancy.⁴¹ UPS required drivers to be able to lift at least 70 pounds, and up to 150 pounds with assistance.⁴² Young requested an accommodation for her pregnancy-related lifting restriction, which UPS denied.⁴³ Young's manager told her she had to go on unpaid leave because "she was 'too much of a liability' and could 'not come back' until she 'was no longer pregnant.'"⁴⁴ In doing so, UPS forced Young to go without pay for most of her pregnancy and to eventually lose her employee medical coverage.⁴⁵ After filing a pregnancy discrimination charge with the EEOC in 2007 and receiving a right-to-sue letter, Young sued UPS in 2008 under the PDA amendments of Title VII, in *Young v. United Parcel Service, Inc.*, arguing that UPS had discriminated against her on the basis of her pregnancy status because it accommodated other drivers with similar lifting restrictions.⁴⁶ UPS argued that it had not discriminated against Young because she was not a worker in one of the three categories it provided accommodations for: (1) injured on the job, (2) lost Department of Transportation certifications, or (3) disabled within the meaning of the ADA.⁴⁷ Thus, UPS argued it had not discriminated against Young due to her pregnancy, but had treated her as they would any worker who did not fall into one of these three categories.⁴⁸ The case made its way to the Supreme Court, where, in 2015, the Court determined that Young—and pregnant workers like her—can overcome an employer's "apparently 'legitimate, non-discriminatory' reason for its actions" by showing evidence that both (1) "the employer's policies impose a significant burden on pregnant workers,"

³⁹ Kobylak, *supra* note 37; Phelps, *supra* note 27.

⁴⁰ Kobylak, *supra* note 37; Phelps, *supra* note 27.

⁴¹ *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 211 (2015).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 215.

⁴⁵ *Id.* at 211.

⁴⁶ *Id.* at 211, 214, 216.

⁴⁷ *Id.* at 211–12.

⁴⁸ *Id.*

and (2) the employer's "reasons are not sufficiently strong to justify the burden."⁴⁹ The question becomes, "why, when the employer accommodated so many, could it not accommodate pregnant women as well?"⁵⁰

However, Young's experiences mirror Durham's treatment five years later, to the point of *déjà vu*. Yet, despite the Supreme Court's ruling in *Young*, amicus briefs in support of Durham from the EEOC, and support from a coalition of 20 women's and workers' rights groups, Durham was denied an accommodation by the court and the legal system.⁵¹ In fact, in the wake of *Young*, courts allowed employers to deny accommodations to pregnant workers in more than two-thirds of cases.⁵² Thus, pregnant workers who were at least nominally protected under Title VII remained unprotected in reality.⁵³

B. *The ADA*

In 1990, the ADA was passed to, among other things, make it unlawful for employers with 15 or more employees to discriminate against qualified employees with a disability.⁵⁴ The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) broadened the statutory definition of *disability* in an attempt to cover more workers, including those with more temporary, significant limitations.⁵⁵

⁴⁹ *Id.* at 229.

⁵⁰ *Id.* at 231.

⁵¹ Brief of Amici Curiae A Better Balance, Ctr. for WorkLife L. et al. in Support of Plaintiff-Appellant Urging Reversal, at 22–32, *Durham v. Rural/Metro Corp.*, 955 F.3d 1279 (11th Cir. 2019) (No. 4:16-CV-01604) (listing the amici curiae and outlining their statements of interest); *Durham v. Rural/Metro Corp.*, No. 4:16-CV-01604, 2018 WL 4896346, at *1–3 (N.D. Ala. Oct. 9, 2018) (explaining how Durham was ineligible for FMLA leave due to her short tenure at Rural/Metro and was advised by her employer that unpaid leave was her only recourse); *Durham I*, No. 4:16-CV-01604, 2020 WL 7024892, at *5 (N.D. Ala. Nov. 30, 2020) (granting the employer's motion for summary judgment on Durham's claim that Rural/Metro discriminated against her by denying her request for light duty work); *Durham v. Rural/Metro. Corp.*, 955 F.3d 1279, 1281, 1287 (11th Cir. 2020) (remanding the case back to the district court after finding summary judgment was erroneously granted); *Durham II*, No. 4:16-CV-01604, 2021 WL 4477623, at *1 (N.D. Ala. Sep. 30, 2021) (denying Durham's motion for a new trial).

⁵² BAKST ET AL., *supra* note 12, at 5.

⁵³ *Id.* at 5–6.

⁵⁴ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213); *The ADA: Your Employment Rights as an Individual With a Disability*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability> [<https://perma.cc/S67H-QNWU>] (last visited Mar. 31, 2026).

⁵⁵ *Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/statutes/notice-concerning-americans-disabilities-act-ada-amendments-act-2008> [<https://perma.cc/VY7M-N747>] (last

For the purposes of the statute, *disability* is defined as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3)).”⁵⁶ “Major life activities” include activities of daily existence such as “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,” as well as major bodily functions of “the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive” systems.⁵⁷ A disability may be “episodic or in remission” so long as “it would substantially limit a major life activity when active.”⁵⁸ However, to be a “qualified individual” for ADA employment protection, the employee must be able, “with or without reasonable accommodation,” to “perform the essential functions of the employment position.”⁵⁹ A reasonable accommodation “may include . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position, [or] acquisition or modification of equipment,” so long as the accommodation does not cause “undue hardship” to the employer.⁶⁰ To determine whether an accommodation would cause an undue hardship to the employer, courts consider “the nature and cost of the accommodation,” the financial and personnel resources of the employer, the size and location of the employer, and the type of operations of the employer.⁶¹

Pregnancy itself is not a disability under the ADA, but some medical conditions related to a worker’s pregnancy may qualify.⁶² Courts have continued to view pregnancy as “normal” and not a disability, unless a pregnant worker has severe complications.⁶³ In doing so, courts have dismissed disability status for common

visited Mar. 31, 2026).

⁵⁶ 42 U.S.C. § 12102(1).

⁵⁷ *Id.* § 12102(2).

⁵⁸ *Id.* § 12102(4)(D).

⁵⁹ *Id.* § 12111(8).

⁶⁰ *Id.* § 12111(9)–(10).

⁶¹ *Id.* § 12111(10).

⁶² *Pregnancy Discrimination and Pregnancy-Related Disability Discrimination*, *supra* note 14.

This assumption has been called into question by various legal scholars but remains the legal presumption under the ADA—despite parallels between pregnant workers and workers found to have physical limitations that are covered as an ADA disability. *See, e.g.*, Joan C. Williams, Robin Devaux, Danielle Fuschetti & Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL’Y REV. 97, 110–11 (2013); Jeannette Cox, *Pregnancy As “Disability” and the Amended Americans With Disabilities Act*, 53 B.C. L. REV. 443, 443–45 (2012); Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA’s Pregnancy Exclusion*, 27 WIS. J.L., GENDER & SOC’Y 1, 12–14 (2012).

⁶³ *See, e.g.*, *Selkow v. 7-Eleven, Inc.*, No. 8:11-cv-456-T-33EAJ, 2012 WL 2054872, at *14 (M.D. Fla. June 7, 2012) (“[P]regnancy may rise to the level of a disability if the plaintiff

physical and psychological limitations of pregnancy such as vomiting, hypertension, vaginal bleeding, and dizziness.⁶⁴

In addition, even if a pregnant worker was successfully able to claim a disability related to their pregnancy, employers could then argue that the disability was such that the pregnant worker could not perform an essential function of the job, disqualifying them from protections under the ADA.⁶⁵ Therefore, whether deemed not sufficiently limited for disability status or too disabled to perform the work required, pregnant workers were denied reasonable accommodations, even after the ADA was deliberately expanded to cover a broader swath of the workforce.⁶⁶

C. *The PWFA*

Lawmakers recognized this state of affairs for pregnant workers under Title VII and the ADA long before the PWFA was passed.⁶⁷ The PWFA was first introduced in 2012 in the House of Representatives by Representative Jerry Nadler, a Democrat from New York, as a solution to the pregnant workers' continued lack of accommodation in the workplace.⁶⁸ However, the Bill was not successfully passed by either chamber, leading to its death.⁶⁹ Despite his lack of success, Representative Nadler reintroduced the Bill repeatedly—nearly every

experiences severe complications.”); *McKellips v. Franciscan Health Sys.*, No. C13-5096, 2013 WL 1991103, at *3–4 (W.D. Wash. May 13, 2013) (“Facts demonstrating a departure from a normal pregnancy make a finding of disability under the ADA more likely.”).

⁶⁴ Alemzadeh, *supra* note 62, at 12.

⁶⁵ See, e.g., *Lang v. Wal-Mart Stores E., L.P.*, 813 F.3d 447, 455–56 (1st Cir. 2016) (finding that the employer did not have to accommodate a pregnant employee because her lifting up to 60 pounds was deemed an essential job function); *Agee v. Mercedes-Benz U.S. Int'l, Inc.*, 646 Fed. App'x 870, 872, 875–76 (11th Cir. 2016) (finding that an employer did not have to accommodate a pregnant employee because her restriction of working 40 hours per week, maximum, prevented her from working overtime—which was an essential job function).

⁶⁶ *Spees v. James Marine, Inc.*, 617 F.3d 380, 396 (6th Cir. 2010) (holding that “pregnancy, by itself, does not constitute a disability under the ADA,” while noting that federal courts have unanimously held as such when deciding the issue); *Appel v. Inspire Pharms., Inc.*, 712 F. Supp. 2d 538, 549 (N.D. Tex. 2010) (holding that, even if the “incompetent cervix” of an employee was an ADA disability, the employee was not qualified individual under ADA as necessary to support her prima facie case of disability discrimination); *Notice Concerning the ADA Amendments Act of 2008*, *supra* note 55.

⁶⁷ Pregnant Workers Fairness Act, H.R. 5647, 112th Cong. (as referred to the Comm. on Educ. & the Workforce, May 8, 2012).

⁶⁸ *Id.*

⁶⁹ *Id.*; *H.R. 5647 - Pregnant Workers Fairness Act*, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/5647/all-info?s> [<https://perma.cc/XD3K-RWDA>] (last visited Apr. 1, 2026) (explaining that the bill was referred to various House subcommittees, but no further action was taken during the 112th session).

two years between 2013 and 2019—before each new Congress.⁷⁰

Eventually, upon its fifth introduction, the bill secured enough support to receive a committee hearing.⁷¹ On October 22, 2019, before the House of Representatives Subcommittee on Civil Rights and Human Services for the Committee on Education and Labor, Chairwoman Suzanne Bonamici introduced the PWFA at a hearing for testimony, stating:

As a mom and a policymaker, I know how important it is to protect the economic security of pregnant women in working families. Unfortunately, our current laws are inadequate, and many pregnant workers are placed on unpaid leave or forced out of work when they only need a simple accommodation to stay on the job during their pregnancy.

Today, we are holding a legislative hearing on . . . the [PWFA].

This bill takes an important step to guarantee that pregnant women will get reasonable accommodations that will allow them to stay in the workplace.⁷²

Support for the Bill and its purpose built in both chambers and on both sides of the aisle, such that on May 14, 2021, the Bill was reintroduced for the last time as House Bill 1065.⁷³ Apparently, in the case of pregnant worker employment protections, the sixth time's the charm. On the day the Bill was reintroduced, the House of Representatives passed the Bill with over 75% approval across party lines.⁷⁴ More than a year later, the Bill was included in the Consolidated Appropriations Act, 2023, which the Senate passed on December 22, 2022.⁷⁵ The House followed suit, passing the Bill the next day.⁷⁶ On December 29, 2022, President Joe Biden signed the PWFA into law as 42 U.S.C. §§ 2000gg through

⁷⁰ Pregnant Workers Fairness Act, H.R. 1975, 113th Cong. (as referred to the Comm. on Educ. & the Workforce, May 14, 2013); Pregnant Workers Fairness Act, H.R. 2654, 114th Cong. (as referred to the Comm. on Educ. & the Workforce, June 4, 2015); Pregnant Workers Fairness Act, H.R. 2417, 115th Cong. (as referred to the Comm. on Educ. & the Workforce, May 11, 2017); Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (as referred to the Comm. on Educ. & Lab., May 14, 2019).

⁷¹ *Long Over Due*, *supra* note 1, at 1.

⁷² *Id.* at 2 (statement of Hon. Suzanne Bonamici, Chairwoman, Subcomm. on C.R. & Hum. Servs.).

⁷³ Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. (2021) (enacted).

⁷⁴ See sources cited *supra* note 17.

⁷⁵ Pregnant Workers Fairness Act (PWFA), Pub. L. No. 117-328, 136 Stat. 4459 (2022) (codified as amended at 42 U.S.C. §§ 2000gg) (including the PWFA as “Division II” in the Bill, while the Consolidated Appropriations Act is listed as “Division I”); *Social Security Legislative Bulletin Number: 117-13*, SOC. SEC’Y (Dec. 29, 2022), https://www.ssa.gov/legislation/legis_bulletin_122322.html [<https://perma.cc/7M2V-XRJD>].

⁷⁶ *Social Security Legislative Bulletin Number: 117-13*, *supra* note 75.

2000gg-6,⁷⁷ and these statutes took effect 180 days later on June 27, 2023,⁷⁸ more than a decade after being first proposed.

The legislative history also makes clear that the PWFA was Congress' explicit response to the failings of Title VII and the ADA.⁷⁹ For example, at the same Subcommittee hearing on the PWFA, Chairwoman Bonamici stated,

[Y]et, 41 years after the passage of the [PDA], federal law still falls short of guaranteeing that all pregnant workers have reasonable workplace accommodations. Under current law, a pregnant worker must show that her employer accommodated similarly-situated coworkers, a burdensome, and often impossible, standard to meet.

Similarly, the [ADA] covers pregnancy related impairments but leaves women with less serious, pregnancy-related impairments or who simply need accommodations without legal recourse. Even the Supreme Court's decision in *Young v. UPS*, which affirmed pregnant workers' rights to reasonable accommodations under the [PDA], has not provided workers or businesses the clarity or legal certainty they need.

In fact, since *Young v. UPS*, approximately 70 percent of courts have denied reasonable accommodations for pregnant workers.

. . .

Guaranteeing that pregnant workers have reasonable accommodation in the workplace is a crucial step to eradicating pregnancy discrimination.

. . .

The [PWFA] is an opportunity for Congress to finally fulfill the promise of the [PDA] and take an important step towards workplace gender equity,

⁷⁷ PWFA §§ 101–09, 42 U.S.C. §§ 2000gg–2000gg-6.

⁷⁸ PWFA § 109; *What You Should Know About the Pregnant Workers Fairness Act*, *supra* note 13.

⁷⁹ H.R. REP. NO. 117-27, pt. 1, at 5 (2021) (“When Congress passed the [PDA], which amended [Title VII], its objective was to eradicate pregnancy discrimination in the workplace and ensure that pregnant workers were treated fairly in the workplace. Yet nearly 43 years after its passage, federal law still falls short of guaranteeing that all pregnant workers have reasonable workplace accommodations. H.R. 1065, the *Pregnant Workers Fairness Act*, ensures that pregnant workers who work for employers with 15 or more employees have access to reasonable accommodations in the workplace for pregnancy, childbirth, and related medical conditions. When pregnant workers do not have access to reasonable workplace accommodations, they are often forced to choose between their financial security and a healthy pregnancy. Ensuring that pregnant workers have access to reasonable accommodations will promote the economic well-being of working mothers and their families and promote healthy pregnancies.” (footnotes omitted)); *id.* at 11 (“Although workers in need of pregnancy-related accommodations may be able to seek recourse under [the PDA and the ADA], varying interpretations have created an unworkable legal framework. This has frustrated pregnant workers’ ability to secure reasonable accommodations.” (footnotes omitted)).

healthy pregnancies, and the economic security of all pregnant and parenting women and their families.⁸⁰

Congressional debates surrounding the Bill reiterated this purpose of addressing gaps in Title VII and ADA protections for pregnant workers *ad nauseum*.⁸¹ The purpose of the Bill was no secret. The PWFA was designed to support and protect pregnant workers in direct response to the continued failure to accommodate pregnant workers under the ADA and Title VII.⁸²

As discussed above, the PWFA requires employers to offer workers reasonable accommodations for “known limitations” related to “pregnancy, childbirth, or related medical conditions” unless the accommodation would result in an “undue hardship” for the employer.⁸³ The PWFA defines *known* as meaning “that the employee or employee’s representative has communicated [the condition] to the employer,” and *limitation* as a “physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.”⁸⁴

While similar to the ADA in its goal of granting accommodations to workers for certain conditions, and even borrowing the ADA’s definitions of *undue hardship*, *essential function*, and *reasonable accommodation*, the PWFA is different from the ADA in key ways, reflecting its targeted purpose of mandating workplace accommodations for pregnant workers.⁸⁵ For example, the PWFA grants protections to employees who

⁸⁰ *Long Over Due*, *supra* note 1, at 2–3 (cleaned up) (statement of Hon. Suzanne Bonamici, Chairwoman, Subcomm. on C.R. & Hum. Servs.).

⁸¹ *See, e.g.*, 166 CONG. REC. H4509 (daily ed. Sep. 17, 2020) (statement of Rep. Robert Scott) (“Unfortunately, our pregnancy antidiscrimination laws urgently need to be updated to provide reasonable accommodations for workers.”); *id.* at H4514 (statement of Rep. John Katko) (“Unfortunately, current Federal law lacks adequate protections to ensure pregnant workers are able to remain healthy in the workplace.”); *id.* at H4515 (statement of Rep. Alma Adams) (“Madam Speaker, over 40 years ago, after the [PDA] provided civil rights protections to pregnant people, it is shameful that we still must address this issue today.”); *id.* at H4517 (statement of Rep. Susan Wild) (“Madam Speaker, as a former lawyer who worked long hours during two pregnancies, it is outrageous to me that, in 2020, 100 years after women finally secured the power to vote, current law does not explicitly guarantee every pregnant worker the right to a reasonable accommodation at work.”); *id.* at H4519 (statement of Rep. Debbie Wasserman Schultz) (“Madam Speaker, I rise in strong support of the [PWFA], a bipartisan proposal that finally secures clear protections for pregnant workers. In the year 2020, Federal protections for pregnant workers are stuck in the 1950s. Current law does not explicitly guarantee all pregnant workers the right to reasonable accommodations so they can work without jeopardizing their pregnancies.”).

⁸² H.R. REP. NO. 117-27, at 5, 11.

⁸³ *Id.* at 2.

⁸⁴ 42 U.S.C. § 2000gg(4).

⁸⁵ Liz Morris & Cynthia Thomas Calvert, *The Pregnant Workers Fairness Act: What U.S. Employers Need to Know*, HARV. BUS. REV. (May 30, 2024), <https://hbr.org/2024/05/the-pregnant-workers-fairness-act-what-u-s-employers-need-to-know/> [<https://perma.cc/Z4UP-PGXJ>]. *Compare* 42 U.S.C. § 2000gg (defining terms used in the enacted statutes of the PWFA),

would not qualify as disabled under the ADA, because “normal” pregnancy is typically excluded as a disability.⁸⁶ In addition, the PWFA mandates that an employee receive reasonable accommodations even if they cannot perform the essential functions of their job—again, unlike the ADA—so long as the limitation is “temporary” and the employee will be able to perform the essential function “in the near future.”⁸⁷ This deliberately end routes around past successful employment arguments against accommodation under the ADA about pregnant workers being unable to perform essential job functions due to limitations such as lifting or overtime restrictions.⁸⁸

As for its similarities with the PDA provisions of Title VII, the PWFA mirrors language of the PDA’s definition of pregnancy discrimination (as a subtype of sex discrimination) in its definition of *known limitation*, specifically using the phrase “pregnancy, childbirth, or related medical conditions.”⁸⁹ However, the PWFA is not an antidiscrimination statute, unlike Title VII.⁹⁰ Still, the PWFA is responsive to the plight of pregnant workers who tried and failed to make a claim under Title VII.⁹¹ For example, in 2015, the Supreme Court held in *Young* that if a pregnant worker was able to make a prima facie disparate treatment case, then they *may* be able to prevail on claims under Title VII if their employer fails to grant reasonable accommodations for limitations associated with pregnancy, childbirth, or related medical conditions.⁹² The PWFA adopts the ADA’s failure-to-accommodate structure, which presumes that pregnant workers *will* prevail on claims under the PWFA for the same, unless the employer can prove the affirmative defense of undue hardship.⁹³

II. THE EEOC’S FINAL RULES AS CURRENTLY IMPLEMENTED AND CONTROVERSIES

The PWFA creates a relatively broad framework outlining generalized definitions and illegal acts under the law and then grants authority to the EEOC to

with id. § 12111(8)–(10) (defining *qualified individual*, *reasonable accommodation*, and *undue hardship* as used in the enacted statutes of the ADA).

⁸⁶ Morris & Calvert, *supra* note 85.

⁸⁷ 42 U.S.C. § 2000gg(6).

⁸⁸ See cases cited *supra* note 65.

⁸⁹ Compare 42 U.S.C. § 2000gg(4) (providing definition of *known limitation* per the PWFA), *with id.* § 2000e(k) (including in the PDA’s explanation of sex discrimination conditions related to pregnancy).

⁹⁰ *What You Should Know About the Pregnant Workers Fairness Act*, *supra* note 13.

⁹¹ See *Long Over Due*, *supra* note 1, at 2–3 (statement of Hon. Suzanne Bonamici, Chairwoman, Subcomm. on C.R. & Hum. Servs.).

⁹² William R. Corbett, *Reasonably Accommodating Employment Discrimination Law*, 128 PENN. ST. L. REV. 535, 536, 542, 549 (2024); see *supra* note 49 and accompanying text.

⁹³ Corbett, *supra* note 92, at 548–49.

create final rules regarding the detailed implementation of the law.⁹⁴ Specifically, the PWFA requires the EEOC to “provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions.”⁹⁵ Thus, while the PWFA statutory text outlines a general definition for *known limitation*, it fails to give any examples of these conditions, more detailed definitions, or limitations on the scope of the definition.⁹⁶

On April 15, 2024, the EEOC issued its final regulations to fill these definition gaps and carry out the law, which went into effect on June 18, 2024.⁹⁷ For example, with regard to employees who have a temporary limitation preventing them from performing an essential job function due to their pregnancy-related condition, the final rules defined *temporary* as lasting for “a limited time, not permanent, and may extend beyond ‘in the near future.’”⁹⁸ As for what constitutes “in the near future,” the EEOC assumes a limitation for a pregnant employee, which prevents them from performing an essential function, is limited in time to “in the near future” because “they could perform the essential functions within generally 40 weeks of” the temporary suspension of the essential function.⁹⁹ This assumption signals to the PWFA’s mandate, as the typical full-term pregnancy will last roughly 39 to 40 weeks,¹⁰⁰ and, thus, any accommodation for a pregnant worker will generally end within the length of a pregnancy.

The EEOC also placed limitations on the documentation an employer may request from the employee who seeks an accommodation under the PWFA.¹⁰¹ The documentation must be the minimum sufficient to confirm the condition; confirm it is a condition “related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions”; and describe the change or adjustment at work needed due to the limitation.¹⁰² This allows pregnant workers to maintain a degree of privacy with regard to their medical information by only having to disclose the minimum amount of information necessary to show that the PWFA is involved.

As for the limitations themselves, the EEOC outlined that the limitation may be “an impediment or problem that may be modest, minor and/or episodic; a need or problem related to maintaining the employee’s health or the health of the pregnancy;

⁹⁴ 42 U.S.C. §§ 2000gg, 2000gg-1, 2000gg-3(a).

⁹⁵ *Id.* § 2000gg-3(a).

⁹⁶ *Id.* § 2000gg(4).

⁹⁷ *What You Should Know About the Pregnant Workers Fairness Act*, *supra* note 13.

⁹⁸ 29 C.F.R. § 1636.3(f)(2)(i) (2026).

⁹⁹ *Id.* § 1636.3(f)(2)(ii).

¹⁰⁰ *Know Your Terms: Full-Term Pregnancy*, NAT’L INST. HEALTH: NAT’L CHILD & MATERNAL HEALTH EDUC. PROG. (June 6, 2022), <https://www.nichd.nih.gov/ncmh/ep/initiatives/know-your-terms/moms> [<https://perma.cc/J2MU-XSBM>].

¹⁰¹ 29 C.F.R. § 1636.3(l).

¹⁰² *Id.* § 1636.3(l)(1).

or an employee seeking health care related to pregnancy, childbirth, or a related medical condition itself.”¹⁰³ This language follows both the ADA inspiration for the PWFA by actively addressing that the limitation may be temporally limited and the explicit intent of the PWFA to cover even the most minor limitations related to “pregnancy, childbirth, or a related medical condition.”¹⁰⁴

The EEOC’s stance is that the phrase *pregnancy, childbirth, or related medical conditions* should be read broadly to have the same meaning as the phrase in Title VII.¹⁰⁵ To bolster this interpretation, the EEOC points out that the PWFA is partially Congress’ response to the shortcomings of Title VII, as amended by the PDA.¹⁰⁶ The EEOC notes the limitations imposed on the PDA through court decisions, including the Supreme Court’s 2015 decision in *Young*, which according to the PWFA House Report, created a standard that did not adequately protect the workers the PDA had been designed to cover.¹⁰⁷ Therefore, the EEOC argues it is justified in taking a broad interpretation for defining the conditions the PWFA covers.¹⁰⁸

However, this broad interpretation has drawn controversy. For example, based on a broad interpretation of the phrase *pregnancy, childbirth, or related medical conditions*, the EEOC has explicitly declined to create a temporal proximity requirement for conditions before or after pregnancy or to limit the scope of conditions covered further.¹⁰⁹ A worker would not have to show they were pregnant in the past six months, for example, to have a “related medical condition.”¹¹⁰ This

¹⁰³ *Id.* § 1636.3(l)(2)(i)(A).

¹⁰⁴ *Id.*; see 167 CONG. REC. H2331 (daily ed. May 14, 2021) (statement of Rep. John Katko) (“This bipartisan bill provides pregnant workers with an affirmative right to reasonable—and I stress the word ‘reasonable’—accommodations in the workplace while creating a clear and navigable standard for employers to follow. These accommodations are minor, as simple as providing an employee with extra restroom breaks or a stool to sit on.”); *id.* at H2333 (statement of Rep. Jerrold Nadler) (“We all agree that pregnancy is not a disability, but sometimes pregnant workers need an easy fix, such as a stool or an extra bathroom break, to stay on the job. These accommodations are short in duration, and typically cost very little to provide, but they can mean the difference between keeping your job or putting your pregnancy at risk.”); 168 CONG. REC. H10527 (daily ed. Dec. 23, 2022) (statement of Representative Jerrold Nadler) (“When pregnant women are denied accommodations, they face health risks including miscarriage and premature births, according to the March of Dimes. Studies have shown an increased risk of miscarriage and preterm birth as a result of heavy lifting, extended hours, or prolonged periods of sitting or standing.”).

¹⁰⁵ Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096, 29099 (Apr. 19, 2024) (codified at 29 C.F.R. pt. 1636).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (citing H.R. REP. NO. 117-27, pt. 1, at 14–16 (2021)).

¹⁰⁸ See *id.*

¹⁰⁹ *Id.* at 29099–100.

¹¹⁰ See *id.* at 29100.

is counter to many Title VII cases that have required a temporal link to pregnancy to show an accommodation was denied due to discrimination over the workers' pregnancy.¹¹¹

In addition, the EEOC disagrees that the inclusion of certain conditions in its non-exhaustive list of potential "related medical conditions" that are or may be related to pregnancy or childbirth exceeded its authority under the PWFA.¹¹² The EEOC claims that it will be "readily apparent that certain medical conditions (e.g., lactation, miscarriage, stillbirth, having or choosing not to have an abortion, preeclampsia, gestational diabetes, and HELLP (hemolysis, elevated liver enzymes and low platelets syndrome)) have a relation to pregnancy and childbirth."¹¹³ Thus, even though the PWFA did not explicitly ask for the EEOC to create such a list of potential related medical conditions, the EEOC feels it is in its authority to do so since doing so will help the implementation and enforcement of the statute.¹¹⁴ Nonetheless, the EEOC's claim that it will be "readily apparent" that the conditions it has chosen to list "have a relation to pregnancy and childbirth" is made somewhat dubious in light of the controversy key conditions have drawn.¹¹⁵

As discussed above, the PWFA was very obviously designed to fill the cracks that pregnant workers were falling through under Title VII and the ADA based on the statutory text and legislative history.¹¹⁶ However, regardless of the potential benefits a particularly broad interpretation of the phrase *pregnancy, childbirth, or related medical conditions* may bring to female workers in general, and not just pregnant workers, the

¹¹¹ See, e.g., *Briggs v. Women in Need, Inc.*, 819 F. Supp. 2d 119, 127–28 (E.D.N.Y. 2011) ("Courts have found that an employee terminated while pregnant, on maternity leave, or soon after returning from maternity leave, is a member of the protected class."); *Quarantino v. Tiffany & Co.*, 71 F.3d 58, 65 (2d Cir. 1995) (finding the temporal proximity between company's discovery of plaintiff's pregnancy and interviews for non-pregnant replacement supported inference of discrimination); *Asmo v. Keane, Inc.*, 471 F.3d 588, 594 (6th Cir. 2006) (stating in regard to a decision to terminate plaintiff within two months of learning plaintiff was pregnant, "[t]his temporal proximity is sufficient to establish a link between Asmo's pregnancy and her termination for the purposes of a prima facie case."); *Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1257 (11th Cir. 2017) (determining a "temporal proximity of only eight days" from when a plaintiff returned to work after pregnancy to an adverse reassignment was evidence she was discriminated against on the basis of her pregnancy). *But see Solomen v. Redwood Advisory Co.*, 183 F. Supp. 2d 748, 754–55 (E.D. Pa. 2002) (determining a plaintiff who was terminated 11 months after giving birth was not a member of the PDA's protected class); *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 469–71 (6th Cir. 2005) (finding on appeal that the lower court erroneously required a "nexus" between pregnancy and adverse employment decision as a prerequisite to PDA coverage).

¹¹² Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29100–01.

¹¹³ *Id.* at 29101.

¹¹⁴ See *id.* at 29100–01.

¹¹⁵ See *id.* at 29101–03.

¹¹⁶ See *supra* Section I.C.

statutory support for such a broad interpretation becomes tenuous once overstretched. An overbroad interpretation also calls into question and fuels debate over other related medical conditions that, by their own plain meaning combined with the statutory text and legislative intent, are clearly meant to be included.

A. *Arguments Against Menstruation and Lactation as Pregnancy-Related Medical Conditions*

Take, for example, menstruation being listed as a “related medical condition” under the EEOC’s current final rules.¹¹⁷ The main arguments against menstruation as a related medical condition are two-fold. The first argument, generally, can be summed up as: menstruation is too attenuated from pregnancy to be a “related medical condition.” Menstruation—colloquially, a period—is the beginning of the menstrual cycle, when an individual sheds blood and tissue from the lining of the uterus in time with low estrogen and progesterone hormones, signaling the individual is *not* pregnant.¹¹⁸ In the United States, the average age for an individual to begin to menstruate is 12 years old and the process will generally occur, although not always regularly, for the next 40 years of life.¹¹⁹ Menstruation stops during pregnancy and can take time to restart post-pregnancy, especially if the individual is breastfeeding.¹²⁰ Thus, while related to an individual’s reproductive system, menstruation does not have any link to an employee’s current or recent pregnancy.¹²¹ Instead, a problem with menstruation may prevent pregnancy or be completely unrelated to pregnancy.¹²² The commentors on the EEOC’s proposed rules argued that if menstruation was to be included, it needed to at least be temporally related to a current or recent pregnancy “occurring 6 or fewer months earlier.”¹²³

In attempting to address the attenuation of menstruation from pregnancy, the EEOC responded that, while it would not create a “bright-line temporal rule” excluding menstruation further removed from pregnancy, it did clarify that “related medical conditions’ must be related to the pregnancy or childbirth of the specific employee in question” and that the determination of relation is fact-specific and to be

¹¹⁷ 29 C.F.R. § 1636.3(b) (2026).

¹¹⁸ *Your Menstrual Cycle*, U.S. DEP’T OF HEALTH & HUM. SERVS.: OFF. ON WOMEN’S HEALTH (Jan. 13, 2025), <https://womenshealth.gov/menstrual-cycle/your-menstrual-cycle> [<https://perma.cc/K2NY-ZTY8>].

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See* Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096, 29101 (Apr. 19, 2024) (codified at 29 C.F.R. pt. 1636).

¹²² *See id.* During the notice-and-comment period before final rules are promulgated, citizens are invited to comment on proposed rules so the promulgating agency can address concerns. *Learn About the Regulatory Process*, REGULATIONS.GOV, <https://www.regulations.gov/learn> [<https://perma.cc/VK57-8XGF>] (last visited Apr. 9, 2026).

¹²³ *See id.* at 29100.

case-by-case.¹²⁴ Still, it is difficult to see how menstruation would ever be a medical condition of a pregnant worker or a medical condition related to a worker's recent pregnancy, given that menstruation stops during pregnancy.¹²⁵ In fact, bleeding during pregnancy is not caused by menstruation, but by other possible pregnancy complications.¹²⁶

The second argument against including menstruation as a "related medical condition" is related to whether menstruation even falls under the Title VII definition of *related medical conditions* on which the EEOC is basing its broad interpretation for the PWFA. There are relatively few federal courts that have addressed this issue, and several of those that have addressed whether menstruation is a pregnancy-related medical condition have held that menstruation does not fall under Title VII's definition.¹²⁷ However, despite the division on the issue in the courts, the EEOC states that "read together" the "cases illustrate that, at a minimum, menstruation is covered under Title VII when it has a nexus to a current or prior pregnancy or childbirth."¹²⁸ This is ironic since menstruation being covered when it "has a nexus to a current or prior pregnancy or childbirth" suggests that a temporal connection of menstruation to pregnancy is required.¹²⁹

In addition, the EEOC's interpretation leaves the status of each worker's limitations due to menstruation on shaky ground. Instead of a bright-line rule, the determination of whether menstruation is a covered limitation under the PWFA must be case-by-case, leaving the required response under the PWFA murky for both employers and employees, not to mention courts.¹³⁰ Inevitably,

¹²⁴ *Id.*

¹²⁵ *Your Menstrual Cycle*, *supra* note 118.

¹²⁶ *Symptoms: Bleeding During Pregnancy*, MAYO CLINIC (Jan. 24, 2025), <https://www.mayoclinic.org/symptoms/bleeding-during-pregnancy/basics/causes/sym-20050636> [<https://perma.cc/LQX7-24FN>].

¹²⁷ See *Jirak v. Fed. Express Corp.*, 805 F. Supp. 193, 195 (S.D.N.Y. 1992) (stating that menstrual cramps alone were not a medical condition related to pregnancy or childbirth); *Coleman v. Bobby Dodd Inst.*, No. 4:17-CV-29, 2017 WL 2486080, at *2 (M.D. Ga. June 8, 2017) (stating that the employee's excessive menstruation was "related to pre-menopause, not pregnancy or childbirth"). *But see* *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 429–30 (5th Cir. 2013) (noting in dicta about whether lactation was a "related medical condition," that "as both menstruation and lactation are aspects of female physiology that are affected by pregnancy, each seems readily to fit into a reasonable definition of 'pregnancy, childbirth, or related medical conditions'"); *Flores v. Va. Dep't of Corr.*, No. 5:20-CV-00087, 2021 WL 668802, at *4 (W.D. Va. Feb. 22, 2021) (declining to decide whether heavy menstruation due to perimenopause was a "related medical condition," but observing that "there is a strong argument that menstruation is a 'related medical condition' to pregnancy and childbirth under the PDA").

¹²⁸ Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29101.

¹²⁹ *Id.* at 29100–01.

¹³⁰ See *id.*

this murkiness means employees will be less likely to seek accommodation for menstruation, assuming the condition was related to a current or recent pregnancy or childbirth. Even if the worker did seek an accommodation, employers are less likely to grant it without a clear mandate from the final rules to do so.¹³¹ And finally, there will continue to be splits in the courts about whether menstruation should be reasonably accommodated as a related medical condition under the PWFA or not based on the existing split on whether menstruation is a “related medical condition” under Title VII.¹³²

Commentors on the proposed rule have also attacked lactation as a “related medical condition” using a similar reasoning, again arguing that lactation was not uniformly adopted as a “related medical condition” under Title VII and should not be included.¹³³ However, unlike with menstruation, where there is a genuine split in authority, the case evidence cited in the comments is weak at best. Commentors relied on “*dicta* without any citation of authority” from *Barrash v. Bowen*.¹³⁴ In contrast, at least two cases have recognized lactation as a “related medical condition” to pregnancy under Title VII.¹³⁵ This position is supported by the fact that lactation often begins during pregnancy due to changes in hormone levels.¹³⁶ While lactation will continue after childbirth, it will usually stop once “milk is no longer being taken from the breasts,” making it a limited condition temporally linked to pregnancy and childbirth.¹³⁷ Outside of medical intervention, lactation is usually related to pregnancy or a recent childbirth and so it logically pairs as a medical condition related to pregnancy.¹³⁸ Thus, the tenuous connection to pregnancy and childbirth of some of the pregnancy-related medical conditions endorsed by the EEOC—such as menstruation—encouraged

¹³¹ Marcy L. Karin, *Addressing Periods at Work*, 16 HARV. L. & POL'Y REV. 449, 453, 474, 512–13 (2022).

¹³² See cases cited *supra* note 127.

¹³³ Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29101–02.

¹³⁴ *Notter v. N. Hand Prot.*, No. 95-1087, 1996 WL 342008, at *5 (4th Cir. 1996) (per curiam) (“In *Barrash* we said in *dicta* without any citation of authority, ‘Under the [PDA], pregnancy and related conditions must be treated as illnesses only when incapacitating.’ The text of the [PDA] contains no requirement that ‘related medical conditions’ be ‘incapacitating.’” (quoting *Barrash v. Bowen*, 846 F.2d 927 (4th Cir. 1988))).

¹³⁵ *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) (holding that lactation is a related medical condition of pregnancy for purposes of the PDA because it is the “physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth” and is “a physiological result of being pregnant and bearing a child.”); *Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1259 (11th Cir. 2017) (holding that lactation is a related medical condition and therefore covered under the PDA).

¹³⁶ *Lactation*, NAT'L CANCER INST., <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/lactation> [<https://perma.cc/8VNN-JMRN>] (last visited Apr. 6, 2026).

¹³⁷ *Id.*

¹³⁸ See *id.*

similar arguments against the more supported position of other related medical conditions—such as lactation—by casting doubt on the EEOC’s authority in general.¹³⁹

B. Arguments Against Infertility and Contraception as Pregnancy-Related Medical Conditions

Other currently accepted “related medical conditions” have also drawn criticism on similar grounds. For example, the arguments against infertility and fertility treatments being treated as conditions related to pregnancy focus on the inconsistent treatment of fertility issues under Title VII case law.¹⁴⁰ Some cases have ruled that fertility treatments and infertility are related to pregnancy.¹⁴¹ However, several cases have held the opposite—especially those related to health plans—generally considering infertility and fertility treatments as issues and treatments both men and women deal with outside of pregnancy.¹⁴² If infertility prevents pregnancy and is present in female and male workers, it is unclear how a statute requiring accommodations for pregnant workers would be relevant. Instead, infertility may be a separate, more generalized health issue outside of the statutory mandate protecting pregnant workers, and, while possibly worthy of further protections due to limitations of the ADA and Title VII, the legal solution is not to try and shove a square peg into a round hole.

The EEOC decided to allow infertility and fertility treatments to be recognized

¹³⁹ See Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096, 29101–02 (Apr. 19, 2024) (codified at 29 C.F.R. pt. 1636).

¹⁴⁰ *Id.* at 29102.

¹⁴¹ *Hall v. Nalco Co.*, 534 F.3d 644, 645–46, 649 (7th Cir. 2008) (finding an employer’s practice of terminating employees who took leave for IVF treatment violated the PDA because only women undergo IVF); *Erickson v. Bd. of Governors of State Colls. & Univs.*, 911 F. Supp. 316, 320 (N.D. Ill. 1995) (finding that a plaintiff who underwent infertility treatment, “although infertile, may have been viewed by her employer as potentially pregnant,” and distinguishing between “infertility [that] does not relate to [the] capacity to become pregnant” and that which does relate to the capacity to become pregnant); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1403–04 (N.D. Ill. 1994) (finding that infertility or its treatment were conditions that fell under the umbrella of pregnancy (including potential pregnancy), childbirth, or related medical conditions).

¹⁴² *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679–80 (8th Cir. 1996), *abrogated on other grounds by* *Bragdon v. Abbott*, 524 U.S. 674, 680 (1998) (finding the benefits policy at issue did not violate Title VII, reasoning that “the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender-neutral”); *Saks v. Franklin Covey, Inc.*, 316 F.3d 337, 346 n.4 (2d Cir. 2003) (finding that generally, “[i]nfertility is a medical condition that afflicts men and women with equal frequency,” but leaving open the question of whether an individual “would be able to state a claim under the PDA or Title VII for adverse employment action taken against her because she has taken numerous sick days in order to undergo surgical implantation procedures”).

to allow “for reasonable accommodations for treatment for infertility when an employee with the capacity to become pregnant is trying to get pregnant.”¹⁴³ To do so, the EEOC relied heavily on *International Union v. Johnson Controls*, where the Supreme Court held that Title VII, as amended by the PDA, prohibits discrimination based on potential pregnancy or childbearing capacity.¹⁴⁴ However, it is unclear whether the justifications enumerated for this protection stem from Title VII’s protections against pregnancy discrimination or sex discrimination more generally because the Court does not draw clear distinctions between discrimination based on sex due to gender and discrimination based on sex due to pregnancy. For example, the case focused on an employer’s gender-based fetal-protection policy which excluded “*fertile female* employee[s] from certain jobs because of its concern for the health of the fetus *the woman might conceive*.”¹⁴⁵ In a similar vein, the Court states, “*women* as capable of doing their jobs as their *male counterparts* may not be forced to choose between having a child and having a job.”¹⁴⁶ The Court finally notes that the PDA was enacted to help “protect *female workers* from being treated differently from *other employees* simply because of their capacity to bear children.”¹⁴⁷ With this muddling of sex, gender, pregnancy capability, and pregnancy status, it is unclear how this case should be applied to providing protections under the PWFA. The EEOC notes that “an inference of unlawful *sex discrimination* may be raised if, for example, an employee is penalized for taking time off from work to undergo [infertility treatment].”¹⁴⁸ If the protections are from general sex discrimination and not pregnancy discrimination specifically, then it is unclear why infertility treatments and infertility would be protected by the PWFA, which has the goal of “ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.”¹⁴⁹ In this case, Title VII would be better suited to protect workers dealing with infertility and seeking fertility treatments than the PWFA, as the PWFA is not an antidiscrimination act and is explicitly intended to allow pregnant workers to receive reasonable accommodations.¹⁵⁰

Commentors on the proposed regulations also took issue with contraception being a “related medical condition” to pregnancy.¹⁵¹ Commentors again focused on

¹⁴³ Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29102.

¹⁴⁴ *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991).

¹⁴⁵ *Id.* at 190 (emphasis added).

¹⁴⁶ *Id.* at 204 (emphasis added).

¹⁴⁷ *Id.* at 205 (emphasis added).

¹⁴⁸ Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29102 (emphasis added).

¹⁴⁹ Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. pmb. (2021) (enacted).

¹⁵⁰ See *What You Should Know About the Pregnant Workers Fairness Act*, *supra* note 13.

¹⁵¹ Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29103.

courts' spotty records with regard to holding contraception as a "related medical condition" under the PDA provisions of Title VII.¹⁵² These commentators heavily relied on the Eighth Circuit's holding in *In re Union Pacific Railroad Employment Practices Litigation* that Union Pacific's insurance policy excluding coverage for all types of contraception for both men and women did not violate the PDA.¹⁵³ The EEOC countered that Title VII under *Johnson Controls* protected employees from discrimination based on the potential to become pregnant.¹⁵⁴ Thus, "a limitation related to contraception that affects the individual employee's potential pregnancy can be the basis for a request for an accommodation."¹⁵⁵ This is a broad interpretation of the mandate to reasonably accommodate pregnant workers under the PWFA. It is unclear how the use of contraception would ever not affect "potential pregnancy," as contraception's primary purpose is to prevent pregnancy.¹⁵⁶ Or in other words, pregnancy would indicate either a failure of the contraception method or the nonuse of contraception.¹⁵⁷ It is unclear how the PWFA would lead to an accommodation for a limitation related to contraception beyond an unplanned pregnancy, which would be an accommodation for the pregnancy itself, not a condition related to the contraceptive used.¹⁵⁸

C. Arguments Against "Elective" Abortion as a Pregnancy-Related Medical Condition

The final, and most contentious, "related medical condition" listed by the EEOC was abortion, specifically, "elective" abortions.¹⁵⁹ Roughly 54,000 comments were made during the notice-and-comment period urging the EEOC to exclude abortion from the definition of *pregnancy, childbirth, or related medical conditions*.¹⁶⁰ On the other hand, roughly 40,000 comments approved the inclusion of abortion in the definition.¹⁶¹ The primary driving force behind the comments arguing for abortion to be excluded were rooted in moral and religious beliefs that "abortion is the destruction of a human life, that it is objectionable . . . , and that it is not health

¹⁵² *Id.*

¹⁵³ *See In re Union Pac. R.R. Emp. Pracs. Litig.*, 479 F.3d 936, 938, 944–45 (8th Cir. 2007).

¹⁵⁴ Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29103.

¹⁵⁵ *Id.* at 29104.

¹⁵⁶ *Contraception and Preventing Pregnancy*, U.S. DEP'T OF HEALTH & HUM. SERVS.: OFF. OF POPULATION AFFS., <https://opa.hhs.gov/reproductive-health/preventing-pregnancy-contraception> [<https://perma.cc/GMM9-6ZAM>] (last visited Apr. 6, 2026).

¹⁵⁷ *Id.*

¹⁵⁸ *See* Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29103.

¹⁵⁹ *Id.* at 29104; *see* discussion of the term "elective" abortion *supra* note 26.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

care.”¹⁶² While the EEOC acknowledged these beliefs are sincere and deeply held, they once more pointed to their interpretation of the phrase *pregnancy, childbirth, or related medical conditions* under Title VII as legal justification for the inclusion of abortion as a “related medical condition.”¹⁶³

The PWFA does not regulate or affect the circumstances under which a state may allow an abortion to occur.¹⁶⁴ In reality, under the PWFA, a pregnant person could anticipate accommodations such as time off for a medical appointment or time off for recovery—the same type of accommodations available for any termination of pregnancy, whether medically induced or not.¹⁶⁵ These accommodations would not have to include paid leave, nor would an employer have to pay for the travel-related expenses of the employee.¹⁶⁶ The EEOC also clarified that the PWFA cannot force an employer to pay for a health plan that covers abortion.¹⁶⁷ In sum, the act of an employee having an elective abortion is not relevant to the legality of an elective abortion in a given state, to the kind of accommodation required under the PWFA for limitations after a termination of pregnancy, or to the fear of compromising the religious freedoms of an employer by forcing them to pay the employee to have an elective abortion the employer disapproves of on moral grounds.¹⁶⁸ Instead, the PWFA only addresses the temporary known limitations after an elective abortion,¹⁶⁹ which are medically the same as any other termination of pregnancy.¹⁷⁰ Regardless of the type of termination of pregnancy, the PWFA accommodates the formerly-pregnant worker’s temporary known limitations. In the end, the controversy over abortion, and the state-by-state determination of its legality, are irrelevant to the accommodation of post-termination medical conditions. These issues are separate and apart from the mandate of the PWFA and its operation in practice.

After making its legal argument, the EEOC addressed the issue of abortion in two separate arguments: first, that moral or religious beliefs are not monolithic and frankly irrelevant to the legal mechanism of the PWFA; and second, that very few employers have ever and will ever have to face “a situation where an employee is expressly requesting leave for an abortion and the employer declines to grant the

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *See id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 29104–05, 29109, 29112.

¹⁶⁹ *See* 42 U.S.C. § 2000gg(4).

¹⁷⁰ *See* Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29101 (showing the EEOC’s explicit placement of abortions among other conditions like miscarriage and stillbirth, suggesting the medical similarity between them).

leave on religious or moral grounds.”¹⁷¹ As to the first argument, this is related to the fact that the PWFA is not a “moral law.”¹⁷² It is not making a value determination about whether abortion is objectively right or wrong.¹⁷³ As to the second argument, the EEOC is pointing to the reality in the workplace of how employees and employers interact.¹⁷⁴ Employers provide sick leave to their employees.¹⁷⁵ Employees can use this sick leave as time off to have an abortion.¹⁷⁶ This has not changed simply because of the passing of the PWFA.¹⁷⁷ An employee who has a known limitation due to a recent termination of pregnancy would be able to show documentation that they were recently pregnant, have a physician confirm there had been such a termination, and recommend a reasonable accommodation, such as a short period of time off or time to go to follow-up medical appointments.¹⁷⁸

In addition to the commentor challenges to the inclusion of abortion as a “related medical condition” under the PWFA, numerous states that have limited access to abortion in the wake of *Dobbs v. Jackson Women’s Health Organization*¹⁷⁹—which overturned *Roe v. Wade* and ended the constitutional right to abortion—have challenged the final rules from the EEOC based on the inclusion of abortion as needing reasonable accommodation under the PWFA.¹⁸⁰ The 19 states that have challenged the inclusion of abortion as a “related medical condition” include Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia.¹⁸¹ Unsurprisingly, all of these states—except for Kansas—also have Republican controlled legislatures, Republican governors, and supported the election of Republican President Donald Trump.¹⁸²

¹⁷¹ *Id.* at 29104–05.

¹⁷² See *Moral Law*, CORN. L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/moral_law [<https://perma.cc/FR4M-DUAD>] (last visited Apr. 8, 2026) (providing that “[m]oral law refers to conduct derived from an ‘objective’ right and wrong,” beyond that delineated by legislation).

¹⁷³ See *id.*

¹⁷⁴ Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29105.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 29104, 29131; 29 C.F.R. § 1636.3(a) (2026).

¹⁷⁹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022).

¹⁸⁰ *Louisiana v. EEOC*, 705 F. Supp. 3d 643, 654, 661 (W.D. La. 2024); *Tennessee II*, 129 F.4th 452, 456–57 (8th Cir. 2025).

¹⁸¹ *Louisiana*, 705 F. Supp. 3d at 648–49; *Tennessee II*, 129 F.4th at 452.

¹⁸² *State Government Trifectas*, BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas [<https://perma.cc/K7C6-S2DT>] (last visited Apr. 8, 2026) (showing a Republican trifecta in all 19 states except for Kansas, where the governor is a Democrat); *2024 Electoral College Results*, NAT’L ARCHIVES (Jan. 13, 2025), <https://www.archives.gov/electoral-college/2024> [<https://perma.cc/2XQR-555U>] (showing that all 19 states were won by Trump–Vance in the

The argument that has gained the most traction is that the EEOC has exceeded its statutory authority in identifying abortion as a medical condition related to pregnancy and childbirth.¹⁸³ Essentially, the states have argued that the EEOC must be able to show clear congressional authorization in the PWFA statute for the power to identify abortion as a “related medical condition” and that, given the significant political debate over abortion, Congress would not have conferred such authority implicitly.¹⁸⁴ However, this position ignores the statutory text of the PWFA mandating the provision of reasonable accommodations to workers with known limitations or a “physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.”¹⁸⁵

The EEOC defining elective abortion as a protected condition has added unnecessary complexity and controversy that distracts from this reasonable accommodation mandate. Abortion—“the termination of a pregnancy before the fetus can survive outside the uterus”¹⁸⁶—is under the protection and purpose of the statute as a medical condition. Whether spontaneous, incomplete, missed (i.e., a miscarriage—where a pregnancy ends on its own before the 20th week of pregnancy, and is either fully, partially, or not expelled from the uterus, respectively),¹⁸⁷ or elective (i.e., an induced abortion, where pregnancy is terminated

2024 election; Nebraska appoints its electors proportionally so that President Trump and Vice President Vance each received four electoral votes, while Harris and Walz each received one).

¹⁸³ See *Louisiana*, 705 F. Supp. 3d at 650, 661, 663–64; *Tennessee II*, 129 F.4th at 457.

¹⁸⁴ *Louisiana*, 705 F. Supp. 3d at 653 (“While the States argue that compliance harms alone are sufficient to establish standing, more fundamental is the States’ concern that the EEOC’s implementation of the Final Rule to include an abortion accommodation mandate: (i) was not authorized by Congress in the PWFA; (ii) exceeds the rule-making power of the executive branch; and (iii) interferes with the States’ ability to enforce their laws and implement the chosen public policies of their citizens.”); *Tennessee I*, 737 F. Supp. 3d 685, 692–93, 699 (E.D. Ark. 2024) (“The States contend that the EEOC’s rulemaking to cover this situation breaks faith with Congress’s words in the Act, rests on flawed reasoning, offends the U.S. Constitution in various ways, and in substance violates the Administrative Procedures Act. The States also point to their strong anti-abortion public policies, present in some of their Constitutions and many statutes.”). See generally *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024) (overruling the *Chevron* deference doctrine so that agencies must regulate in accordance with a statute’s “single, best meaning”); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (holding, pursuant to the major questions doctrine, an “agency must point to ‘clear congressional authorization’ for the authority it claims”).

¹⁸⁵ 42 U.S.C. § 2000gg(4).

¹⁸⁶ *Abortion: Definition*, YALE MED., <https://www.yalemedicine.org/clinical-keywords/abortion> [<https://perma.cc/V4DK-67J3>] (last visited Mar 16, 2026).

¹⁸⁷ *Spontaneous Abortion*, NAT’L CANCER INST., <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/spontaneous-abortion> [<https://perma.cc/GSD5-9ANF>] (last visited Apr. 8, 2026); Ashley Redinger & Hao Nguyen, *Incomplete Miscarriage*, NAT’L LIBR. OF MED.: STATPEARLS (Feb. 12, 2024), <https://www.ncbi.nlm.nih.gov/books/NBK559071/> [<https://perma.cc/F7ZY-F4ED>]; Clark Alves, Suzanne M. Jenkins & Amanda Rapp, *Early Pregnancy Loss (Spontaneous Abortion)*, NAT’L LIBR. OF MED.: STATPEARLS (Oct. 12, 2023), <https://www>

by medical intervention through medication or surgery),¹⁸⁸ the type of termination of pregnancy is irrelevant for the purposes of determining whether a worker will need reasonable accommodation due to known limitations related to the termination of a pregnancy. The accommodations are likely so similar for any termination of pregnancy that evaluating “undue hardship” requires no employer knowledge beyond that a termination of pregnancy occurred.¹⁸⁹

While the subject of abortion and limitations related to abortion is a hotly debated topic, abortion law does not have a direct link to the PWFA. Instead, challenging the PWFA on the semantics of elective versus spontaneous abortions only serves to delay and distract from the full implementation of the PWFA and uniform accommodation of pregnant workers across the country.¹⁹⁰

III. A PATH FORWARD FOR THE PWFA UNDER A CONSERVATIVE REGIME

Given the controversy surrounding the EEOC’s final rules for the PWFA, the host of legal challenges blocking enforcement of its protections in many states, and taking into consideration the conservative administration and Supreme Court now in power, it is unlikely that the EEOC’s final rules will survive as currently written.¹⁹¹ The reality is that some of the legal challenges and the shift in political stance related to abortion-related issues may cause significant portions of the EEOC’s rulings to be stripped.¹⁹² In fact, the pressure is already mounting on the EEOC to do so: on April 9, 2025 President Donald Trump released a Presidential Memorandum, Directing the Repeal of Unlawful Regulations, to further implement Executive Order 14219, Ensuring Lawful Governance and Implementing the President’s “Department of Government Efficiency” Deregulatory Initiative.¹⁹³ The Memorandum and accompanying fact sheet direct “agencies to rescind regulations that are unlawful” under ten recent Supreme Court decisions, including *Loper Bright*

ncbi.nlm.nih.gov/books/NBK560521/ [https://perma.cc/2HP4-FHEP].

¹⁸⁸ *Abortion*, World Health Organization [WHO] (May 17, 2024), <https://www.who.int/news-room/fact-sheets/detail/abortion> [https://perma.cc/NT2D-NLFN].

¹⁸⁹ See Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096, 29097, 29105 (Apr. 19, 2024) (codified at 29 C.F.R. pt. 1636).

¹⁹⁰ See *Louisiana v. EEOC*, 705 F. Supp. 3d 643, 658 (W.D.La. 2024); *Tennessee II*, 129 F.4th 452, 456 (8th Cir. 2025).

¹⁹¹ Leen & Pavlick, *supra* note 21; Minniti et al., *supra* note 22.

¹⁹² Minniti et al., *supra* note 22.

¹⁹³ Memorandum from President Donald Trump to the Heads of Exec. Dep’ts & Agencies on Directing the Repeal of Unlawful Regulations (Apr. 9, 2025); see also Exec. Order No. 14219, 90 Fed. Reg. 10583 (Feb. 25, 2025) (aiming to identify and repeal “regulations that implicate matters of social, political, or economic significance that are not authorized by clear statutory authority”).

and *West Virginia v. EPA*.¹⁹⁴ However, it is still unclear what will remain of the EEOC's final rules under the PWFA when the dust settles. This leaves both employees and employers alike in an uncomfortable state of limbo with regard to the future of pregnant worker accommodations.¹⁹⁵

To address this uncertainty, and to attempt to create clarity and consistency in the enforcement of the PWFA across the United States, the arguments regarding the EEOC's specific inclusions of certain "related medical conditions" and the authority of the EEOC to do so under the PWFA must be addressed. In doing so, a path forward is made clear. For the PWFA to grant strong, unambiguous protections to pregnant workers, certain tenuously and tangentially "related medical conditions" may need to be excluded from the EEOC's final rules to avoid a more drastic stripping of the rules. These tenuously related conditions include menstruation, infertility and fertility treatments, and contraception.¹⁹⁶ By the same token, "related" but controversial "medical conditions"—such as lactation and abortion—need to be maintained as protected under the plain language of the PWFA.¹⁹⁷ However, to avoid further irrelevant disagreements and litigation disrupting the enforcement of the PWFA, this Note proposes a reformulation specifically targeted to the subject of abortion that would consider employee privacy and clarify the scope of the PWFA with regard to abortion by suggesting the use of the term *termination of pregnancy*.¹⁹⁸

Two recent Supreme Court cases are of particular importance when considering the path forward for the PWFA: *Loper Bright* and *West Virginia*.¹⁹⁹ Both of these cases are referenced in President Trump's call for agency regulation reforms.²⁰⁰ In fact, President Trump would fully repeal any agency regulation "that is not consonant with the 'single, best meaning' of the statute authorizing it," "that was promulgated in reliance on the *Chevron* doctrine and that could be defended

¹⁹⁴ *Fact Sheet: President Donald J. Trump Directs Repeal of Regulations That Are Unlawful Under 10 Recent Supreme Court Decisions*, THE WHITE HOUSE (Apr. 9, 2025), <https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-directs-repeal-of-regulations-that-are-unlawful-under-10-recent-supreme-court-decisions/> [<https://perma.cc/XX3B-XK4C>] (citing *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022)); Memorandum from President Donald Trump, *supra* note 193 (same).

¹⁹⁵ See Alexandra Olson & Claire Savage, *Judge Vacates Federal Rules Requiring Employers to Provide Accommodations for Abortions*, AP NEWS (May 21, 2025, at 14:41 PDT), <https://apnews.com/article/abortion-workers-pregnancy-civil-rights-eb4bcc821c4932728fcd961757b50552> [<https://perma.cc/E54S-N9DC>].

¹⁹⁶ See *supra* Sections II.A–B.

¹⁹⁷ See *supra* Sections II.A, II.C.

¹⁹⁸ See *supra* note 25 and accompanying text.

¹⁹⁹ See generally *Loper Bright*, 144 S. Ct. 2244 (overruling *Chevron* deference); *West Virginia*, 142 S. Ct. 2587 (articulating the major questions doctrine).

²⁰⁰ Memorandum from President Donald Trump, *supra* note 193.

only by relying on *Chevron* deference,” or that was “promulgated in violation of the Major Questions Doctrine.”²⁰¹

The major questions doctrine is a legal principle that limits the power of administrative agencies to act on issues of major economic or political significance without clear statutory authorization from Congress.²⁰² For many decades, agencies were given a presumption of deference to their interpretation and enforcement of a statute under the *Chevron* doctrine.²⁰³ However, this presumption has been eroded by the current Supreme Court as a means of preserving the separation of powers and to check the executive branch from taking on broad legislative powers.²⁰⁴ While initially a mere narrowing of *Chevron* deference, since 2014, the conservative Supreme Court under Chief Justice John Roberts has moved toward a broader interpretation of the major questions doctrine, culminating in *West Virginia*.²⁰⁵ In this case, the Supreme Court formally adopted the major questions doctrine, requiring agency power to have been clearly granted in the text of the statute.²⁰⁶ The final nail in the coffin for the presumption of agency interpretive authority was the overruling of *Chevron* deference in 2024 in *Loper Bright*.²⁰⁷

When distilled, a major questions doctrine argument becomes one about the actual purpose of the PWFA. The PWFA was meant “[t]o eliminate discrimination and promote women’s health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.”²⁰⁸ One reading of this purpose could be a broader goal of targeting discrimination against women workers with women’s health issues, especially given the language “promote women’s health and economic security.”²⁰⁹ However, the act is called “The Pregnant Workers Fairness Act” and was clearly targeted at pregnant workers, not necessarily workers with the capacity to become pregnant.²¹⁰ Arguably, if that had been the intent, the drafters could have named it “The Female Workers Fairness Act” or something similar. Instead, the PWFA focuses on pregnant workers, outlawing

²⁰¹ *Fact Sheet: President Donald J. Trump Directs Repeal of Regulations That Are Unlawful Under 10 Recent Supreme Court Decisions*, *supra* note 194 (quoting *Loper Bright*, 144 S. Ct. at 2266).

²⁰² Ling Ritter, Note, *Elephants in Mouseholes: The Major Questions Doctrine in the Lower Courts*, 76 STAN. L. REV. 1381, 1384 (2024).

²⁰³ *Id.*

²⁰⁴ *Id.* at 1384, 1392.

²⁰⁵ *Id.* at 1390–91; see *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (limiting agency authority in decisions of vast economic and political significance).

²⁰⁶ *West Virginia*, 142 S. Ct. at 2595.

²⁰⁷ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266, 2273 (2024).

²⁰⁸ Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. pmb. (2021) (enacted).

²⁰⁹ See *id.*

²¹⁰ *Id.* § 1.

discrimination “with regard to reasonable accommodations related to pregnancy”²¹¹ and mandating the provision of such reasonable accommodations to workers with known limitations or a “physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.”²¹² In addition, as discussed above, the legislative history of the PWFA, from its inception, focused on actively pregnant workers and their needs.²¹³ Congressional testimony focused on pregnant workers, not “women” or “fertile females” in general.²¹⁴

The EEOC has stated that a “related medical condition” must be “related to the pregnancy or childbirth” of the specific employee.²¹⁵ However, the statute states accommodation must be provided for a “physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.”²¹⁶ This slight difference in language between *related to*, *affected by*, or *arising out of* versus only *related to* may be demonstrative of the broad approach the EEOC has taken. Alternatively, the EEOC may have had policy reasons for attempting to pigeonhole broader women’s health issues under the accommodation structure of the PWFA, especially given the lack of consistent protections workers with these conditions have received under Title VII and the ADA.²¹⁷ Regardless of how well-meaning the EEOC’s reasons for its broad approach or how needed

²¹¹ 42 U.S.C. § 2000gg-1.

²¹² *Id.* § 2000gg(4).

²¹³ See *supra* Section I.C; see also Press Release, Congressman Jerry Nadler, Reps. Nadler, Maloney, Speier, Davis & Advocates Announce Legislation Protecting Pregnant Workers from Discrimination (May 8, 2012), <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=391160> [<https://perma.cc/8VKQ-Q8QD>] (stating that the PWFA will “ensure that pregnant women are not forced out of jobs unnecessarily or denied reasonable job modifications that would allow them to continue working”). A press release from Congressmembers includes direct statements about the purpose of the PWFA with regard to pregnant workers. Congressman Jerry Nadler stated, “The [PWFA] is an essential means of clarifying our laws so that pregnant women and their families are not allowed to slip through the cracks.” Congresswoman Carolyn Maloney stated, “Women need to work during pregnancy and must not be penalized in the workplace for choosing to have a child.” Congresswoman Jackie Speier stated, “Women are not disposable workers who can be cast off if, and when, they are pregnant.” Congresswoman Susan Davis stated, “With more and more women working while pregnant, we need to make sure that their employers provide them the reasonable and necessary accommodations they need (such as access to water) to ensure a safe and healthy pregnancy. . . . It is unfortunate that Congress needs to even address this issue since any sensible person would consider it inconceivable to fire a pregnant woman for trying to care for the health of herself and her baby.” Congressman George Miller stated, “This bill closes those gaps and gives expecting mother’s [sic] some basic, long overdue protections in the workplace.” Press Release, Congressman Jerry Nadler, *supra*.

²¹⁴ See *supra* notes 79–82 and accompanying text.

²¹⁵ Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096, 29100 (Apr. 19, 2024) (codified at 29 C.F.R. pt. 1636).

²¹⁶ 42 U.S.C. § 2000gg(4).

²¹⁷ See *supra* Part I.

accommodations may be by workers affected by limitations due to menstruation, infertility, and contraception, without some strong link to pregnancy or childbirth, the definition of *related medical conditions* becomes stretched to the point of unnecessary and potentially catastrophic controversy.

The PWFA stands on the precipice of being heavily stripped of enforceable protections for pregnant workers.²¹⁸ To save certain “related medical conditions” from further legal controversy under *Loper Bright*, it is necessary to remove those that have the most tenuous of connections. Lactation and termination of pregnancy are conditions related to pregnancy or childbirth that do fit under the mandate of the PWFA, given their temporal proximity to and requirement of an active pregnancy or childbirth.²¹⁹ In contrast, given the tenuous thread connecting menstruation, infertility and fertility treatments, and contraception to medical conditions related to pregnancy and childbirth, a court looking for an explicit justification of the inclusion of those conditions under the PWFA is unlikely to find it.²²⁰ At best, menstruation, infertility and fertility treatments, and contraception are related to gynecological health and may precede pregnancy.²²¹ But with regard to whether they could cause known limitations “related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions,” the argument is textually weak, especially when facing a likely skeptical Supreme Court under the major questions doctrine or a conservative administration aiming to curb agency regulation.²²² Lactation and termination of pregnancy must not be allowed to “go down with the ship” due to the inclusion of menstruation, infertility, and contraception as “related medical conditions” in the EEOC’s final rules.

IV. ADDRESSING POTENTIAL CRITICISMS OF A PRAGMATIC PATH FORWARD FOR THE PWFA

This Note proposes a pragmatic, textualist, and plain-meaning-friendly path forward for the EEOC’s final rules under the PWFA in response to the current political and legal climate. However, such an approach is unlikely to satisfy opponents on both sides of the political spectrum as it attempts to thread the needle toward a workable and survivable position for the EEOC. With this in mind, this Note addresses two anticipated criticisms of its pragmatic approach: (1) that the proposed solution will force employers to compromise their religious freedoms, and (2) that the proposed solution ignores the gender inequities in the workplace and

²¹⁸ See Memorandum from President Donald Trump, *supra* note 193 (foreshadowing an expansive repeal of administrative decisions purportedly not in compliance with the revised major questions doctrine).

²¹⁹ See *supra* Sections II.A, II.C.

²²⁰ See *supra* Sections II.A–B.

²²¹ See *supra* Sections II.A–B.

²²² 42 U.S.C. § 2000gg; see *supra* Sections II.A–B.

may cause unintended consequences by narrowing the protections afforded by the PWFA, especially for women workers.

A. Forcing Employers to Compromise Their Religious Freedoms

With regard to the proposed pragmatic approach compromising employers' religious freedoms, the argument once more centers on elective abortions. The religious freedom argument was raised by commentors on the EEOC's final rules, as well as by religious plaintiffs in *Louisiana v. Equal Employment Opportunity Commission*.²²³ However, as discussed above, the PWFA does not have any bearing on abortion itself.²²⁴ With many legal challenges and debates on the topic, elective abortions—or, induced abortions in general—may become legal under only severely limited circumstances or may become entirely illegal in some states. However, that is not for the PWFA, or this Note, to determine. All that the PWFA states is that known limitations due to pregnancy, childbirth, or related medical conditions must be reasonably accommodated unless the employer can show undue hardship.²²⁵ The controversy surrounding abortion is irrelevant to the workings of the statute or to the clear intent of the drafters.²²⁶ If a worker is pregnant and the pregnancy is terminated, regardless of the mechanism, the worker may have a physical or mental condition related to, affected by, or arising out of the termination of the pregnancy. Thus, within the plain meaning of the statutory text, the termination of a pregnancy, regardless of mechanism, must be reasonably accommodated.²²⁷ It is under different law, for example state abortion law or constitutional provisions, that the type of abortion may separately be determined unlawful and the remedies outlined.²²⁸

²²³ Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096, 29149 (Apr. 19, 2024) (codified at 29 C.F.R. pt. 1636) (noting the commentors' complaints that required accommodations for health services such as abortion, IVF, surrogacy, contraception, and sterilization would substantially burden their free exercise and violate the Religious Freedom Restoration Act (RFRA)); *Louisiana v. EEOC*, 705 F. Supp. 3d 643, 654 (W.D. La. 2024) ("Chiefly, the *Bishops* Plaintiffs argue that under the abortion accommodation mandate of the Final Rule, they must knowingly violate their sincerely held beliefs regarding what they term the 'moral evil' of 'direct' abortion or risk liability and face years-long expensive and entangling litigation by both the EEOC and private parties.").

²²⁴ See *supra* Section II.C.

²²⁵ 42 U.S.C. § 2000gg-1(1).

²²⁶ See *supra* Sections I.C, II.C.

²²⁷ See *supra* notes 186–89 and accompanying text.

²²⁸ See, e.g., LA. STAT. ANN. § 40:1061 (2022) (outlawing abortion with an exception where reasonable medical judgment requires abortion to prevent death or substantial risk of death); MISS. CODE ANN. § 41-41-45 (2022) (outlawing abortion with exceptions where there is risk of death or the pregnancy was caused by sexual assault and formal charges were filed with the appropriate law enforcement).

The continued argument about religious freedoms ignores the reality of how the PWFA works.²²⁹ A worker does not have to disclose to their employer, “I had an illegal abortion and need some time off to recover” to receive accommodation.²³⁰ Nor, realistically, would any worker do so. A worker would simply disclose the minimum amount of sensitive medical information necessary to indicate they have a known limitation.²³¹ For example, a worker may indicate through a doctor’s note that they have a physical or mental need to rest and heal—rather than work full-time—that is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, such as the termination of a pregnancy.²³² The doctor’s note would also provide the reasonable accommodation requested—for example, two days off for recovery.²³³ The employer will neither be able to determine the type of termination of pregnancy nor enforce state abortion law. They will not be forced to pay for abortions by having to pay for abortion coverage in their health plans or for travel expenses for employees to receive an abortion.²³⁴ There is no requirement that the employer must knowingly and repeatedly go against their own personal religious beliefs to comply with the mandates of the PWFA.²³⁵ Even a religious organization that has employees, such as a church, would be able to provide accommodation to workers whose pregnancy has ended without a living child without having to confront their views on abortion.

B. Undermining Gender Equity and Causing Unintended Consequences

As for the concern that the proposed pragmatic approach could undermine gender equity in the workplace and cause unintended consequences to workers by excluding menstruation, infertility, and contraception as related medical conditions, there are two separate reasons to dismiss it. One is that, as things currently stand, the PWFA is not likely to remain untouched in the coming years.²³⁶ Limitations are coming; the question is only what they will be. With that in mind, the long-term survival of the PWFA and its consistent enforcement across the nation is the

²²⁹ See *supra* Section II.C.

²³⁰ See *supra* Section II.C; *Tennessee I*, 737 F. Supp. 3d 685, 694 (E.D. Ark. 2024) (“The fourth step—an employee who says, “I need time off to get an illegal abortion”—seems particularly unlikely. Under the new rule, the employee does not have to provide her employer details about her medical care, though an employer can require some supporting documentation in certain instances.”).

²³¹ See 29 C.F.R. § 1636.3(l) (2026) (explaining limits on required supporting documentation).

²³² Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096, 29135–36 (Apr. 19, 2024) (codified at 29 C.F.R. pt. 1636).

²³³ See *id.* at 29136.

²³⁴ See *id.* at 29104.

²³⁵ See *id.* at 29105.

²³⁶ See Memorandum from President Donald Trump, *supra* note 193 (hinting at broad repeal of administrative decisions that are not strictly within statutory authority).

remaining achievable goal. The intended effect of the PWFA was to further gender equity in the workplace,²³⁷ and ensuring the continued existence and strength of the PWFA is key to achieving that goal. The proposed pragmatic approach seeks to allow the PWFA to accomplish its important goal of accommodating the many pregnant workers who have been forced out of work or suffered other adverse employment actions, while acknowledging the reality that it cannot survive as-is with the broad definitions currently imposed by the EEOC's final rules. While perhaps not the outcome proponents of gender equity in the workplace desire, it may be the best one can get.²³⁸

The other reason is that, as laudable a goal as gender equality in the workplace is—and the reality that women in the workplace continue to be treated unequally compared to men is unquestionable²³⁹—the solution is not to place all women's health conditions under a statute passed to protect pregnant workers. Not all women can or will be pregnant. True gender equity (as opposed to gender equality) in the workplace requires recognition that women are not simply defined as people who become pregnant.²⁴⁰ Women are not a monolith, nor are men. At the end of the day, the buck stops with Congress. The whole reason the EEOC's final rules are in such controversy is because Congress failed to take on women's health issues and rights in the workplace more generally.²⁴¹ Congress should take up the mantle to address the continued gender gaps in the workplace head on. There is ample room to do so, even if political headwinds may push against reform currently.

CONCLUSION

Given the current political and legal climate, the scope of the EEOC's final rules under the PWFA must and will be limited. To protect the PWFA's existence and the important protections it offers to pregnant workers, certain currently included "related medical conditions" will need to be eliminated. At the same time, the "related medical conditions" that clearly must be accommodated under the plain

²³⁷ Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. pmb. (2021) (enacted).

²³⁸ See Charlotte Edmond, *International Women's Day: What's the Difference Between Equity and Equality?*, WORLD ECON. F. (Mar 3, 2023), <https://www.weforum.org/stories/2023/03/equity-equality-women-iwd/> [<https://perma.cc/78KE-22L4>] (explaining that gender equity requires addressing underlying structural disparities and tailoring resources to individual needs rather than merely providing equal formal protections).

²³⁹ Beth Almeida & Isabela Salas-Betsch, *Fact Sheet: The State of Women in the Labor Market in 2023*, CTR. FOR AM. PROGRESS (Feb. 6, 2023), <https://www.americanprogress.org/article/fact-sheet-the-state-of-women-in-the-labor-market-in-2023> [<https://perma.cc/UB8G-JVQV>].

²⁴⁰ See Edmond, *supra* note 238 (distinguishing formal gender equality from equity and explaining why equal treatment alone may be insufficient to remedy entrenched gender-based workplace disparities).

²⁴¹ See discussion *supra* Part I.

meaning of the text of the PWFA, and its legislative intent, must be shielded from further controversy and potential for elimination. This goal can be achieved in two parts: first, removing menstruation, infertility, and contraception as overbroad pregnancy-related medical conditions to avoid further litigation over the EEOC exceeding its statutory authority under a *Loper Bright* analysis, and countering controversies surrounding lactation and abortion with the strong textual support for their inclusion. Second, to avoid continuing distracting controversy over abortion, the term *termination of pregnancy* should be used, as it is broad enough to encompass all terminations of pregnancy and to protect employee medical privacy while avoiding the sensitive debate surrounding abortion.

It is unclear whether the EEOC or the Supreme Court will be the body that eventually limits the EEOC's final rules. Regardless, both should consider the importance of the purpose of the PWFA and the need for stability and clarity to allow effective implementation and enforcement by workers, employers, and lower courts during this transition to a new regulatory scheme. Doing so is pragmatic, but also purposeful.