No. 24-2249

**IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Defendant-Appellee*.

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

**BRIEF OF SMALL BUSINESS MAJORITY, MAIN STREET ALLIANCE, AND AMERICAN SUSTAINABLE BUSINESS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE FOR AFFIRMANCE**


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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* Small Business Majority, Main Street Alliance, and American Sustainable Business Council state they do not have a corporate parent and are not owned in whole or in part by any publicly held corporation.

Dated: August 30, 2024

*/s/ Kaitlyn Golden*

Kaitlyn Golden



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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* represent businesses, including small businesses, across the nation that are regulated by the Final Rule, and appreciate the Final Rule's clear guidance about their legal obligations to their employees. *Amici* include:

Small Business Majority is a national small business organization that empowers America's diverse entrepreneurs to build a thriving and equitable economy. Small Business Majority engages a network of more than 85,000 small businesses and 1,500 business and community organizations to deliver resources to entrepreneurs and advocate for public policy solutions that promote inclusive small business growth. Small Business Majority's work is bolstered by extensive research and deep connections with the small business community.

Main Street Alliance ("MSA") is a national network of small businesses, which represents approximately 30,000 small businesses across the United States. MSA helps small business owners realize their full potential as leaders for a just future that prioritizes good jobs, equity, and community through organizing, research, and policy advocacy on behalf of small businesses. MSA also seeks to amplify the voices of its small business membership by sharing their experiences with the aim of creating an economy where all small business owners have an equal opportunity to succeed.

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[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund this brief, and no person other than *amici curiae*, their members, and their counsel contributed money to fund this brief. All parties have consented to the filing of this brief.



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The American Sustainable Business Council ("ASBC") is a multi-issue membership organization comprised of the business and investor community, which collectively represents over 200,000 businesses, the majority of which are small and mid-sized businesses. ASBC advocates for solutions and policies that support a just, sustainable stakeholder economy. Its mission is to educate, connect, and mobilize business leaders and investors to transform the public and private sectors and the overall economy.

## INTRODUCTION

The Pregnant Workers Fairness Act ("PWFA") is a landmark, bipartisan law that creates a national standard for how employers handle workplace accommodation requests from pregnant employees. To ensure that employers and employees understand their new obligations, Congress directed Defendant Equal Employment Opportunity Commission ("EEOC") to promulgate regulations. The EEOC did so, issuing a Final Rule that provides important guidance for employers on how to comply with the PWFA.

Employers benefit from the PWFA and the Final Rule. *Amici* and their members better understand their obligations to their employees following the issuance of the Final Rule. And accommodating employees with qualifying conditions will allow employees to stay on the job longer, reducing costly employee turnover and prolonged and avoidable leaves of absence.

The relief sought by Plaintiffs threatens to upend this system and undermine the

effectiveness of the PWFA. Plaintiffs seek to enjoin the Rule for "elective abortions." Doing so will sow chaos and confusion, harming *amici*'s members and their employees. The Court should uphold the district court's decision or alternatively remand to the district court to address the motion for preliminary injunction.

## ARGUMENT

### I. The EEOC's Rule Provides Vital Guidance to Employers.

The Final Rule provides important guidance to employers about how to comply with the PWFA, which has been in effect since last year. For example, the Rule explains what conditions are covered by the Act, addresses the types of accommodations that may be "reasonable," including predictable assessments, and lays out a process to ensure that employers and employees can quickly collaborate to address employees' health needs. The EEOC's guidance is particularly important to *amici*'s members, many of whom are small businesses that often lack the resources to retain counsel to ensure compliance with relevant laws.

The PWFA requires that employers with fifteen or more employees provide "reasonable accommodations" for "known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee," unless the employer can demonstrate "the accommodation would impose an undue hardship" on the employer's business. 42 U.S.C. § 2000gg-1(1). The Act defines a "known limitation" as any "physical or mental condition related to, affected by, or arising out of

pregnancy, childbirth, or related medical conditions." *Id.* § 2000gg(4). The Rule, in turn, provides necessary guidance on "related medical conditions," offering a "non-exhaustive" list of conditions covered, including, among other things, termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; endometriosis; sciatica; lumbar lordosis; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; and lactation and conditions related to lactation. Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg 29096, 29183 (April 19, 2024) (to be codified at 29 C.F.R. pt. 1636). The Rule's preamble explains that the Rule does not "requires blanket accommodation for every condition listed nor precludes accommodations for conditions that are not listed." *Id.* at 29101. Instead, the Rule provides a blueprint to help employers determine if the employee's medical condition relates to "current pregnancy; past pregnancy; potential or intended pregnancy . . . ; labor; and childbirth[.]" *Id.* at 29183.

The Final Rule also provides comprehensive examples of "reasonable accommodations" that employers may offer. Potential accommodations include modifying work schedules, modifying uniforms, permitting use of paid leave or



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providing unpaid leave, allowing for telework, providing a reserved parking space, temporarily suspending "essential functions" of the job, and allowing for breaks and a private place for lactation in reasonable proximity to the employee's usual work area. *See* 89 Fed. Reg. at 29184-85. Even more explicitly, the Final Rule offers four "predictable assessments"—simple accommodations that when requested by a pregnant employee will "in virtually all cases," be found to be "reasonable accommodations." *Id*. at 29185-86. The "predictable assessments" are allowing the employee to, as needed, carry or keep water near; take additional restroom breaks; take breaks to eat and drink; and to sit or stand. *Id*. at 29186. The examples provided, both as reasonable accommodations and "predictable assessments," helpfully give employers a framework for understanding what types of accommodations to offer their employees, absent undue hardship.

Plaintiffs' appeal on the merits chiefly hinges on whether "elective abortion" should be blocked from the Rule's list of "related medical conditions." Notably, Plaintiffs do not appear to dispute that termination of pregnancy by abortion may sometimes be necessary medical care. *See* States Br. 6 (Rule imposes "requirement to accommodate elective abortions"); *id.* at 47 (arguing "elective abortions" are not covered by the word medical); *see also* R. Doc. 63, at 5 ("The States acknowledge that some pregnant women will need, and be entitled to, workplace accommodations in connection with an abortion."). *Amici* defer to other briefs to explain why the injunction Plaintiffs seek would contravene the PWFA, and would not otherwise be

proper relief. *See* EEOC Br. 41-46.

Importantly, from *amici's* perspective, the problem with the relief Plaintiffs seek on appeal—excluding "elective abortion" from the Rule—will confuse employers and employees on the scope of the PWFA. As a threshold matter, the Rule neither defines, nor even mentions, "elective abortion." *Amici* and their members would not have any guidance as to what abortion care they must accommodate under the PWFA, making it difficult for them to comply and undermining the clarity provided by the Final Rule and Appendix for employers. 89 Fed. Reg. at 29189-219.

Plaintiffs' brief points to the Hyde Amendment ("Hyde"), *see* States Br. 10, which allows for federal funding of abortion only in the case of rape and incest, or when the pregnant person's life is threatened. But applying Hyde would create more questions than answers. Would pregnancy terminations for rape and incest still be seen as "elective?" And what about when state law permits abortions in different situations than recognized by Hyde? Do employers need to look to those definitions too? Many of the Plaintiff states' abortion bans are different from the Hyde exceptions, allowing for termination of pregnancy when the health of the pregnant person is at risk.[2] Five Plaintiff states (Tennessee, Arkansas, Alabama, Missouri, Oklahoma, and South Dakota) do not allow for abortions in the case of rape or incest.[3]

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[2] *Policy Tracker: Exceptions to State Abortion Bans and Early Gestational Limits,* Kaiser Fam. Found. (July 29, 2024), https://www.kff.org/womens-health-policy/dashboard/exceptions-in-state-abortion-bans-and-early-gestational-limits.
[3] *Id.*

Six others (Idaho, Iowa, West Virginia, South Carolina, Florida, Georgia) allow for abortions in the case of rape or incest, but only if it is reported to law enforcement officials and only during certain gestational periods, neither of which is required by Hyde.[4] Employers have no guidance, apparently being left to navigate the complexities of state and federal laws relating to abortion, and to make medical judgments that they have no training or expertise to make, all while pressing their employees for the most personal of details, in order to comply with Plaintiffs' proposed injunction. This is unworkable, particularly for small businesses.

Small businesses often lack the resources to retain counsel for compliance assistance, sometimes lacking even Human Resources personnel to track and shift their practices based on the litigation landscape.[5] Easy-to-understand guidance that provides precise rules of the road to follow—like the Final Rule—reduces the costs and burden on small businesses and helps employers comply with the legal requirements. And, for a small business, anything that reduces risk and increases stability and predictability makes opening, survival, and growth more possible.

Plaintiffs' requested injunction may also be impossible for employers to lawfully implement. The district court suggested "elective abortion" may be tied to "the woman's choice," R. Doc. 63, at 5, which would force employers to inquire about

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[4] *Id.*

[5] *See Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab.*, 116th Cong. 24 (2019) (statement of Iris Wilbur, Vice President of Gov. Affs. & Pub. Pol'y, Greater Louisville, Inc.), https://www.govinfo.gov/content/pkg/CHRG-116hhrg39487/pdf/CHRG-116hhrg39487.pdf.



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the reasons their employees are receiving medical care. The Rule expressly limits the types of documentation employers may request from their employees. Recognizing the importance of employee and patient privacy, the Commission has limited employers to requesting supporting documentation "only when it is reasonable under the circumstances." 89 Fed. Reg. at 29186. The Rule also expressly provides for situations where it is not "reasonable" for an employer to request documentation. One such situation occurs when the "requested accommodation is available to employees without known limitations under the PWFA pursuant to a covered entity's policies or practices without submitting supporting documentation." *Id.*

Plaintiffs' requested relief would force employers to impermissibly inquire about what sort of medical care their employees are receiving and the reasons for that care. Indeed, the Rule recognizes that "the type of accommodation that most likely will be sought under the PWFA regarding an abortion is time off to attend a medical appointment or for recovery." *Id.* at 29104. If an employer's policies allow employees time off for a medical appointment or for leave without supporting documentation, employers would not be permitted to request documentation about the basis for that appointment. *Id.* at 29210 ("For example, if an employer has a policy or practice of requiring supporting documentation only for the use of leave for 3 or more consecutive days, it would not be reasonable to ask someone who is using the same type of leave due to a known limitation under the PWFA to submit supporting documentation when they request leave for 2 or fewer days."). An injunction carving "elective abortions"



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out of the Rule could push employers to inquire about the reasons for a medical appointment—even if they would not otherwise do so, in violation of the Rule.

Enjoining the Rule only for "elective abortions" also would be incongruous and inconsistent with the Pregnancy Discrimination Act ("PDA"). Congress intended for the PWFA to fill the gaps left by existing laws, such as the PDA.[6] *Amici*'s members and other employers have long understood that they cannot take adverse employment action against employees who have had an abortion under the PDA. It makes little sense that an employer could deny an employee time off to have an abortion or recover from an abortion but could not terminate the same employee for receiving that care. Interpreting two coextensive statutes differently risks confusing employers on the contours of their obligations and needlessly exposes them to liability.

Plaintiffs contend that their requested injunction would not injure employers, since they might avoid any confusion by providing accommodations voluntarily. Whether or not that would actually lessen employer confusion, *amici* are concerned that the injunction Plaintiffs seek would prevent some employers from doing so. This is particularly true for employers in Plaintiff states. Plaintiffs have made clear their opposition to abortion care, including abortions obtained out of state. States Br. 19. Indeed, Plaintiff Alabama's Attorney General has suggested that the state might

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[6] *Long Over Due: Exploring the Pregnant Workers Fairness Act (H.R. 2694)*, *supra* note 5, at 4 (statement of Rep. Suzanne Bonamici). *See also* H.R. Rep. No. 117-27, pt. 1, at 17 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf ("To remedy the shortcomings of the PDA, Congress must step in and act.").



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prosecute any individual who helps women travel out of state to obtain lawful abortion care.[7] And Texas legislators have warned employers that offering travel benefits for abortion care could result in civil or criminal penalties.[8] A chilling effect seems certain: employers might fear that offering even unpaid leave to employees to obtain medical care could open them up to liability or retaliation, and an injunction against that part of the Rule enhances that chilling effect. And the injunction Plaintiffs seek certainly risks chilling employees from seeking accommodations for needed reproductive care, even when necessary for medical reasons, and even from employers who have chosen to offer the full accommodations promised by the PWFA.

## II. The EEOC's Rule is Good for Business and the Economy.

*Amici* also know that the PWFA and the Final Rule make good business sense. There was widespread support from the business community for the PWFA.[9] Advancing women's participation in the workforce is critical to spurring economic growth and advancing equality. Women today make up nearly half the labor force.[10]

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[7] John Fritze*, Federal Judge Blasts Threat by Alabama to Prosecute Groups Aiding Out-of-State Abortions*, CNN (May 7, 2024, 8:44 AM), https://www.cnn.com/2024/05/07/politics/alabama-prosecute-out-of-state-abortion/index.html.

[8] Jacqueline Thomsen, *Texas Lawmakers Target Law Firms for Aiding Abortion Access*, Reuters (July 8, 2022, 7:19 PM), https://www.reuters.com/legal/legalindustry/texas-lawmakers-target-law-firms-aiding-abortion-access-2022-07-08/.

[9] *See* Letter from Neil L. Bradley, Exec. Vice President & Chief Pol'y Officer, U.S. Chamber of Com., to Members of the U.S. Senate (July 21, 2021), https://www.uschamber.com/assets/documents/210721_s._1486_pregnantworkersfairnessact_senate.pdf (stating that the U.S. Chamber of Commerce "strongly supports" the PWFA and recognizing that "[e]mployers currently face great uncertainty about whether, and how, they are required to accommodate pregnant workers").

[10] TED: The Economics Daily, *Labor Force Participation Rate for Women Highest in the District of Columbia in 2022*, U.S. Bureau of Lab. Stat. (Mar. 7, 2023),



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But despite gains by women in recent decades, gender gaps in employment and earnings persist.[11] The PWFA and the Rule implementing it are critical tools to keep women in the workforce, whether or not they want to remain pregnant. Keeping these workers in the workforce could improve the national economy, as well as help *amici*'s members by increasing worker retention, reducing leaves of absences, and improving the health, well-being, and productivity of their employees.

Nearly 2.8 million workers each year—70 percent of all pregnant women—are employed during the year of their pregnancy.[12] According to one survey, nearly half of pregnant workers required some sort of accommodation to continue working.[13] But prior to the passage of the PWFA and its implementing regulations, employees were often unable to obtain those accommodations or were afraid to request needed accommodations altogether.[14] Pregnancy discrimination—coupled with a lack of paid

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https://www.bls.gov/opub/ted/2023/labor-force-participation-rate-for-women-highest-in-the-district-of-columbia-in-2022.htm.

[11] 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/.

[12] Jessica Mason & Katherine Gallagher Robbins, *Discrimination While Pregnant*, Nat'l P'ship for Women & Fams. (2022), https://nationalpartnership.org/report/discrimination-while-pregnant/.

[13] Carly McCann & Donald Tomaskovic-Devey, *Pregnancy Discrimination at Work: An Analysis of Pregnancy Discrimination Charges Filed with the U.S. Equal Employment Opportunity Commission*, Ctr. for Emp. Equity, Univ. of Mass. Amherst 8 (2021), https://www.umass.edu/employmentequity/sites/default/files/Pregnancy%20Discrimination%20at%20Work.pdf.

[14] Nearly one in four mothers considered leaving their jobs during a pregnancy due to a lack of reasonable accommodations or fear of discrimination from an employer. *See* Ben Gitis et al., *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/. One in five mothers say they have experienced pregnancy discrimination. *Id.* *See also* McCann & Tomaskovic-Devey, *supra* note 13, at 8-9 (estimating that 250,000 women a year are denied pregnancy related accommodations).



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leave and the enormous costs of child care—drove women out of the workforce. Labor force participation decreased by 30 percentage points within a year of motherhood.[15]

Keeping these employees in the workforce will provide enormous economic benefits to businesses. Businesses—particularly small businesses—today are grappling with persistent worker shortages.[16] Incentivizing worker retention is a critical goal for all businesses to combat shortages. And when employers are able to retain their existing employees, it saves employers money on recruiting and training new employees.[17] *Amici* believe that the Final Rule promotes employee retention by improving employee health and wellbeing. Employees who are pregnant or experiencing related medical conditions will be able to stay in the workforce longer, should they so choose, with commonsense accommodations.[18] Employees now have

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[15] Lena Burleson et al., *Pregnancy and Parental Status Discrimination: A Review of Career Impacts and Mitigation Strategies*, Insight Pol'y Rsch., Inc. 8 (2022), https://dacowits.defense.gov/Portals/48/Documents/Reports/2022/Insight%20RFI%2016_Lit%20Review_Pregnancy%20and%20Parental%20Status%20Discrimination.pdf?ver=YSqHzfeHAHkwxDRwvVo3Cw%3D%3D.

[16] EntreLeadership, *Small-Business Labor Crisis 2023 Report*, Ramsey Sols. 3 (2023), https://cdn.ramseysolutions.net/media/b2b/entre/article/the-small-business-labor-crisis/2023-small-business-labor-crisis-report-final.pdf (noting that 11.3 million small business owners report struggling to find the employees they need); Giulia Carbonaro, *America's Labor Shortage is Most Severe in These 13 States*, Newsweek (Aug. 10, 2023, 7:03 AM), https://www.newsweek.com/america-labor-shortage-most-severe-13-states-1818545.

[17] Shane McFeely & Ben Wigert, *This Fixable Problem Costs U.S. Businesses $1 Trillion*, Gallup (Mar. 13, 2019), https://www.gallup.com/workplace/247391/fixable-problem-costs-businesses-trillion.aspx (noting that "[t]he cost of replacing an individual employee can range from one-half to two times the employee's annual salary").

[18] *See Long Over Due: Exploring the Pregnant Workers Fairness Act (H.R. 2694)*, *supra* note 5, at 68 (testimony of Dina Bakst) ("Keeping pregnant workers attached to the workforce has also been a key reason for business support of state pregnant worker fairness legislation. For example, the Associated Industries of Massachusetts ("AIM"), which represents 3,500 member employers, took a strong statement in support of the Massachusetts Pregnant Workers Fairness Act.").



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more reassurance to seek these kinds of accommodations, knowing their employer is required to accommodate them without retaliation. Employees who are pregnant and do not want to be can obtain the accommodations they need to access abortions and return to work, without risking their jobs and livelihood. And new parents will have the confidence to return to the workforce, knowing that their employer must provide them with a private place to pump breast milk[19] and accommodations to address any medical conditions that arise or are exacerbated following pregnancy.

Access to reproductive health care is also essential to furthering gender equality and economic growth. Research from *amicus curiae* Small Business Majority confirms the importance of that access to their members. Their research shows that access to reproductive health care, including abortion care, is critical to the ability of women entrepreneurs to start and grow their business while also contributing to their business' success and financial security.[20]

Providing accommodations as required by the Rule will also reduce worker time off and increase employee morale and productivity.[21] The accommodations set forth

[19] Employees are also entitled to nursing accommodations under the Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"). The PWFA expands those protections beyond just a year, and to employees not covered by the PUMP Act.

[20] Small Bus. Majority, *Opinion Poll: Women Entrepreneurs See Access to Reproductive Health as Essential to Their Economic Security*, at 2 (2023), https://smallbusinessmajority.org/sites/default/files/research-reports/2023-women-small-business-reproductive-health-report.pdf.

[21] *See* Dina Bakst et al., *Long Overdue: It Is Time for the Federal Pregnant Workers Fairness Act*, A Better Balance 22 (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf.



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in the Rule will mean employees will not take unnecessary leaves of absence, which can create operational headaches for employers. And research suggests that employee accommodations, including pregnancy and breastfeeding accommodations, improve worker satisfaction and can increase productivity.[22] According to one survey, over half of employers who offered a workplace accommodation saw an increase in the employee's productivity, and 20 percent of employers saw an increase in overall company productivity.[23]

## CONCLUSION

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

Dated: August 30, 2024

Respectfully submitted,

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[22] Job Accommodation Network, *Costs and Benefits of Accommodation* (2024), https://askjan.org/topics/costs.cfm (finding that offering employees accommodations resulted in increased employee retention, increased employee productivity, and increased employee attendance); Colleen Payton et al., *Evaluation of Workplace Lactation Support Among Employers in Two Pennsylvania Cities*, 62 Bus. Horizons 579, 580 (2019) https://www.sciencedirect.com/science/article/pii/S0007681318301800#sec0115; *cf.* Margaret D. Whitley et al., *Workplace Breastfeeding Support and Job Satisfaction Among Working Mothers in the United States*, 62 Am. J. Indus. Med. 716, 725 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8423352/pdf/nihms-1735888.pdf (finding work-related problems with breastfeeding are associated with low job satisfaction).

[23] Job Accommodation Network, *supra* note 22.



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## CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,537 words according to the word count function of Microsoft Word 365.

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Pursuant to Eight Circuit Rule 28(A)(h)(2), I further certify that the brief has been scanned for viruses, and the brief is virus free.

Dated: August 30, 2024

Respectfully submitted,

*/s/ Kaitlyn Golden*

## CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, a true and accurate copy of the foregoing proposed brief was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

Dated: August 30, 2024

Respectfully submitted,

*/s/ Kaitlyn Golden*