IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

BRANDON & CLARK, INC., *Plaintiff* v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; CHARLOTTE A. BURROWS, JOCELYN SAMUELS, KEITH E. SONDERLING, ANDREA R. LUCAS, AND KALPANA KOTAGAL, EEOC COMMISSIONERS; KARLA GILBRIDE, EEOC GENERAL COUNSEL, UNITED STATES OF AMERICA, *Defendants*.	§ § § § § § § § § § § § § § § §	Civil Action No. 5:24-cv-00173-C

PLAINTIFF'S BRIEF SUPPORTING MOTION FOR A PRELIMINARY INJUNCTION AND RELIEF UNDER 5 U.S.C. § 705

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INTRODUCTION

When the House of Representatives voted to pass the Consolidated Appropriations Act of 2023, Pub. L. 117-328, 136 Stat. 4459 (2022), only 201 Members were present in the Hall of the House. But the Constitution excludes absent Members from counting toward a quorum. Thus, the House of Representatives did not have the power to vote on the Consolidated Appropriations Act of 2023, and it is therefore not a law. Division II of the Consolidated Appropriations Act of 2023 contained the Pregnant Workers Fairness Act. Because the House of Representatives purported to pass the Pregnant Workers Fairness Act as part of the Consolidated Appropriations Act of 2023, it too is not a law.

The Pregnant Workers Fairness Act authorized the Equal Employment Opportunity Commission (EEOC) to issue regulations implementing the Act. Pub. L. 117-328, Division II § 105, 136 Stat. 4459, 6088 (2022); Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29,096 (Apr. 19, 2024). This rule, among other things, requires employers to provide accommodations to an employee seeking an elective abortion. Because the Pregnant Workers Fairness Act contained EEOC's sole rulemaking authority for this regulation, the Commission had no authority to conduct the rulemaking and rule is therefore void.

Plaintiff Brandon & Clark Inc. will suffer irreparable harms if the Pregnant Workers Fairness Act and its implementing rule continue in force. Therefore, Plaintiff respectfully requests this Court grant a preliminary injunction against the Pregnant Workers Fairness Act's enforcement and a stay of enforcing the implementing rule pending review of this case under 5 U.S.C. § 705.

BACKGROUND

I. THE CONSOLIDATED APPROPRIATIONS ACT OF 2023

A. Procedural Background

The Pregnant Workers Fairness Act (PWFA) was included in H.R. 2617, the Consolidated Appropriations Act of 2023. Pub. L. 117-328, Division II, 136 Stat. 4459, 6084 (2022) (codified at 42 U.S.C. ch. 21G). H.R. 2617 began its legislative life as the "Performance Enhancement Reform Act" introduced on April 16, 2021. H.R. 2617, 117th Cong. (2021) (as introduced). The bill originally required additional information be included in each federal agency's annual performance plan. *Id.*

H.R. 2617 passed the House of Representatives with minor amendments on September 28, 2021. 167 Cong. Rec. H5497–98 (daily ed. Sept. 28, 2021). Fourteen months later H.R. 2617 passed the Senate with additional minor amendments on November 15, 2022. 168 Cong. Rec. S6704 (daily ed. Nov. 15, 2022).

The House then used H.R. 2617 as a vehicle to pass an enormous appropriations bill. It did so by adopting H. Res. 1518 on December 14, 2022. 168 Cong. Rec. H9752 (daily ed. Dec. 14, 2022). In adopting this resolution, the House concurred with the Senate amendments to H.R. 2617 and added an additional amendment consisting of the *Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2023*. 168 Cong. Rec. H9746 (daily ed. Dec. 14, 2022). After H.R. 2617 returned to the Senate, Senator Patrick Leahy introduced Senate Amendment 6552. 168 Cong. Rec. S7328–S7785 (daily ed. Dec. 19, 2022). This amendment was an amendment in the nature of a substitute and completely replaced the prior text of H.R. 2617 with the Consolidated Appropriations Act of 2023. *Id.* Senate Amendment 6552 did not contain the PWFA. *Id.*

B. The Senate Adds the Pregnant Worker Fairness Act to the Consolidated Appropriations Act of 2023

Senators Robert Casey of Pennsylvania and William Cassidy of Louisiana originally introduced the PWFA on April 29, 2021. S. 1486, 117th Cong. (2021); 167 Cong. Rec. S2353 (daily ed. Apr. 29, 2021). By December 2022 it had been reported out of committee but had not received a floor vote. *See* 167 Cong. Rec. S6841 (daily ed. Sept. 30, 2021).

On December 20, 2022, Senators Cassidy and Casey introduced Senate Amendment 6558, which amended Senate Amendment 6552 to include the PWFA. 168 Cong. Rec. S9631–32 (daily ed. Dec. 20, 2022). The Senate adopted Senate Amendment 6558, the PWFA, on December 22, 2022, by a vote of 73-24. 168 Cong. Rec. S10071 (daily ed. Dec. 22, 2022). Later that day the Senate adopted Senate Amendment 6552 and passed H.R. 2617 by a vote of 68-29, with 3 Senators not voting. 168 Cong. Rec. S10077 (daily ed. Dec. 22, 2022).

C. The House Votes on the Consolidated Appropriations Act of 2023

The House voted to concur in the Senate amendments and pass H.R. 2617 on December 23, 2022. 168 Cong. Rec. H10528–29 (daily ed. Dec. 23, 2022). The final vote total was 225-201, with one Representative voting present (by proxy) and four Representatives not voting. *Id.* Of the 426 votes cast, 226 of these votes were cast in person and 201 were delivered by proxy. *Id.* The 117th Congress consisted of 435 Representatives. *See* Act of August 8, 1911, Pub. L. No. 62-5, 37 Stat. 13-14 (1911); 2 U.S.C. § 2a(a). On December 23, 2022 there were 431 Representatives in office, with 4 vacancies. 168 Cong. Rec. H9651 (daily ed. Dec. 12, 2022) (upon the resignation of Rep. Karen Bass on December 9, the Speaker of the House announced "the whole number of the House is 431.").

Following its enrollment, the President signed H.R. 2617 into law on December 29, 2022. Pub. L. 117-328, 136 Stat. 4459 (2022).

II. THE HOUSE OF REPRESENTATIVES ADOPTS A PROXY VOTING RULE

Rule III of the House of Representatives states "[e]very Member shall be present within the Hall of the House during its sittings." H.R. Rule III, cl. 1, 117th Cong. (2021); H.R. Res. 8, 117th Cong. (2021). The Rule also states that "[a] Member may not authorize any other person to cast the vote of such Member or record the presence of such Member in the House." H.R. Rule III, cl. 2(a), 117th Cong. (2021). Rule III in the 117th Congress was unchanged from Rule III as it applied in the 116th Congress. *See* H.R. Res. 8, 117th Cong. (2021).

On May 15, 2020, the House passed H. Res. 965. 167 Cong. Rec. H2253–54 (daily ed. May 15, 2020). H. Res. 965 suspended Rule III's presence requirement and allowed a Representative to deliver proxy votes on another Representative's behalf. H.R. Res. 965, 116th Cong. (2020). H. Res. 965 was to remain in effect for 45 days, and could be renewed (without limitation) for additional 45-day periods so long as the Speaker found a public health emergency existed due to a novel coronavirus. *Id.* § 1(b). The House continued H. Res. 965 in the 117th Congress. H.R. Res. 8, 117th Cong. § 3(s) (2021). The proxy rule was not renewed in the 118th Congress. *See* H.R. Res. 5, 118th Cong. (2023).

Prior to the 116th Congress, the House of Representatives had never authorized votes by proxy on legislation before the full House. The Senate never adopted a rule allowing for proxy votes when legislation is before the full Senate. The Senate only allows proxy votes in committees. *See* S. Rule XXVI, 117th Cong. (2021).

III. PREGNANT WORKER FAIRNESS ACT OVERVIEW

The PWFA requires covered employers to "make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless" doing so would "impose an undue hardship on the operation of the business"

and prohibits "deny[ing] employment opportunities," "requiring a qualified employee to take leave," and "tak[ing] adverse action" based on the employee's need for an accommodation. 42 U.S.C. § 2000gg–1(1), (3)–(5). The PWFA's goal is to address gaps in Title VII (as amended by the Pregnancy Discrimination Act of 1978), the Family and Medical Leave Act, and the Americans with Disabilities Act that (in Congress's view) did not adequately protect pregnant workers. *See* Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54,714, 54,714–16 (August 11, 2023) (proposed rule). A "covered employer" under the Act is "a person engaged in industry affecting commerce who has 15 or more employees. 42 U.S.C. § 2000gg(2)(B)(i).

The PWFA imposes the same definitions of "reasonable accommodation" and "undue hardship" as are used in the Americans with Disabilities Act. *Id.* § 2000gg(7) . A violation of the PWFA's requirements allows for the same remedies using the same procedures as under Title VII of the Civil Rights Act of 1964. *Id.* § 2000gg–2(a) . This includes the requirement to respond to charges of discrimination filed with the EEOC, investigation and litigation by the EEOC, and private actions by allegedly aggrieved individuals. *Id.* § 2000e–5; 29 C.F.R. §§ 1601.15–17, 1601.23–25, 1601.28–29.

IV. EEOC IMPLEMENTS THE PWFA

The PWFA directed EEOC to promulgate regulations to implement the Act. 42 U.S.C. § 2000gg–3. EEOC's implementing rule relies solely on the PWFA, 42 U.S.C. § 2000gg et seq., for its authority. *See* Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29,096, 29,183 (Apr. 19, 2024) ("Authority: 42 U.S.C. 2000gg et seq.").

The EEOC's implementing rule defines abortion as a "related medical condition" which requires employers to provide accommodations. Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29,096, 29,104–14, 29,183 (Apr. 19, 2024) (to be codified at 29 C.F.R. §

1636.3(b)) ("The following are examples of conditions that are, or may be, 'related medical conditions': termination of pregnancy, including via miscarriage, stillbirth, or abortion"); *see also id.* at 29,191 (to be codified 29 C.F.R. Part 1636 Appendix A, section III, paragraph 18). Accommodations for abortion will require an employer to provide leave for an employee to obtain one. *See* Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29,096, 29,113 (Apr. 19, 2024).

STANDARD FOR GRANTING MOTION

When deciding whether to grant a preliminary injunction or a stay pending review under 5 U.S.C. § 705, courts use a largely identical four-factor test. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (noting the "substantial overlap" between factors for a stay pending review and a preliminary injunction); *Texas v. EPA*, 829 F.3d 405, 424–36 (5th Cir. 2016) (considering the four *Nken* factors when staying an agency's action under 5 U.S.C. § 705). Courts consider: (1) whether the movant has shown a likelihood of success on the merits; (2) whether the plaintiff "will be irreparably injured absent" preliminary relief; (3) whether preliminary relief "will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434; *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). The first two factors "are the most critical." *Nken*, 556 U.S. at 434. The final two factors "merge" and are considered together if "the Government is the opposing party." *Id.* at 435.

ARGUMENT

I. PLAINTIFF HAS STANDING.

Article III of the Constitution requires a plaintiff have standing to show that its claims are a "Case[]" or "Controvers[y]" fit for judicial resolution. U.S. Const. art. III, § 2; *Raines v. Byrd*, 521 U.S. 811, 818 (1997). To show standing, "the plaintiff must have (1) suffered an injury in fact,

(2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robbins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–61 (1992)). Although the plaintiff has the burden of establishing those elements, courts assume for standing purposes that Plaintiff is correct on the merits. *See id.*; *Young Conservatives of Tex. Found. v. Smatresk*, 73 F.4th 304, 309 (5th Cir. 2023). As a regulated entity, Brandon & Clark, Inc. will suffer irreparable harms caused by Defendants' enforcement of the PWFA. When the plaintiff is a regulated entity, "[c]ausation and redressability then flow naturally from the injury." *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015). A preliminary injunction of the PWFA and a stay pending review of the PWFA implementing rule will remedy the harms that Defendants are imposing.

A. Plaintiff will suffer irreparable harm if the PWFA applies to it.

Enforcing the PWFA and its implementing rule will cause Brandon & Clark, Inc. to suffer injuries because it is a regulated entity and will incur unrecoverable compliance costs.

Brandon & Clark, Inc. employs 15 or more employees, so it is a "covered employer" under the PWFA. 42 U.S.C. § 2000gg(2)(B)(i) . "If, in a suit challenging the legality of government action, the plaintiff is himself an object of the action, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019); *Contender Farms*, 779 F.3d at 266 (under the "ordinary rule," a party that is the "object[ ] of the [r]egulation[] may challenge it.").

There is no doubt that Brandon & Clark, Inc. is "an object of the regulation." By its own terms, the PWFA applies to employers with 15 or more employees. 42 U.S.C. § 2000gg(2)(B)(i) . Brandon & Clark, Inc. has 231 employees. Decl. Scott Clark ¶ 2. The PWFA imposes on Brandon & Clark, Inc. requirements to provide accommodations for pregnant employees using specifically

defined procedures and opens it up to investigation and litigation by the EEOC. *See* 42 U.S.C. §§ 2000gg–1(1), (3)–(5), 2000e–5. These requirements impose new legal obligations on, and create new causes of action against Brandon & Clark, Inc., making it an "object of the regulation."

In addition, the PWFA will impose compliance and implementation costs on Brandon & Clark, Inc. A "pocketbook injury is a prototypical form of injury in fact." *Collins v. Yellen*, 141 S. Ct. 1761, 1767 (2021). Specifically, Brandon & Clark, Inc. will spend at least $3,500 to implement the PWFA's requirements. Decl. Scott Clark ¶ 11. This includes the cost to update its policies and to train managers and employees on how to comply with the PWFA. *Id.* The implementation costs must be spent at the outset and cannot be recovered even if the PWFA were later found invalid. *See id.*; *Wages & White Lion Investments, LLC v. United States Food and Drug Administration*, 16 F.4th 1130, 1142 (5th Cir. 2021) (holding that regulatory compliance costs are unrecoverable and therefore amount to irreparable harm). "For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017). EEOC in its rulemaking acknowledged that the PWFA and its implementing rule will impose on covered entities some "[a]dministrative costs, which include rule familiarization." Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29,096, 29,177 (Apr. 19, 2024). Therefore, based on Scott Clark's declaration and EEOC's own admission, Brandon & Clark, Inc. will suffer an injury in fact from the PWFA's enforcement. This injury stems from Brandon & Clark, Inc's status as an "object of the regulation" and due to its unrecoverable compliance costs.

Two Courts within the Fifth Circuit have recently found that challengers to the PWFA and its implementing rule have standing as the object of the regulation and due to implementation costs. *See Texas v. Garland*, No. 5:23-CV-034-H, 2024 U.S. Dist. LEXIS 33161, at *51–*54 (N.D.

Tex. Feb. 27, 2024); *Louisiana v. EEOC*, 2024 U.S. Dist. LEXIS 107308, at *14–*23 (W.D. La. June 17, 2024). This Plaintiff similarly has standing here.

B. Plaintiff's irreparable harm is traceable to Defendants' duties under the PWFA.

Brandon & Clark, Inc.'s harms stem directly from the PWFA and its implementing rule. A plaintiff can show that its injury is traceable when the challenged action "produce[s] a 'determinative or coercive effect upon the action of someone else,' resulting in injury." *Inclusive Cmtys. Proj., Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019) (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). While an injury is not traceable if it results from "the independent action of some third party not before the court," traceability does not require showing that "the defendant's actions are the very last step in the chain of causation." *Bennett*, 520 U.S. at 169.

Brandon & Clark, Inc. has made it clear that it will not update its policies nor grant leave for elective abortion absent legal compulsion. *See* Decl. Scott Clark ¶ 9. These requirements are a direct result of the PWFA and its implementing rule. *See* 42 U.S.C. § 2000gg–1; Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29,096, 29,104–14, 29,183 (Apr. 19, 2024) (to be codified at 29 C.F.R. § 1636.3(b)). EEOC is the sole federal agency charged with enforcing the PWFA against private employers, since the Attorney General may only enforce the PWFA against state employers. 42 U.S.C. §§ 2000gg–2(a), 2000e–5; *see also id.* § 2000e–6 (c) (transferring civil enforcement powers from the Attorney General to EEOC effective March 24, 1974); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 Denv. U.L. Rev. 995, 1023 n.105 (2015). Thus Brandon & Clark, Inc's injuries are fairly traceable to Defendants' actions.

The possibility of third-party lawsuits does not defeat traceability. Because the PWFA borrows Title VII's enforcement procedures, it also borrows its process for issuing right-to-sue letters. *See* 42 U.S.C. § 2000e–5(f)(1). If EEOC declines to file charges against an employer, it "may issue aggrieved individuals 'right-to-sue' letters, allowing those persons to sue" their

employer. *Texas v. EEOC*, 933 F.3d 433, 439 (5th Cir. 2019). Thus EEOC's involvement in a third party's pre-litigation process is mandatory and is a prerequisite for a third party's cause of action to arise. *See Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1851 (2019). Enjoining EEOC from enforcing the PWFA—including issuing right-to-sue letters—will prevent third parties from satisfying their cause of action's statutory requirements. Furthermore, granting declaratory relief holding that the PWFA is unconstitutional will further frustrate efforts to bring third party litigation. Any attempt by third party litigants to avoid Plaintiff's declaratory relief (should this Court grant Plaintiff's request) and the statute's requirements through equitable tolling or judicially-created exceptions to the mandatory claims processing rule is untested and speculative and cannot serve as a basis to defeat traceability. *See WildEarth Guardians v. United States Dep't of Agric.*, 795 F.3d 1148, 1159 (9th Cir. 2015) ("Such speculation does not defeat standing."). Even if it did, the defendant's conduct need not be the "very last step in the chain of causation." *Bennett*, 520 U.S. at 169. Thus any possibility of third-party lawsuits does not defeat traceability.

Brandon & Clark, Inc.'s status as an object of the regulation, its unrecoverable implementation costs, and exposure to new litigation are a direct result of EEOC enforcing the PWFA and its implementing rule. Two Courts within the Fifth Circuit have found that challengers to the PWFA and its implementing rule met the traceability prong of standing. *See Texas v. Garland*, No. 5:23-CV-034-H, 2024 U.S. Dist. LEXIS 33161, at *60–*63 (N.D. Tex. Feb. 27, 2024); *Louisiana v. EEOC*, 2024 U.S. Dist. LEXIS 107308, at *14–*23 (W.D. La. June 17, 2024). Therefore, the injury is traceable to Defendants.

C. This Court is empowered to redress Plaintiff's injuries by issuing declaratory and injunctive relief.

Brandon & Clark, Inc.'s requested remedies—declaratory relief and enjoining the PWFA and its implementing rule—will reduce its injuries. To satisfy redressability, a plaintiff must show

that a favorable decision "is *likely*, as opposed to merely *speculative*," to redress its injury. *Inclusive Cmtys. Proj.*, 946 F.3d at 655 (emphasis in original). The remedy may merely "lessen" the injury; a "complete[] cure" is not required. *Id.*

Preventing EEOC from enforcing the PWFA and its implementing rule will substantially reduce Brandon & Clark, Inc.'s injuries. First, it will eliminate the threat of investigation and litigation by EEOC. Second, eliminating EEOC's ability to issue right-to-sue letters will likely discourage third parties from filing suit against Brandon & Clark, Inc. Third, declaring the PWFA unconstitutional will make it more difficult for third parties to bring litigation under the Act against Brandon & Clark, Inc. This substantial reduction in injuries meets the redressability prong of standing. Furthermore, in the State of Texas's challenge to the PWFA, this Court recognized that the possibility of third-party litigation does not defeat standing. *Texas v. Garland*, No. 5:23-CV-034-H, 2024 U.S. Dist. LEXIS 33161, at *63–*65 (N.D. Tex. Feb. 27, 2024).

Similar to the discussion above on traceability, the mere potential for third party lawsuits does not defeat standing. The Fifth Circuit recently held (in an unpublished opinion) that redressability is met even where a plaintiff's remedy does not preclude third party lawsuits. *See Consumer Data Indus. Ass'n v. Texas*, No. 21-51038, 2023 U.S. App. LEXIS 19007, at *13 (5th Cir. July 25, 2023). Notably, in *Consumer Data*, the statutory right of action was not conditioned on the government's action or inaction (such as issuing a right-to-sue letter). Thus, under the law challenged in *Consumer Data*, a consumer's ability to bring suit is much broader than an employee's ability to sue under the PWFA. If the plaintiff's claims in *Consumer Data* met the redressability prong, then the Plaintiff here has also met the redressability prong.

Notably, to provide Plaintiff with adequate relief, the Court must enjoin both the PWFA and its implementing rule. Enjoining one without the other will not adequately remedy its injuries.

The PWFA itself imposes many of the burdens that cause Brandon & Clark, Inc.'s injuries. *See* 42 U.S.C. § 2000gg–1. The implementing rule inflicts further injuries by creating additional legal obligations (i.e. the abortion leave mandate). Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29,096, 29,104–14, 29,183 (Apr. 19, 2024) (to be codified at 29 C.F.R. § 1636.3(b)). Because Brandon & Clark, Inc. is injured by both the PWFA and the implementing rule, if the Court finds that the PWFA was enacted in violation of the Quorum Clause, the Court must enjoin the PWFA itself as well as the implementing rule.

II. THIS CASE IS JUSTICIABLE.

None of the justiciability concerns prevent this Court from reaching the merits. This Court previously considered this precise issue in *Texas v. Garland*. No. 5:23-CV-034-H, 2024 U.S. Dist. LEXIS 33161, at *86–*125 (N.D. Tex. Feb. 27, 2024). That case involved the State of Texas's Quorum Clause challenge to the PWFA. First, this Court determined that the Enrolled Bill Doctrine does not ordinarily preclude a constitutional challenge, and that a court must first determine whether proxy voting is constitutional before applying the Enrolled Bill Doctrine's principles. *Id*. at *86–*106. This Court also explained that the Speech and Debate Clause does not apply because none of the Defendants are legislative branch officials. *Id*. at *89 n.13. Then this Court determined that the Political Questions Doctrine is not applicable because (1) the Framers codified the majority quorum requirement in the Constitution rather than committing quorum determinations to Congress's discretion; (2) the Quorum Clause provides a judicially manageable standard; and (3) prudential considerations do not weigh against deciding the merits. *Id*. at *106–*124. Nevertheless, Plaintiff will address below each of these arguments in detail.

In the Texas case this Court stated that "justiciability doctrines would likely limit the number of [similar] claims," noting that "[a] plaintiff would still need to show a concrete and

particularized injury-in-fact caused by the act and redressable by a favorable result, which cannot be satisfied by a general claim that the defendant violated the Constitution." *Id*. at *123. Plaintiff demonstrated this standing in the previous section. Since Plaintiff has "overcome these barriers to suit, then their claims may also be cognizable." *Id*. at *124.

A. The Enrolled Bill Doctrine does not preclude judicial review because the doctrine does not preclude Constitutional challenges.

The Enrolled Bill Doctrine limits a court's ability to review certain Constitutional claims that challenge the procedures Congress used to adopt a particular law. The doctrine is commonly invoked to deny challenges that a law violated the Bicameralism and Presentment Clauses; often alleging that the House of Representatives and Senate did not vote on the same text. *See* U.S. Const. art. I, § 7, cls. 2–3; *Pub. Citizen v. U.S. Dist. Ct. for D.C.*, 486 F.3d 1342, 1343–44 (D.C. Cir. 2007) (Enrolled Bill Doctrine prevented judicial review of claims that a statute was unconstitutional for failing the bicameral-passage requirement); *OneSimpleLoan v. U.S. Secy. of Educ.*, 496 F.3d 197, 198 (2d Cir. 2007) (Enrolled Bill Doctrine prevented judicial review of claims that statute was enacted in violation of the Bicameralism, Presentment, and Appropriations Clauses). But the doctrine only exempts enrolled bills from factual—not legal—disputes as to whether the law meets the Constitution's procedural requirements. Plaintiff does not question whether the bill passed the House and Senate in the same form. Instead, Plaintiff's challenge rests on whether, based on uncontroverted evidence in the Congressional Record, the House's vote on H.R. 2617 met the Quorum Clause's requirements to "do Business."

The Enrolled Bill Doctrine "concerns 'the nature of the evidence the Court [may] consider in determining whether a bill had actually passed Congress.'" *U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents of Am. Inc.*, 508 U.S. 439, 455 n.7 (1993). The doctrine establishes that "a law consists of the 'enrolled bill,' signed in open session by the Speaker of the House of Representatives and

the President of the Senate." *Id.* The Supreme Court created this doctrine in 1892 in *Marshall Field & Co. v. Clark,* 143 U.S. 649 (1892). That case involved a section of the Tariff Act of October 1, 1890 that was passed by both houses of Congress but was omitted from the enrolled bill. *Id.* at 662–69. The Court held that when a bill is enrolled, "its authentication as a bill that has passed Congress should be deemed complete and unimpeachable." *Id*. at 670–72. But the Court clarified that courts may still determine whether that enrolled bill "is in conformity with the Constitution." *Id*. at 672. In other words, *Marshall Field & Co.* is concerned with whether a bill has *factually* passed Congress, not whether it has *legally* passed.

Furthermore, the Supreme Court has clarified that the Enrolled Bill Doctrine does not apply "[w]here, as here, a constitutional provision is implicated." *United States v. Munoz-Flores*, 495 U.S. 385, 391 n.4 (1990). In *Munoz-Flores* a criminal defendant challenged a monetary "special assessment," arguing the authorizing statute violated the Origination Clause. *Id.* at 387. In reaching the merits of the argument, the Court held whether "a bill becomes a 'law' . . . does not answer the question whether that 'law' is *constitutional*." *Id*. at 397 (emphasis in original). Therefore, "[t]o survive this Court's scrutiny, the 'law' must comply with all relevant constitutional limits." *Id*. Furthermore, "[a] law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would be a law passed in violation of the First Amendment." *Id*.

This case brings a challenge in the mold of *Munoz-Flores*. Deciding this case does not require the Court to conduct the fact-intensive analysis the Supreme Court sought to avoid in *Marshall Field & Co*. This case does not challenge the actual contents of the enrolled bill. Rather, the Court must determine here whether that enrolled bill "compl[ies] with all relevant constitutional limits." *See id.* The "relevant constitutional limits" are the Quorum Clause's

physical presence requirement. If Congress violated the "relevant constitutional limits," the bill is not a law.

The Enrolled Bill Doctrine does not limit this Court's power to decide this case. The Enrolled Bill Doctrine applies to factual disputes about how a bill was passed, not legal challenges to Congress's power to legislate. This Court has previously held that the Enrolled Bill Doctrine does not preclude review of a Quorum Clause challenge to the PWFA. *Texas v. Garland*, No. 5:23-CV-034-H, 2024 U.S. Dist. LEXIS 33161, at *86–*89 (N.D. Tex. Feb. 27, 2024). Therefore, this Court may decide the merits of this case.

B. The Political Question Doctrine does not preclude judicial review because there is no textually demonstrable commitment of discretion and the Quorum Clause's standards are judicially manageable.

The Political Question Doctrine provides that cases involving so-called "political questions" nonjusticiable. The Supreme Court has provided six considerations to determine whether a claim raises a nonjusticiable political question: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving" the issue; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962). A plurality of the Court has noted that "[t]hese tests are probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).

First, the Quorum Clause is not a "a textually demonstrable constitutional commitment of the issue" to Congress. To determine if there is a textually demonstrable constitutional

commitment, courts ask two questions: (1) whether there is a textual commitment in the first place, and (2) to what extent the issue is textually committed. *Nixon v. United States*, 506 U.S. 224, 228 (1993). Constitutional provisions that show such textual commitment include the Senate Impeachment Trial Clause. That clause reads: "[t]he Senate shall have the sole Power to try all Impeachments" with the word "sole" showing textual commitment. *Nixon*, 506 U.S. at 229, 230–31 (quoting U.S. Const. art. I, § 3, cl. 6). Conversely, while the Judge of Elections Clause seems to give each House the unreviewable power to "Judge of the Qualifications of its own Members," Congress may only exercise unreviewable judgment as to the Constitution's qualifications; it cannot add its own qualifications and use the Political Questions Doctrine to evade judicial review. *Powell v. McCormack*, 395 U.S. 486, 520–22, 547–48 (quoting U.S. Const. art. I, § 5, cl. 1).

The Quorum Clause does not show a "textually demonstrable constitutional commitment" to Congress. If anything, the clause *takes away* Congress's discretion by fixing the number that constitutes a quorum. The Framers thought it important to enshrine the quorum requirement in the Constitution rather than let each house determine the quorum threshold in its own rules. *See* James Madison, *Notes of Debates in the Federal Convention of 1787*, at 428–31 (W.W. Norton & Co. 1987) (1840). At the Constitutional Convention, delegates opposed to the Quorum Clause raised concerns that a majority requirement could lead to delays in obtaining the necessary quorum and conducting business. *Id.* But rather than lower the threshold through proxies or excused absences, the delegates added a clause giving each house the power to compel attendance of absent members. *Id.* at 431. The Framers resolved the issue in the Constitution's text, leaving little discretion committed to Congress.

The Constitutional Convention history shows that there is no "lack of judicially discoverable and manageable standards for resolving" the issue. The Framers themselves chose to

set the quorum requirement at a majority, rather than let each House choose the quorum level in its own rules. This contrasts with Supreme Court precedents that give each house of Congress wide latitude to "determine the Rules of its Proceedings."[1] U.S. Const. art. I, § 5, cl. 2; *see NLRB v. Noel Canning*, 573 U.S. 513, 550 (2014). The Framers intentionally took away Congress's discretion and placed a straightforward standard in the Quorum Clause.

Interpreting the Quorum Clause does not involve "political, not legal" judgments such as those raised in political gerrymandering challenges. *See Rucho v. Common Cause*, 588 U.S. 684, 686 (2019). Instead, interpreting the Quorum Clause is a matter of Constitutional interpretation—a task "courts routinely undertake." *Texas v. Garland*, No. 5:23-CV-034-H, 2024 U.S. Dist. LEXIS 33161, at *118 (N.D. Tex. Feb. 27, 2024). Resolving a dispute using ordinary tools of legal interpretation usually yields judicially manageable standards. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); *Kuwait Pearls Catering Co., WLL v. Kellogg Brown & Root Servs., Inc.*, 853 F.3d 173, 182–84 (5th Cir. 2017). Therefore, the Quorum Clause presents judicially discoverable and manageable standards.

The remaining four factors are prudential considerations. *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 953 (5th Cir. 2011). Resolving the Quorum Clause's meaning does not require a court to make "an initial policy determination." It requires the court to apply the Constitution, regardless of the underlying legislation's policy. The court's constitutional analysis does not "express[] a lack of the respect due" to Congress. Courts routinely declare Congress's enactments unconstitutional without expressing a "lack of [] respect." There is also no "unusual need for unquestioning adherence" or a risk of "embarrassment." Plaintiff is asking this Court to do what it is Constitutionally empowered to do: exercise the "judicial Power" over "Cases" and

[1] Even with such wide latitude, the Court has recognized that Congress "may not by its rules ignore constitutional restraints or violate fundamental rights." *United States v. Ballin*, 144 U.S. 1, 5 (1892).

"Controversies." U.S. Const. art. III, §§ 1–2. This Court recognized that a similar Quorum Clause challenge to the PWFA did not present a non-justiciable political question. *Texas v. Garland*, No. 5:23-CV-034-H, 2024 U.S. Dist. LEXIS 33161, at *106–*125 (N.D. Tex. Feb. 27, 2024). Therefore, the Plaintiff's claim is justiciable and the Court may reach the merits.

C. The Speech and Debate Clause does not preclude judicial review because none of the defendants are legislative branch officials and the evidence does not implicate legislative privilege.

The Speech and Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other place." U.S. Const. art I, § 6, cl. 1. This Clause "confers on Members of Congress immunity for all actions within the legislative sphere." *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995) (quoting *Doe v. McMillan*, 412 U.S. 306, 312–13 (1973) (cleaned up). This Clause covers matters that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972). In addition to an absolute claim immunity, the Speech and Debate Clause also confers an evidentiary legislative privilege. Legislative privilege protects "materials held by Congress" that fall within the legitimate legislative sphere. *See id.* at 416–17. It is meant to protect Members of Congress and their staff from "intrusive" discovery procedures. *Brown & Williamson Tobacco Corp.*, 62 F.3d at 418.

The Speech and Debate Clause's claim immunity does not apply here because none of the Defendants are "Senators and Representatives." When the Speech and Debate Clause is extended beyond Members of Congress, "[t]he 'key consideration, Supreme Court decisions teach, is the act presented for examination, not the actor.'" *McCarthy v. Pelosi*, 310, 5 F.4th 34, 39 (D.C. Cir. 2021)

(quoting *Walker v. Jones*, 733 F.2d 923, 929 (D.C. Cir. 1984)). Here, Plaintiff is challenging Defendants' enforcement of the PWFA. A law's enforcement is quintessential executive power and cannot be described as an immune legislative act. Therefore, neither the act of enforcing the PWFA nor the actors enforcing it have claim immunity under the Speech and Debate Clause.

Legislative privilege also does not apply to this case. Legislative privilege is aimed at preventing discovery of privileged documents in the legislative process. *See Brown & Williamson Tobacco Corp.*, 62 F.3d at 418. This case will not require discovery of privileged documents. Instead, Plaintiff is relying on the publicly available vote count published in the Congressional Record. 168 Cong. Rec. H10528–29 (daily ed. Dec. 23, 2022). There is no need to obtain this document via discovery as it is a public record eligible for admission by judicial notice. Fed. R. Evid. 201; *see, e.g.*, *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 226–27 (1959) ("We are reinforced in this conclusion by the legislative history of the bill that became the repealing Act, a history of which we take judicial notice."); *Guardian Flight LLC v. Health Care Serv. Corp.*, No. 3:23-CV-1861, 2024 U.S. Dist. LEXIS 95973, at *1 n.1 (N.D. Tex. May 30, 2024) ("The Court takes judicial notice of the Congressional Record"); *ImprimisRx, LLC v. OSRX, Inc.*, No. 21cv1305-BAS(BLM), 2022 U.S. Dist. LEXIS 146426, at *16 (S.D. Cal. Aug. 15, 2022) (collecting cases that take judicial notice of the Congressional Record). Therefore, legislative privilege does not inhibit this Court's power to hear this case.

Notably, this Court has also determined that the Speech and Debate Clause does not apply to non-legislative defendants and did not bar another plaintiff from bringing a Quorum Clause challenge to the PWFA. *Texas v. Garland*, No. 5:23-CV-034-H, 2024 U.S. Dist. LEXIS 33161, at *89 n.13 (N.D. Tex. Feb. 27, 2024). Therefore, the Speech and Debate clause does not apply to this case and this Court may decide the merits of this case.

III. PLAINTIFF IS ENTITLED TO AN INJUNCTION AND STAY PENDING REVIEW

In determining whether to grant a preliminary injunction or a § 705 stay pending review courts consider: (1) whether the movant has shown a likelihood of success on the merits; (2) whether the plaintiff "will be irreparably injured absent" preliminary relief; (3) whether preliminary relief "will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434; *Janvey*, 647 F.3d at 596. The first two factors "are the most critical." *Nken*, 556 U.S. at 434. The final two factors "merge" and are considered together if "the Government is the opposing party." *Id.* at 435. Plaintiff satisfies all these factors.

A. Plaintiff is likely to succeed on the merits.

Brandon & Clark, Inc. is likely to succeed on its claims that the PWFA was passed in violation of the Quorum Clause. Less than five months ago, this Court, after a trial on the merits, held that the PWFA violated the Quorum Clause. *Texas v. Garland*, No. 5:23-CV-034-H, 2024 U.S. Dist. LEXIS 33161, at *169–*170 (N.D. Tex. Feb. 27, 2024). To receive preliminary relief, Brandon & Clark, Inc. must merely show "likely" success on the merits. *See Janvey*, 647 F.3d at 596 (citing Charles A. Wright et al., 11A Federal Practice & Procedure § § 2948.3 (2d ed. 1995) ("All courts agree that plaintiff must present a prima facie case but need not show that he is certain to win."). A plaintiff's actual success on the merits in the same Court should consequently meet the "prima facie" standard for another Plaintiff to show likelihood of success on the same claim. In the interest of judicial economy and for the Court's convenience, Plaintiff will not repeat the State of Texas and this Court's thorough analysis of the Quorum Clause violation. *See Texas v. Garland*, No. 5:23-CV-034-H, 2024 U.S. Dist. LEXIS 33161, at *125–*157 (N.D. Tex. Feb. 27, 2024). However, Plaintiff stands ready to argue the merits of this claim should the Court request it.

In the alternative, Defendants should be barred by the principle of nonmutual collateral estoppel from arguing that Plaintiff will not likely succeed on the merits. There are no Defendants in this suit that are not covered by the injunction issued in the Texas case. *See id.* Plaintiff recognizes that *United States v. Mendoza*, 464 U.S. 154 (1984), has been applied to generally exempt the United States from nonmutual collateral estoppel. However, *Mendoza* concerned nonmutual collateral estoppel arising from litigation against the United States in different district courts. *See Mendoza v. United* States, 672 F.2d 1320, 1320, 1323 (9th Cir. 1982), *rev'd*, 464 U.S. 154 (1984). Neither the Supreme Court nor the Fifth Circuit has addressed whether this exception to nonmutual collateral estoppel applies to litigation conducted in the same district.

The remaining issue not addressed in the Texas case is the PWFA's implementing rule. Despite being permanently enjoined from enforcing the PWFA against the State of Texas, two months later Defendants moved forward to promulgate a final rule implementing the PWFA. Because Plaintiff has shown a likelihood of success that the PWFA is unconstitutional, the PWFA implementing rule is invalid.

The PWFA's implementing rule solely relies on the PWFA for its rulemaking authority. "Agencies are creatures of Congress; an agency literally has no power to act unless and until Congress confers power on it." *City of Arlington v. FCC*, 569 U.S. 290, 317 (2013) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)) (cleaned up). Courts are empowered to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C).

When a court invalidates a statute that confers authority on an agency, an agency action that relies upon that statute becomes beyond the agency's authority—even if the agency's authority was valid at the time it acted. This principle is straightforward for most Constitutional challenges.

For example, if Congress passed a law banning all protests on federal land, and the Department of Interior promulgated a rule pursuant to that law banning protests on the National Mall, both the statute and the rule's subject matter would violate the First Amendment. But here the Constitutional challenge to the PWFA has nothing to do with the statute's subject matter. Instead, the Quorum Clause claim challenges *how* the law was enacted. The Plaintiff does not argue that the subject matter of the PWFA implementing rule is unconstitutional. But the rule is nonetheless invalid based on the Quorum Clause violation.

In promulgating the PWFA implementing rule, EEOC relied solely on the PWFA. *See* Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29,096, 29,183 (Apr. 19, 2024) ("Authority: 42 U.S.C. 2000gg et seq."). This is because EEOC does not have authority under other statutes to promulgate such a rule. *See Young v. UPS*, 575 U.S. 206 (2015). If the PWFA is invalid, EEOC's residual rulemaking authority under Title VII is limited to procedural rules. 42 U.S.C. § 2000e–12(a). The PWFA implementing rule goes beyond procedure to impose substantive requirements, such as the abortion leave mandate. Invalidating the PWFA for violating the Quorum Clause therefore makes the PWFA implementing rule "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C). Therefore, the court should "hold unlawful and set aside" the PWFA implementing rule because the statute violates the Quorum Clause.

B. Plaintiff will be irreparably harmed by the PWFA and its implementing rule.

Enforcing the PWFA will cause Brandon & Clark, Inc. to suffer irreparable harm. Enforcing an unconstitutional law inflicts per se irreparable harm. In addition, Plaintiff will suffer irreparable harms in the form of unrecoverable implementation and compliance costs.

Enforcing an unconstitutional law that regulates Plaintiff's activities is a per se irreparable harm. *See BST Holdings L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) ("the loss of constitutional freedoms for even minimal periods of time unquestionably constitutes irreparable

injury") (cleaned up). Irreparable harm is also satisfied when a plaintiff is likely to suffer "harm for which there is no adequate remedy at law." *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013). Unrecoverable costs are a kind of financial injury that inflicts irreparable harm. *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016). This is especially true when the federal government is a defendant, as sovereign immunity usually precludes an adequate remedy at law, i.e. monetary damages. *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021). "[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *EPA*, 829 F.3d at 433 (emphasis in original).

The PWFA's harms to Brandon & Clark, Inc. are "more than an unfounded fear." *Daniels Health Scis., L.L.C.*, 710 F.3d at 585. Brandon & Clark, Inc. has determined that complying with the PWFA will cost the company at least $3,500 in implementation and training costs. Decl. Scott Clark ¶ 11. These costs will be paid to a human resources consulting company and will not be recoverable once expended. Furthermore, Brandon & Clark, Inc. estimates that it will cost the company on average $1,440 each time it must provide an employee an accommodation under the PWFA. Decl. Scott Clark ¶ 12. These costs will also be unrecoverable once the employee uses the accommodation. In addition, the PWFA subjects Brandon & Clark, Inc. to investigation and litigation by the EEOC and creates new causes of action against it. Brandon & Clark, Inc. will have to spend additional funds to retain counsel and respond to these investigations and litigation.

The PWFA inflicts several irreparable harms on Brandon & Clark, Inc. These irreparable harms stem from the statute itself. The implementing regulations increase, but do not independently create, these irreparable harms. This Court previously found that the PWFA inflicted irreparable harms on another plaintiff. *Texas v. Garland*, No. 5:23-CV-034-H, 2024 U.S. Dist.

LEXIS 33161, at *157–*161 (N.D. Tex. Feb. 27, 2024). Similarly, another court within the Fifth Circuit found the PWFA's implementing rule caused irreparable harm. *Louisiana v. EEOC*, 2024 U.S. Dist. LEXIS 107308, at *38–*39 (W.D. La. June 17, 2024). Therefore the Court must enjoin both the statute and the implementing rule to adequately redress these irreparable harms.

C. The balance of the equities and public interest favor and injunction and stay.

The balance of equities and public interest factors merge when seeking an injunction or stay pending review against federal government. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The Court must weigh whether "the threatened injury outweighs any harm that may result from the injunction to the non-movant" and whether "the injunction will not undermine the public interest." *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051, 1056 (5th Cir. 1997). "The public interest is also served by maintaining our constitutional structure." *BST Holdings, L.L.C.*, 17 F.4th at 618. In fact, "the public interest of the nation is always served by the cessation of a program that was created in violation of law and whose existence violates the law." *Texas v. United States*, 50 F.4th 498, 530 (5th Cir. 2022).

The PWFA's burdens fall squarely on Brandon & Clark, Inc., not the Defendants. Issuing an injunction and stay pending review will not impose costs on the Defendants. In fact, preliminary relief may save the Defendants money they would have otherwise spent implementing and enforcing the PWFA. Furthermore, having shown that the PWFA violates the Quorum Clause, "any interest that the defendants have in enforcing the Act is 'illegitimate' because it is unconstitutional." *Texas v. Garland*, No. 5:23-CV-034-H, 2024 U.S. Dist. LEXIS 33161, at *161 (N.D. Tex. Feb. 27, 2024) (quoting *BST Holdings L.L.C.*, 17 F.4th at 618 (5th Cir. 2021)).

The absence of preliminary relief will inflict concrete, substantial, and irreparable harms on Brandon & Clark, Inc. Granting the requested preliminary relief will ameliorate these injuries. This Court previously found that the balance of equities and public interest favor issuing an

injunction against enforcing the PWFA against another plaintiff. *Texas v. Garland*, No. 5:23-CV-034-H, 2024 U.S. Dist. LEXIS 33161, at *161–*164 (N.D. Tex. Feb. 27, 2024). Accordingly, the balance of equities and public interest favor granting a preliminary injunction against enforcing the PWFA and a stay pending review of the PWFA implementing rule.

CONCLUSION

For the foregoing reasons, Plaintiff Brandon & Clark, Inc. respectfully requests this Court declare the PWFA was adopted in violation of the Quorum Clause, enjoin Defendants from enforcing the PWFA, and issue a stay pending review of the PWFA implementing rule.

Dated: July 24, 2024

Respectfully submitted,

/s/ *Matthew Miller*

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2024, I served the forgoing documents with the Summons and Complaint upon Defendants via USPS certified mail.

/s/ Matthew Miller
Matthew Miller

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

BRANDON & CLARK, INC., *Plaintiff* v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; CHARLOTTE A. BURROWS, JOCELYN SAMUELS, KEITH E. SONDERLING, ANDREA R. LUCAS, AND KALPANA KOTAGAL, EEOC COMMISSIONERS; KARLA GILBRIDE, EEOC GENERAL COUNSEL, UNITED STATES OF AMERICA, *Defendants*.	§ § § § § § § § § § § § § § § §	Civil Action No. 5:24-cv-00173-C

PLAINTIFF'S APPENDIX IN SUPPORT OF THEIR BRIEF SUPPORTING MOTION FOR A PRELIMINARY INJUNCTION AND RELIEF UNDER 5 U.S.C. § 705

APPENDIX CONTENTS

Pages

United States District Court
Northern District of Texas
Lubbock Division

Brandon & Clark, Inc,

Plaintiff,

v.

Equal Employment Opportunity Commission, et al.,

Defendants.

No. _____

DECLARATION OF SCOTT CLARK

My name is Scott Clark, and I am over the age of 18 and fully competent in all respects to make this declaration. I have personal knowledge and expertise of the matters herein stated.

1. I am the President of Brandon & Clark, Inc. I have worked at Brandon & Clark, Inc. for 19 years and have served as President since 2022. As part of my role, I oversee the entire company's operations, to include human resources policy and management.

2. Brandon & Clark, Inc. employs 231 people, including 18 women. A number of these women are of a child bearing age.

3. In December 2022 Congress enacted the Pregnant Workers Fairness Act. Pub. L. 117-328, Division II, 136 Stat. 4459, 6084 (2022) (codified at 42 U.S.C. ch. 21G). This law requires covered employers to provide accommodations to its pregnant women employees. The law also prohibits covered employers from "deny[ing] employment opportunities" or "requiring a qualified employee to take leave" based on the employee's need for an accommodation. 42 U.S.C. § 2000gg–1(3)–(4).

4. The Equal Employment Opportunity Commission recently issued regulations to implement the PWFA. These regulations require covered employers to provide leave for an

employee to obtain an elective abortion. Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29,096, 29,104–14, 29,183 (Apr. 19, 2024) (to be codified at 29 C.F.R. § 1636.3(b)).

5. Brandon & Clark, Inc. is a "covered employer" under the PWFA because it employs 15 or more employees. 42 U.S.C. § 2000gg(2)(B)(i).

6. Brandon & Clark, Inc. is a small employer that values its employees and seeks to provide a positive, family-friendly work environment for its employees. It does not have formal policies in place to provide accommodations for conditions associated with a normal pregnancy. Such accommodation requests are handled on a case-by-case basis. Accommodations for a pregnancy involving a disability are handled under the Americans with Disabilities Act of 1990.

7. Brandon & Clark, Inc. provides its employees a combined pool of personal time off (PTO) leave. It also provides leave under the Family and Medical Leave Act. Aside from any required FMLA leave, it does not provide separate leave for specific purposes, such as sick leave or vacation leave.

8. Accordingly, Brandon & Clark, Inc. does not provide its employees with accommodations, such as leave, for an employee to obtain an elective abortion.

9. Brandon & Clark, Inc. will not change its policies to accommodate elective abortion leave, absent legal compulsion, and the EEOC's abortion leave requirement, set forth in its recent regulations concerning PWFA is arbitrary and exceeds the agency's powers. I have also reviewed the Congressional Record and, based on the list of 226 Representatives who voted by proxy, believe that the House of Representatives did not have the Constitutionally-required quorum when it voted on the PWFA. 168 Cong. Rec. H10528–29 (daily ed. Dec. 23, 2022).

10. Because the PWFA arbitrarily imposes new requirements on Brandon & Clark, Inc., it must now (1) engage a compliance firm to determine our duties and prohibitions under the PWFA; (2) update our policies to provide PWFA-compliant accommodations; (3) train employees on how to process pregnancy-related accommodations requests; and (4) respond to, litigate, and defend against charges of discrimination filed with the Equal Employment Opportunity Commission, investigations and lawsuits brought by the Commission, and lawsuits by private individuals, relating to the same.

11. The immediate initial costs for Brandon & Clark, Inc. to implement the PWFA is $3,500. This includes the cost for our human resources department to create a PWFA-compliant accommodations policy and to train managers and employees on how to comply with the PWFA. These implementation costs will be unrecoverable once expended and do not include the additional costs for other related matters outlined above that will also result.

12. Accommodations the PWFA requires will also impose costs in the form of lost employee productivity. The estimated cost to provide an employee with an average accommodation is $1,440.

13. The PWFA also subjects Brandon & Clark, Inc. to litigation instituted by the Equal Employment Opportunity Commission and private parties who receive from the Commission a right-to-sue letter. This will require Brandon & Clark, Inc. to retain counsel and defend against these kinds of lawsuits.

14. All of the facts and information contained within this declaration are within my personal knowledge and are true and correct to the best of my knowledge.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of July 2024.

SCOTT CLARK