U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Commissioner
Andrea R. Lucas

STATEMENT

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CC: Raymond Windmiller
Executive Secretariat

From: Andrea R. Lucas
Commissioner

Date: April 3, 2024

Re: Statement re: Vote on Final Rule to Implement the Pregnant Workers Fairness Act

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This statement addresses my vote to disapprove the Commission's final rule implementing the Pregnant Workers Fairness Act ("PWFA"), enacted as part of the Consolidated Appropriations Act ("CAA"). *See* Pub. L. 117-328, Div. II, 136 Stat. 4459, 6084-89, 42 U.S.C. §§ 2000gg-2000gg-6.

I support elements of the final rule. However, I am unable to approve it because it purports to broaden the scope of the statute in ways that, in my view, cannot reasonably be reconciled with the text. At a high level, the rule fundamentally errs in conflating pregnancy and childbirth accommodation with accommodation of the female sex, that is, female biology and reproduction. The Commission extends the new accommodation requirements to reach virtually every condition, circumstance, or procedure that relates to any aspect of the female reproductive system. And the results are paradoxical. Worse, the Commission chose not to structure the final rule in a manner that realistically allows for severability of its objectionable provisions from its reasonable and rational components.

The PWFA was a tremendous, bipartisan legislative achievement. Pregnant women in the workplace deserve regulations that implement the Act's provisions in a clear and reliable way. It

is unfortunate that the elements of the final rule serving this purpose are inextricably tied to a needlessly expansive foundation that does not. I cannot support the Commission's final product.

I. COMPLIANCE WITH THE INJUNCTION ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS AND THE CONSTITUTIONAL VULNERABILITY OF THE PWFA

Before turning to the final rule itself, preliminary collateral business demands attention. On February 27, 2024, the United States District Court for the Northern District of Texas permanently enjoined the Commission, and each commissioner, from enforcing the PWFA, or any implementing regulations, against the state of Texas, or any division or agency of the government of Texas. *See Texas v. Garland*, No. 5:23-CV-034-H, 2024 WL 967838 (N.D. Tex. Feb. 27, 2024) ("Order"). An observer might reasonably ask whether voting to approve a regulation that, on its face, applies to the state of Texas violates that injunction and places the Commission, me as a commissioner, or both, at odds with the Order and the court. After careful analysis, I have concluded that a vote on whether to promulgate the Commission's final rule does not violate the injunction.

On the constitutional question presented, the court held that the Quorum Clause contains a physical presence requirement. Order at **39-41. On December 23, 2022, the House of Representatives conducted a roll call vote on final passage of the CAA, with 225 yeas, 201 nays, 1 present, and 4 not voting. *Id.* at *5 (citations omitted). Of the 431 members who voted, 226 did so by proxy, with absent members having certified, pursuant to House rules and regulations, that they were "unable to physically attend" the vote pursuant to the chamber's proxy rules and procedures; 205 members voted in person. *Id.* (citations omitted). The parties agreed that 218 members constitutes a quorum in the House, that is a majority of the 435 total seats—though the House also considers the quorum requirement satisfied by a majority of seated members, the whole "number of the House" (in this case 216 since the House had 431 members). *Id.* & n.5. Either way, a quorum of members was not physically present, which, so the court held, violated the Quorum Clause. *Id.* at *39. Accordingly, the CAA—and with it the PWFA—was not constitutionally enacted.

The district court entered an injunction, but voting on the question whether to promulgate the PWFA final rule does not violate its terms. The Order enjoins the Commission or any commissioner from *enforcing* the PWFA or *enforcing* "any implementing regulations thereto" against the state of Texas; it says nothing about promulgating regulations. *Id.* at *52. In my view, enforcement includes accepting and investigating charges, issuing cause determinations and right to sue letters, filing actions, and the like—but simply promulgating rules is not, by itself, enforcement. *Id.* In fact, the district court's very mention of "any implementing regulations," at a time before the Commission had yet to promulgate the final rule, appears to presume that the court expected the agency to issue regulations. Provided that we take no action to enforce this final rule against Texas, or any division or agency of the government of Texas, merely voting whether to approve and issue the final rule does not run afoul of the Order.

Of course, the constitutional vulnerability of the PWFA is a question for the courts. Even if it is not resolved in the Texas case, the question will arise in others. Indeed, until it is

conclusively answered—by the Supreme Court or unanimous consensus of circuits—defendants to PWFA actions will continue to raise it as a defense, increasing the likelihood of an appropriate vehicle for consideration of the constitutional question. When it reaches the Supreme Court, the stakes will be higher and the odds longer than comfort would prefer. The Commission's decision to issue a final rule considerably more expansive and decisively more partisan than the statute itself effectively gambles the fate of the PWFA on the government's success on the merits of the constitutional question. I would not make that wager. The choices made by a partisan majority of the Commission in the final rule all but extinguish the prospect of future bipartisanship in Congress if it becomes necessary to reenact the PWFA—and pregnant women in the workforce will be the ones who lose.

II. THE PWFA IS AN IMPORTANT STEP FORWARD FOR *PREGNANT* WOMEN IN THE WORKFORCE

On its face, the Pregnant Workers Fairness Act of 2022 is a focused, measured, and balanced extension of the Americans with Disabilities Act, which continues to apply to and protect pregnant employees with disabilities related to their pregnancies. Specifically, the PWFA extends the reasonable accommodation requirement of the ADA to "known limitations," a lower threshold than "disabilities," for pregnant and postpartum women in the workplace. The primary implication is obvious: covered employers must reasonably accommodate the limitations of pregnancy and childbirth that may not qualify as a disability, absent undue hardship. Congress balanced the expansion of this affirmative requirement by focusing it in two ways. First, the PWFA's accommodation requirement applies only to workers who are pregnant or who have recently given birth. Second, it covers only those limitations that are part of a worker's particular pregnancy and childbirth, as well as medical conditions caused or exacerbated by the worker's specific pregnancy and childbirth.

For pregnant women in the workplace, the PWFA ostensibly requires employers in many workplaces to offer the sort of minor assistance that should be expected from common decency and good manners, but sadly, sometimes is denied: water, a place to sit, fitting attire, increased access to the bathroom, and the like. By requiring these measures, Congress sought to help more women remain in the workplace longer during pregnancy, while they are still both able (aided by small adjustments) and willing to perform their jobs.

As a working mother of two young daughters, one born during my time at the Commission, I strongly supported the bill as it made its way through Congress. Since its enactment, I have continued to advocate the law's goal to facilitate pregnant and recently postpartum women's ability to remain in, and return to, their jobs when this end may be accomplished or aided by modest workplace accommodations. Indeed, this variation of the ADA paradigm garnered widespread support from both houses of Congress and the White House.

Even beyond the particulars of the statute itself, I encourage employers creatively and proactively to accommodate women, mothers, and caregivers in their employ. When modest adjustments and flexibility make the difference, employers often reap numerous benefits from doing so, even where the PWFA may not *require* such efforts. Often, a simple solution or thoughtful flexibility costs employers less and benefits employees more in the end. Many

employers have long recognized this reality and have facilitated the work of their pregnant employees in mutually beneficial ways. At least to some degree, other employers must do likewise. Regardless, all employers should do more to help workers when small steps can achieve significant benefits and savings for both workers and employers.

I was optimistic that the Commission's final rule would follow the example of the underlying statute itself. Our path forward seemed clear: reasonably interpret and clarify the requirements of a brief and focused statute, and in so doing place it within the broader panoply of federal accommodation law; explain how the PWFA must—as well as how it may not—be applied in the main and in light of the ADA; and clarify core rights and limits of employees and employers, outlining the appropriate analytic framework, again buttressed by helpful examples. Such a rule would ensure robust application of the PWFA, withstand challenge, and potentially endure for decades. But the Commission took a different approach.

III. THE FINAL RULE IS BASED ON AN INTERPRETATION OF STATUTORY TERMS STRETCHED BEYOND THEIR ORDINARY MEANING AND FOR WHICH THE COMMISSION FAILS TO OFFER A REASONABLE EXPLANATION

After a careful review of the PWFA, the public comments received in response to the Commission's Notice of Proposed Rulemaking (NPRM), and the text of the final rule and ancillary documents, I cannot agree with the Commission's interpretation of the phrase "pregnancy, childbirth, or related medical conditions." Misalignment on such a foundational and core component of the final rule that is not severable requires that I part ways with the agency on this rulemaking.

A. The Commission Imports Title VII Discrimination Policy into Accommodation Law

Congress used the same phrase—"pregnancy, childbirth, or related medical conditions"—in the PWFA as Congress previously had used in the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), when it amended Title VII's definition of "sex" for purposes of what constituted "sex" discrimination.[1] Based on that overlap in phrasing, the Commission claims in the Preamble to the final rule and the rule's Interpretive Guidance that the final rule "gives the term 'pregnancy, childbirth, or related medical conditions' the *same meaning* as under Title VII." Interpretative Guidance, "Section 1636.3(b) Pregnancy, Childbirth, or Related Medical Conditions" (emphasis added). In doing so, the Commission imports into the PWFA the Commission's 2015 gloss on the PDA as well as what the Commission misleadingly calls "Title VII's longstanding

[1] Congress enacted the PDA in response to *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). There, the Court held that discrimination on the basis of pregnancy was not sex discrimination for purposes of Title VII. The PDA amended Title VII to clarify that the terms "because of sex" and "on the basis of sex" included, without limitation, "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). The PDA makes clear that pregnancy discrimination in its various forms constitutes sex discrimination under Title VII.

definition of "pregnancy, childbirth, or related medical conditions"[2] or, more amorphously, "the meaning given that phrase by the courts and the Commission for over 40 years." Preamble. The Commission claims this outcome is justified by three canons of statutory interpretation—the prior-construction canon, related statutes canon, and presumption of legislative acquiescence canon—or at least its *characterizations* of those canons. *See* Preamble n. 66.

The Commission describes the prior-construction canon as providing that "when administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." Preamble, "Response to Comments Regarding the Commission's Proposed Definition of "Pregnancy, Childbirth, or Related Medical Conditions" as Reflected in Statutory Text" (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)). Similarly, in describing the related statutes canon, the final rule notes that statutes ought not to be interpreted "in isolation, but rather in the context of the body of law of which they are a part," so that "statutes addressing the same subject matter generally should be read as if they are one law." *Id.* Finally, the Commission offers the presumption of legislative acquiescence (sometimes also called congressional ratification), arguing that when a statute is adopted after "certain judicial and administrative interpretations," the statute's repetitive language may reasonably be said to "acquiesce," or even ratify, those interpretations. *Id.*

Pointing to these interpretative canons, the Commission claims that the use of the same phrase in the PWFA and Title VII is proof positive that Congress sought to imbue into the PWFA the administrative and judicial gloss of Title VII's prohibition of sex discrimination. As discussed further in Part III.B of this Statement, the Commission errs from the very start by skipping straight to these interpretative canons instead of first resolving whether any textual ambiguity exists such that it is appropriate to consider whether these canons could resolve that ambiguity. But even assuming *arguendo* that the text in question is ambiguous, the Commission also fails to defend these canons' applicability. The Commission simply invokes its preferred canons of statutory interpretative as if an incantation, without any real attempt—much less reasoned explanation—to show that their application is justified in the instant case. However, to use the prior-construction canon to apply the meaning of a phrase from one statute to the next, a sufficiently "settled" meaning of the phrase in question must in fact exist. This is an unavoidable predicate. The Commission repeatedly asserts that it "gave the phrase 'pregnancy, childbirth, or related medical conditions' the *same meaning* under the PWFA as under Title VII." Preamble, "1636.3(b) Pregnancy, Childbirth, or Related Medical Conditions" (emphasis added). But Congress cannot

[2] Unfortunately, no such statutory definition exists. The text of Title VII does not, in fact, define "pregnancy, childbirth, or related conditions." Rather, as noted in the prior footnote, Title VII—via the PDA—defined the protected basis of "sex" enumerated in Title VII as including "pregnancy, childbirth, or related conditions;" the statute does not define that phrase. Perhaps the Commission majority in fact means to refer to the judicial and administrative gloss of the undefined statutory phrase. But a gloss, of course, is not on the same footing as a statutory definition, and conflating the two does the Commission no favors here. And in fact, any gloss put on this statutory phrase—or any other in Title VII—does not even carry the weight of a regulation, much less a statutory definition, as Congress did not grant the Commission authority to issue substantive regulations under Title VII. *See* 42 U.S.C. § 2000e-12(a) (granting the Commission the authority only to issue "suitable *procedural* regulations" to carry out Title VII) (emphasis added); *see, e.g.*, *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976).

be presumed to have given the "same meaning" in both statutes—or to have acquiesced or ratified a prior meaning—if a sufficient consensus does not exist for a term or phrase from a former statute. This is a high bar to meet. As recently clarified by the Supreme Court, it is "unlikely … that a smattering of lower court opinions could ever represent the sort of judicial consensus so broad and unquestioned that we must presume Congress knew of and endorsed it." *BP P.L.C. v. Mayor & City Council of Baltimore*, 593 U.S. 230, 244 (2021) (cleaned up and citation omitted). The Commission cannot meet this bar. In the Preamble and Interpretative Guidance for the final rule, at no point does the Commission demonstrate *any* judicial consensus exists either directly following or adopting the interpretations reached by our non-binding, sub-regulatory 2015 pregnancy discrimination guidance document, or reaching parallel conclusions to our guidance. Instead, the agency essentially points to the existence of our guidance document and includes citations to a "smattering of lower court opinions" (largely predating that guidance) for each component of the agency's interpretation of the phrase in question. But the Commission never articulates why or how this handful of opinions represents a sufficient consensus. In fact, often where it summarizes the state of the caselaw at all, it does the exact *opposite*: admitting that a "limited number of Federal courts" "have addressed the issue" of whether various conditions "falls within the Title VII definition of 'related medical conditions'" and relying only on a "majority" of these limited sets of cases instead of any judicial consensus. Preamble, "Comments and Response to Comments Regarding Coverage of Specific Conditions—Menstruation;" *see also id.*, "Comments and Response to Comments Regarding Coverage of Specific Conditions—Menstruation" (discussing, and attempting to distinguish, conflicting decisions); *id.*, "Comments and Response to Comments Regarding Coverage of Specific Conditions—Contraception" (same).

Nor does the agency even attempt to show how our 2015 pregnancy discrimination guidance meets the Commission's framing of an administrative consensus. The Commission cites *Hall v. U.S. Department of Agriculture*, which argues "Congress is presumed to be aware of an agency's interpretation of a statute. We most commonly apply that presumption when an agency's interpretation of a statute has been officially published and consistently followed." 984 F.3d 825, 840 (9th Cir. 2020). But while there is no question that the Commission's 2015 pregnancy discrimination guidance has been "officially published," at no point does the Commission argue, much less show, that our guidance has been "consistently followed." Unfortunate, but unsurprising, given the Commission only cites one or two cases postdating our PDA guidance.

In short, the thin support marshalled by the Commission is not sufficient to show a "settled consensus" such that Congress should be presumed to have known of and endorsed it. "And it certainly cannot do so where, as here, the text and structure of the statute are to the contrary," *BP P.L.C.*, 593 U.S. at 244 (cleaned up and citation omitted), as discussed further in Part III.B of this Statement.

Having purported to bridge the PDA and the PWFA through an excerpted common phrase, the Commission then shoves broad concepts of unlawful pregnancy discrimination under Title VII into the PWFA, an accommodation statute designed to allow pregnant women to remain at work. As a result, any subject deemed by the Commission in 2015 or by any supportive federal court over the past 40 years (regardless of the precedential weight of the courts' opinions or the existence of any judicial consensus, or the lack thereof for both) to be sufficiently related to the notion or concept of the female sex or female reproductive biology for purposes of defining sex

discrimination under Title VII, may now likewise be subject to the accommodation requirement of the PWFA under the final rule. Consistent with this interpretation, the final rule expansively defines the term "pregnancy" as "includ[ing], but . . . not limited to, current pregnancy; past pregnancy; potential or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception)," Final Rule, § 1636.3(b)—in essence, the final rule redefines the common and unambiguous term "pregnancy" as the "capacity for pregnancy." Indeed, the Preamble refers to the "capacity to become pregnant" or "childbearing capacity" at least *eighteen* times.[3] And likewise, the final rule defines "related medical conditions" as "medical conditions relating to pregnancy or childbirth of the specific employee in question," *id.*, keeping in mind that the "pregnancy" to which these conditions must relate is not the ordinary meaning of "pregnancy" but rather the expansive definition given by the rule to that term. Thus, the final rule opens the door to requiring accommodations potentially extending to a myriad of conditions ranging from infertility to menstruation to hormone issues to menopause.[4] This is how the Commission paradoxically interprets a statute requiring employers to accommodate a worker's pregnancy and childbirth into a provision that also requires accommodation of a worker's inability to become pregnant.

Having imported its 2015 discrimination guidance into the PWFA—along with the holdings of a smattering of courts—by isolating the phrase "pregnancy, childbirth, and related medical conditions" from the surrounding statutory language of the PWFA, the Commission then returns to that surrounding language. With the statute's scope expanded, the Commission only then recognizes the definite article "the" that proceeds "pregnancy, childbirth, and related medical conditions" in the PWFA. At this point, the final rule purports to apply the definite article to limit the phrase it just expanded concomitant to its pregnancy discrimination guidance to the conditions and related limitations actually suffered or experienced by a particular worker. Specifically, the final rule requires that the pregnancy or childbirth to be accommodated must be "of the specific employee in question" and that "related medical conditions must be related to *the* pregnancy or childbirth of *the specific employee* in question." Preamble (Response to Comments Regarding the List of Conditions Included in the Regulation as Examples of "Pregnancy, Childbirth, or Related Medical Conditions") (emphases added). Relatedly, the Commission "chang[ed] the language in § 1636.3(b) so that the list [of related medical conditions] is now explained as conditions that 'are, or may be,' 'related medical conditions,'" and emphasizes in the Preamble that "[i]n each case, a determination that a medical condition is related to pregnancy or childbirth is fact-specific and

[3] *See, e.g.*, Preamble, "Comments and Response to Comments Regarding Coverage of Specific Conditions—Infertility and Fertility Treatments" ("Thus, depending upon the facts of the case, including whether the infertility treatments are sought by an *employee with the capacity to become pregnant* for the purpose of becoming pregnant, accommodations for an employee due to physical or mental conditions related to, affected by, or arising out of infertility or fertility treatments may be provided under the PWFA, absent undue hardship.") (emphasis added); Preamble, "Comments and Response to Comments Regarding Coverage of Specific Conditions—Infertility and Fertility Treatments;" Preamble, "Comments and Response to Comments Regarding Coverage of Specific Conditions—Menstruation."

[4] As a result of the Commission's decision to cover infertility and other conditions that do not, in fact, relate to a particular pregnancy, the final rule imposes a more onerous and invasive administrative and documentation requirement that differs considerably from the proposed rule. On this and other points there is little and less to distinguish the ADA and the PWFA. Had Congress intended this result, a few words inserted into the ADA would have sufficed.

contingent on whether the medical condition at issue is related to *the* pregnancy or childbirth of *the specific employee* in question." *Id.* (emphases added). The Commission made these allegedly "clarifying" changes in response to commentators arguing that "the language in the NPRM explaining the term 'related medical conditions' could require accommodations for any physical or mental condition that has any real, perceived, or potential connection to—or impact on—an individual's pregnancy, fertility, or reproductive system." *Id.* (summarizing comments).

The Commission wants its cake and to eat it too. But the adage holds true—that cannot be done. The final rule's "limit" or "clarification" is illusory and futile, given the Commission's continued insistence on a definition of "pregnancy" that is so broad as to conflate the term with the female sex. If the Commission had adopted the ordinary meaning of "pregnancy," this limitation *might* work, and rightly constrain "medical conditions" to only those occurrences of such medical conditions related to "the" actual pregnancy or childbirth of a specific employee or applicant in question. But this solution unfortunately becomes untenable under the final rule's expansive definition of pregnancy. Given the rule's expansive definition of "pregnancy," the obligation to accommodate any "medical condition" "related to the pregnancy or childbirth of the specific employee in question" actually means the obligation to accommodate any medical condition related to "the" current pregnancy, past pregnancy (at any point in the past), potential or intended pregnancy (at any point in the future), infertility, fertility treatment, or use of contraception by "the specific employee in question." Once the nexus for a "related medical condition" only need be a speculative future pregnancy, any prior pregnancy no matter how long past, or, in essence, the worker's female sex and the corresponding capacity for pregnancy, there is almost no bounds on what "condition" any female employee or applicant could attempt to point to.

For example, the heavy periods of a 14 year-old, part-time fast-food worker who hopes to get pregnant when she's 30? Under the final rule's definitions, arguably a medical condition related to the potential pregnancy of the specific employee in question. The intermittent, short-term monthly depression a worker experiences from each negative pregnancy test while she's trying to conceive? Or the increased stress a worker experiences from commuting to the office that she fears will decrease her overall health and eventually contribute to challenges getting pregnant a decade later? Both arguably medical conditions related to intended pregnancy of the respective, specific employee in question. The dehydration and corresponding need for additional water breaks experienced by a mom who still is breast-feeding and pumping for her three-year old? Or the increased weight gained and never lost from a long-past pregnancy, such that the worker is overweight but not obese, and she would feel more comfortable performing her duties with a stool? Each of these is possibly a medical condition related to the past pregnancy of the respective, specific employee in question. The fatigue or headaches as a side effect of birth control experienced by a worker at any time during her decades-long lifetime period of fertility (from teens to middle-age)? Arguably a medical condition related to use of contraception by the specific employee in question. None of this is to belittle any of these situations, simply to illustrate how expansive is even the Commission's "limited" and "clarified" definition of which employees and conditions possibly are covered.

For the agency to offer a reasonable, and not an arbitrary and capricious definition of "pregnancy, childbirth, and related medical conditions," it is not sufficient for our final rule to

open the door to a potentially vast universe of accommodation obligations—and then simply hope that this problem practically will be solved by the imposition of more onerous documentation requirements, the good intent of future female employees or applicants, or employers pointing to undue hardship to cabin on the back-end the scope of required accommodations.

In the end, the final rule cobbles together its statutory interpretation in stages: first excising and isolating a common phrase, then using it to import discrimination policy guidance, then returning the newly defined phrase to consider the surrounding text for the first time, and only then in an attempt to make its approach workable. It accomplishes this by selective, cursory, and unsupported applications of canons consonant with its objectives. And while it may take points for creativity, the Commission never explains why its Rube Goldberg contrivance interprets the PWFA in a better, even more credible, way when compared to a basic reading of the language of section 2000gg-1 as a whole. Whatever the Commission's motivation for this approach, it fails basic requirements of statutory interpretation and necessitates a final rule running hundreds of pages to address its implications.[5]

B. The PWFA Does Not Require the Commission's PDA Guidance to Interpret or Apply Its Provisions

In my view, the most defensible interpretation of the PWFA, including "pregnancy, childbirth, and related medical conditions," is not nearly as complicated as the Commission maintains. But my disagreement with the Commission begins with its chosen canons of construction.

While the final rule starts with expected meaning and the stabilizing canons of its choosing, in my view it ought to have begun with the ordinary meaning of the statute's language. This supremacy of the text is also the primary semantic canon, the paramount and "fundamental rule" of statutory interpretation. SCALIA & GARNER, READING LAW, at 56-8, 69. The ordinary meaning canon states that statutory words should be given their plain or common meanings, unless the context indicates that the words bear a technical or other sense. *Id.* at 69-70; *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022) (statutory language interpreted "according to its ordinary, contemporary, common meaning," which is discerned by reading words "in their context, not in isolation") (citations omitted and cleaned up). One must look at two aspects of the text: the meaning of the words in their ordinary sense and the context in which they are used. This allows one to determine meaning. If the words are, or the phrase is, ambiguous, this first step often points to other appropriate tools to arrive at the best interpretation of the text. Here, in my view, one need not go further than the ordinary meaning canon here. But if one does, other canons lend support to the ordinary meaning, including those that command us to interpret the text as a whole and take titles and headings into account.

[5] Unfortunately, the Commission did not lay out the final rule in a way that encourages the severability it summarily declares. As my office outlined these deficiencies early in the rulemaking process, I will not repeat them here. Regardless, the problems with the final rule's approach to severability remain. As a result, I am unable to support the final rule on account of its positive aspects, as they cannot realistically be excised and salvaged.

The Commission skips the first step—are the words "the pregnancy, childbirth, or related medical conditions of a qualified employee" ambiguous? Presumably the Commission thinks so, or considers it obvious, judging by its silence and immediate recourse to tools of statutory interpretation. Without any analysis of the text, or even a discussion explaining that it deems the text ambiguous, the Commission begins with three canons of its choosing, derived from its observation that the phrase "pregnancy, childbirth, and related medical conditions" in the PWFA also appears in Title VII.

However, "pregnancy" is an unambiguous, commonly-understood term for which no agency interpretation is warranted beyond that of its ordinary meaning.[6] Under its ordinary meaning, "pregnancy" means the state of being pregnant, the period in which a child develops inside a woman's body. *See, e.g.*, Pregnancy, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/pregnancy (defining pregnancy as "the quality of being pregnant"; "the condition of being pregnant"; "an instance of being pregnant"); Pregnant, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/pregnant (first definition, "containing a developing embryo, fetus, or unborn offspring within the body"); NIH, National Institute of Child Health and Human Development (defining pregnancy as "the term used to describe the period in which a fetus develops inside a woman's womb or uterus"), available at https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo; *c.f.* 45 CFR § 46.202 (defining pregnancy as "encompass[ing] the period of time from implantation until delivery. A woman shall be assumed to be pregnant if she exhibits any of the pertinent presumptive signs of pregnancy, such as missed menses, until the results of a pregnancy test are negative or until delivery.") (Department of Health and Human Services regulations regarding "Protections for Pregnant Women, Human Fetuses and Neonates Involved in Research"). Contrary to the agency's unwarranted interpretation of this unambiguous term, "the pregnancy" does not mean past pregnancy, potential or intended pregnancy, infertility, fertility treatments, or use of birth control.

Turning to "related medical conditions," the first question is to what "related medical conditions" must relate. Read in context with "the pregnancy[] [and] childbirth . . . of a qualified employee"—and where "the pregnancy" and "childbirth" are given their ordinary meaning, discussed above—"related medical conditions" must mean "medical conditions" related to "*the* pregnancy" or *the* childbirth of a qualified worker. Not "medical conditions" related any biological occurrence connected to the female reproductive system (the biological system which enables females, in general, to have the capacity to become pregnant). That is, "related medical conditions" are conditions related to an actual current pregnancy of the worker, the worker's childbirth, or a pregnancy or childbirth that recently has ended and the worker is in the postpartum period.

The second question in defining "related medical conditions": what is a "condition"? The Oxford English Dictionary defines "condition" as a "state of health," sometimes "a malady or

[6] The same is true of the word "childbirth." However, the final rule's definition of "childbirth" essentially adopts—without specifying that it is doing so—the ordinary meaning of that term: "labor; and childbirth (including vaginal and cesarean delivery)." Final Rule, § 1636.3(b); *see, e.g.*, Childbirth, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/childbirth ("the act or process of giving birth to a baby").

sickness," which aligns with its every day and colloquial use.[7] Likewise, Merriam-Webster relevantly defines "condition" as a "state of being," "a usually defective state of health," or "a state of physical fitness or readiness for use."[8] And similarly, the New Oxford American Dictionary defines "condition" as a "state of health or physical fitness" or "illness or other medical problem."[9] Thus, in my view, the PWFA requires accommodations of medical conditions—states of health or illness—that are created or aggravated by pregnancy and childbirth.[10]

Based on the ordinary meaning of the term "condition," and contrary to the final rule's definition, a medical "condition" is not the same as medical "procedures." Of course, medical procedures sometimes seek to remedy medical conditions, but conditions and procedures are not one and the same. Much as it did in its rule implementing the ADAAA, the final rule helpfully lists many such conditions related to pregnancy that are common, at least to varying degrees, to most pregnant women. And this is helpful to confirm the PWFA's application in common situations. But due to importing the Commission's 2015 pregnancy discrimination guidance into the definition of "related medical conditions," the final rule goes further, sweeping in various medical procedures, treatments, and issues that are not *conditions* in any credible sense of the word. The PWFA itself is simply silent on these matters.[11] Indeed, by focusing an employer's accommodation obligation on pregnancy, childbirth, and resulting medical conditions that are experienced by a pregnant worker, the PWFA obviates the need for definitive lists, discussion,

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[7] *See* "Condition, *N.*, Sense II.9.e." OXFORD ENGLISH DICTIONARY, Oxford Univ. Press, Dec. 2023, https://doi.org/10.1093/OED/2972535253.

[8] Condition, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/condition.

[9] New Oxford Am. Dictionary 362 (3d. ed. 2010).

[10] At one point in the Preamble, the Commission implies that using the ordinary meaning of "the pregnancy, childbirth, or related medical conditions" would exclude qualified employees who have had miscarriages. *See* Preamble, "Response to Comments Regarding the Commission's Proposed Definition of "Pregnancy, Childbirth, or Related Medical Conditions" as Reflected in Statutory Text." Not so. Even if a miscarriage did not fit within the ordinary meaning of "pregnancy" or "childbirth," it clearly is a "medical condition" related to a particular pregnancy of a specific worker. A miscarriage is a "medical problem" or "defective state of health" involving the failure and spontaneous termination of a particular pregnancy.

[11] Of course, medicines or procedures may be necessary to treat or care for a medical condition related to pregnancy or childbirth. For example, non-stress test monitoring or additional, frequent ultrasounds are procedures that might be necessary to care for a pregnancy-related medical condition like gestational diabetes or placenta previa. Here, the employer may be obligated to accommodate limitations stemming from the underlying health condition—limitations which may include the need to take off work for the procedures treating the medical condition in question—but that obligation does not attach directly to the certain medical procedures, treatments, or medicines themselves that may be used to treat that condition.

The PWFA makes clear that its accommodation requirement is triggered by, and is tied inexorably to, a medical *condition* related to—in that it was created or aggravated by—a pregnancy or a childbirth. The statute does not speak to specific treatments, medications, or medical procedures, much less reasonably support the final rule's incorporation of the Commission's chosen favorites. The PWFA does require employers to accommodate the known limitations of their workers from being pregnant and undergoing childbirth, as well as the medical conditions related to being pregnant and undergoing childbirth. The final rule attempts to transform the PWFA into an omnibus female reproduction disability statute. It is not such a statute.

explanation, and line-drawing with respect to every conceivable eventuality. If a medical condition is caused or made worse by the pregnancy or the childbirth of a qualified worker, the employer must accommodate that *condition*, absent undue hardship.

As discussed above, the ordinary meaning canon is sufficient to resolve the definition of "the pregnancy, childbirth, and related medical conditions of a qualified employee." That said, it is true that a subset of this statutory text—"pregnancy, childbirth, and related medical conditions—also appears in the PDA.[12] *See id.* § 2000e(k). Assuming *arguendo* that a prior construction of that phrase with a sufficiently robust consensus existed (which I dispute, as outlined in Part III.A of this Statement), such repetition of language could indicate shared or similar meaning, but only if the surrounding language and context suggests Congress used the phrase to the same end. *See infra* note 16 (cases on context and "the"); *BP P.L.C.*, 593 U.S. at 244. But the language in context does not indicate identical meaning. Rather, both the broader context of each statutory scheme as well as the words surrounding the shared phrase—specifically the definite article "the" and the phrase "of a qualified employee"—show that the PDA and PWFA use "pregnancy, childbirth, and related medical conditions" in materially distinct and different ways.[13]

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[12] All but one of the remaining subsections contain "known limitations related to *the* pregnancy, childbirth, or related medical conditions of the qualified employee." 42 U.S.C. §§ 2000gg-1(1), (3)-(5) (emphasis added). The other prohibits an employer from requiring "a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process referred to in section 2000gg(7) of this title." *Id.* § 2000gg-1(2). This section applies in a context where an employer is already in the process of considering, identifying, or providing a reasonable accommodation under another provision in section 2000gg-1, or has already done so. This provision bars employers from, among other things, pressing a separate less-than-accommodation outside this process—a *de facto* lesser informal accommodation.

[13] In general, there is a basic and logical, but significant, distinction between antidiscrimination and accommodation requirements. And indeed, the Commission elsewhere acknowledges and emphasizes this distinction. In its "What You Should Know About the Pregnant Workers Fairness Act" guidance, the Commission explained, "The PWFA applies only to accommodations. Existing laws that the EEOC enforces make it illegal to fire or otherwise discriminate against workers on the basis of pregnancy, childbirth, or related medical conditions." *See* WYSK, available at https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act (accessed April 3, 2024). Antidiscrimination and accommodation provisions in federal law address different problems in different ways. The duty not to discriminate on designated protected bases is a negative one and is applied to cover not only explicit violations but also the myriad of considerations that serve as proxies for such bases. Moreover, the prohibition of unlawful discrimination is not balanced against the burden or cost to the employer. The fact that clients or customers request or prefer discriminatory practice does not justify or excuse noncompliance with Title VII. *See, e.g.*, EEOC, Section 15 Race and Color Discrimination, available at https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination ("Title VII also does not permit racially motivated decisions driven by business concerns – for example, concerns about the effect on employee relations, or the negative reaction of clients or customers.").

In contrast, the duty to accommodate is positive and requires the employer to treat a particular employee or applicant more favorably than others. *See EEOC v. Abercrombie & Fitch*, 575 U.S. 768, 775 (2015) ("Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual ... because of such individual's" "religious

In the PDA, Congress amended the definition section of Title VII to clarify the scope of discrimination based on the protected characteristic of "sex." The context of the PDA's use of "pregnancy, childbirth, and related medical conditions" therefore shows that it uses the phrase differently from the PWFA—to define "sex discrimination," not to specify physical limitations to be accommodated. The PDA provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes…" 42 U.S.C. § 2000e(k) (emphasis added). There is no definite article limiting the phrase to a particular employee. And by the phrase "pregnancy, childbirth, or related medical conditions" following the words "include, but are not limited to," the PDA's text indicates the phrase is illustrative of a form of sex discrimination but that such sex discrimination is not limited to the enumerated terms. The PDA therefore is broad, using *pregnancy*, *childbirth*, and *related medical conditions* in ways that encompass the literal, abstract, and conceptual to both define and illustrate unlawful discrimination based on the female sex.[14] This is understandable. As acknowledged by the PDA, discrimination against the female sex (women) necessarily includes—among many other forms of sex discrimination against women—discrimination related to inherent (immutable) sex-based traits and sex-typical biological occurrences of adult human females, most notably related to the female reproductive system. Correspondingly, in providing its 2015 pregnancy discrimination guidance, the Commission

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observance and practice"); *see also Hebrew v. Texas Department of Criminal Justice*, 80 F.4th 717, 721 (5th Cir. 2023) ("Title VII imposes on employers both a negative duty not to discriminate and a positive duty to accommodate"). Moreover, accommodation is specific and focused, tailored to the effects of either a particular disability to facilitate the performance of a job or a particular religious observance or practice. Potential accommodations are also balanced against the inherent burdens and costs to employers; if they are too high, an employer is not obligated to provide them.

Although discrimination and accommodations provisions of Title VII and the ADA are enforced through the same cause of action available to redress violations of both statutes, these differences have led Congress separately to articulate accommodation requirements, even if under the broader framework of discrimination. 42 U.S.C §§ 2000e(j); 2000e-(2)(a)(1); 12111(9)-(10); 12112(a), (b)(5). Although the Commission's original interpretative rules regarding Title VII created a religious accommodation requirement from section 703, *see* 31 Fed. Reg. 8370 (June 15, 1966); 32 Fed. Reg. 10298 (July 13, 1967), since the 1972 amendments to Title VII, antidiscrimination and accommodation requirements are delineated separately. Ultimately, neither the PDA nor Title VII includes a pregnancy or sex accommodation requirement. Not surprisingly, the PWFA does not contain a pregnancy discrimination provision, which is already contained in Title VII.

[14] An example might illustrate. Consider two hiring scenarios. First, an employer engages in unlawful sex discrimination under Title VII when it refuses to hire an applicant who it knows is pregnant, either because she is pregnant or, motivated by that fact, out of its desire to avoid long absences attending to maternity leave. Second, an employer likewise engages in unlawful sex discrimination when it refuses to hire a newly married female college graduate applicant who is not pregnant because the employer predicts that she is more likely than other applicants to become pregnant in the near future. By proscribing pregnancy discrimination, Title VII thus prohibits employer actions made because of, or motivated by, both the pregnancy of a specific worker or applicant as well as general pregnancy and childbirth assumptions and stereotypes in the abstract that it applies to said worker or applicant. Put another way, the PDA ensures Title VII covers the tangible, but also extends beyond it, where that which relates to pregnancy motivates employment decisions as a proxy for sex.

interpreted the scope of *sex* discrimination against women. In addressing birth control, the capacity to become pregnant (potential pregnancy), historic (past) pregnancy, infertility treatment, etc. in our pregnancy discrimination guidance, the agency's interpretation is that discrimination on each of these bases constitutes "a form of *sex* discrimination" against women.[15] And indeed, the PDA did not amend Title VII's unlawful employment practices provision to add a separate protected basis of pregnancy in addition to race, sex, color, etc., but rather added to Title VII's definition section that the "terms 'because of sex' or 'on the basis of sex' include, but are not limited to because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). The protected class is "women."

In contrast, to start, in the *Pregnant Workers* Fairness Act, the protected class is "pregnant workers" and postpartum workers. SCALIA & GARNER, READING LAW, at 221-4 (Title and Headings Canon). This protected class is necessarily smaller than the female sex or all female workers. While the capacity to become pregnant is solely a female trait, not all women are or ever will be pregnant or give birth. The text of the statute indicates that the protected class is not "women," and in turn, the scope of the accommodation requirement is not so broad as to require accommodation of any physical or mental conditions related to, affected by, or arising out of the female reproductive system. This is the Pregnant Workers Fairness Act after all, not the Female Workers Fairness Act or the Female Reproductive System Accommodation Act.

To this end, in the PWFA, Congress set out a requirement to "make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee." 42 U.S.C. § 2000gg-1(1). Congress' use of "the" before "pregnancy, childbirth, and related medical conditions" and addition of the reference to "a qualified employee" to articulate the accommodation requirement carries important ramifications for its meaning. First and foremost, it clarifies that the preceding accommodation requirement applies to the limitations of "the" specific pregnancy and childbirth of each pregnant employee, as well as the medical conditions caused or exacerbated by each particular pregnancy and childbirth.[16]

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[15] EEOC Pregnancy Discrimination Guidance (2015), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues; *see, e.g., id.* (concluding that "an inference of unlawful *sex* discrimination" can arise from some discrimination based on "infertility treatment" where such treatments are "intrinsically tied to a woman's childbearing capacity") (emphasis added); *id.* ("employment decisions based on a female employee's use of contraceptives may constitute unlawful discrimination *based on gender*") (emphasis added).

[16] In addition to the meanings of words, context and grammar are important when construing statutes, including use of the definite article "the". *See, e.g.*, *Slack Technologies, LLC v. Pirani*, 598 U.S. 759, 766-67 (2023) ("[C]ontext provides several clues. For one thing, the statute imposes liability for false statements or misleading omissions in 'the registration statement.' Not just a registration statement or any registration statement. The statute uses the definite article to reference the particular registration statement alleged to be misleading, and in this way seems to suggest the plaintiff must 'acquir[e] such security' under that document's terms.") (citations omitted and cleaned up); *Nielson v. Preap*, 586 U.S. ___, 139 S. Ct. 954, 965 (2019) ("Our reading is confirmed by Congress's use of the definite article in 'when the alien is released.' Because '[w]ords are to be given the meaning that proper grammar and usage would assign them,' the rules of grammar govern statutory interpretation "unless they contradict legislative intent or purpose". Here grammar and usage establish that 'the' is 'a function word ... indicat[ing] that a following noun or noun equivalent is definite or has been previously specified by context.") (cleaned up and citations omitted);.

In other words, the PWFA requires accommodation of tangible and concrete (and also often common and basic) limitations—namely, those caused or exacerbated by ***the*** pregnancy, ***the*** childbirth, or ***the*** medical conditions (related to the forementioned specific, actual pregnancy or childbirth) that are actually experienced by the pregnant employee. In so doing, this focuses the PWFA's accommodation requirement on the actual and the practical limitations of a particular pregnancy and childbirth of each individual pregnant worker, as well as the medical conditions caused or exacerbated by the same that the worker is experiencing. And in turn, contrary to the interpretation advanced in the Commission's final rule, this is another reason—on top of the ordinary meaning canon—to exclude from the statute's scope the obligation to accommodate long-past pregnancies (historic pregnancies); speculative future, contemplated, intended, or merely possibly pregnancies; or the female reproductive system in general, that is, the biological system which gives women, typically, the "capacity to become pregnant."

Likewise, as a result of the PWFA's focus on a specific, actual pregnancy and childbirth of an individual worker, and particular medical conditions related to them, it also logically excludes medical conditions that are not explicitly tied to a particular pregnancy or childbirth. Menstruation, infertility, menopause, and the like are not caused or exacerbated by a particular pregnancy or childbirth—but rather the functioning, or ill-functioning, of the female worker's underlying reproductive system—and so are not subject to accommodation under the PWFA.

Ultimately, my interpretation comfortably aligns with the PWFA's focus on what defines its accommodation obligation: pregnant workers' known limitations, the particular sources of those limitations, and the statute's sole focus on accommodation—not the Commission's 2015 guidance on pregnancy discrimination under Title VII nor a smattering of lower-court opinions addressing what reproductive health issues might fall within a penumbra of discrimination based on the female sex. Employers are obligated to accommodate the known limitations of each pregnancy and childbirth, and medical ailments caused or exacerbated by the pregnancy or childbirth, of any of its employees, under familiar standards and for a limited time. Such a system is amenable to simplified processes and less onerous documentation requirements for many common pregnancy accommodations, as the Commission offered in the proposed rule, but which the Commission unfortunately now has replaced to a significant degree in the final rule.

In short, my approach goes no further than the plain and ordinary meaning of the words in the statute read together as a whole. In contrast, the Commission's house of cards requires carefully sequenced stages. First, isolate and excise "pregnancy, childbirth, and related medical conditions" to identify a match with the PDA. Second, import the Commission's Title VII discrimination guidance into the PWFA through that excised phrase. Third, reinsert the phrase and then look to surrounding context and only then recognize the limitations of "the" and "of a qualified employee" that, for unexplained reasons, only apply after the expansion wrought by the first two steps. None of these maneuvers are necessary or appropriate.[17]

[17] *See Food Marketing Institute v. Argus Leader Media*, 588 U.S. 427, 436 (2019) (the "proper starting point [of statutory interpretation] lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop") (citation omitted).

The texts of the PWFA and the PDA confirm that their shared language does not carry identical meaning. The ordinary meaning of the PWFA affords a clear, understandable, and foreseeable scope and application of its accommodation requirement. The Commission's contrary approach conflicts with basic statutory construction and, therefore, is far from a—let alone the most—reasonable or defensible construction of the PWFA.

IV. CONCLUSION

In the PWFA Congress attempted to fill a narrow accommodation gap between Title VII and the ADA. Minor, simple, temporary accommodations for pregnant workers—such as water, food, and a place to sit while working—would allow women to remain working further into their pregnancies, if they wish to do so. These often temporary and simple accommodations should not require the full apparatus of documentation attending disabilities under the ADA. The statute is simple, the Commission's task likewise.

But the Commission could not resist the temptation to "interpret" into the PWFA all the components it has long desired to complement its administrative gloss on Title VII and the ADA. And with some linguistic gymnastics and a simple sleight of hand, the new accommodation statute became considerably more complicated and controversial. Sadly, the cost was high. The final rule jettisoned some of the most desirable aspects of the proposed rule, including the streamlined administration of the most common and simple pregnancy accommodations.

The first step in this misguided and bloated regulatory morass is the Commission's interpretation of the phrase "pregnancy, childbirth, or related medical conditions." It is at this first step that we part ways. Accordingly, I vote to disapprove the final rule.[18]

[18] There are other aspects of the final rule with which I take issue, but none are necessary to address here, as the rule fails at the most basic and fundamental step—defining the scope of coverage via the definition of "the pregnancy, childbirth, and related medical conditions of a qualified employee."