

Congress of the United States

Washington, DC 20515

October 10, 2023

The Honorable Charlotte A. Burrows
Chair
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

RE: RIN 3046–AB30, Regulations to Implement the Pregnant Workers Fairness Act

Chair Burrows:

As the lead sponsor of the Pregnant Workers Fairness Act (“PWFA”), the leaders of the Democratic Women’s Caucus, and supporters of the PWFA, we write to you to speak to the congressional intent of the PWFA for the Commission’s consideration during the rulemaking process. We submit this comment in response to the Equal Employment Opportunity Commission’s (“EEOC”) Notice of Proposed Rulemaking, RIN 3046–AB30, “Regulations To Implement the Pregnant Workers Fairness Act”, published in the Federal Register on August 11, 2023.¹

PWFA was inspired by stories of women like Armanda Legros, a single mother from Queens, who was forced out of her job at an armored truck company after requesting light duty.² She lost her income and employer-provided health insurance at eight and a half months pregnant. What happened to Ms. Legros and to women before and after her was happening far too frequently. Despite the Pregnancy Discrimination Act, workers’ requests for accommodations were often denied, forcing many women to choose between their health and their paycheck.³ For ten years, a team of legislators and advocates worked to get this law passed, to help protect the millions of women like Ms. Legros from experiencing similar harm.⁴

The need for this legislation became even more apparent following *Young v. United Parcel Serv., Inc.* Resulting research found that two-thirds of pregnant workers were losing their accommodation cases under the Pregnancy Discrimination Act in federal court, largely due to a requirement that to merit accommodations, an employee must prove that other employees in their workplace who were similarly situated in their ability to work were receiving accommodations.⁵ Soon after, the House held our first hearing on the PWFA stressing the urgency of getting this bill passed into law to level the playing field for workers with limitations related to pregnancy, childbirth, or related medical conditions.⁶ As of October 2022, this law will help protect nearly 3 million pregnant workers – 70 percent of all pregnant women – who are employed during the year of their pregnancy.⁷

¹ 88 Fed. Reg. 54714 (Aug. 11, 2023).

² An op-ed sparked the introduction of the Pregnant Workers Fairness Act. See Dina Bakst, “Pregnant, and Pushed Out of a Job,” *N.Y. Times* (Jan. 30, 2012), <https://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html>. Worker stories like the ones shared continued to surface. See, e.g. The Women Who Inspired the Movement for the Pregnant Workers Fairness Act, A Better Balance (last updated June 27, 2023), <https://www.abetterbalance.org/pregnant-worker-stories>.

³ *Id.*

⁴ See, e.g. National Women’s Law Center and A Better Balance. “It Shouldn’t Be a Heavy Lift.” https://nwlc.org/wp-content/uploads/2015/10/pregnant_workers.pdf.

⁵ Dina Bakst, Elizabeth Gedmark, and Sarah Brafman. “Long Overdue,” <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.

⁶ *Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab.*, 116th Cong. (2019).

In December 2022, after deliberate negotiations and final passage of the law, President Biden signed the PWFA into law. In doing so, he recognized the intent of the PWFA: to ensure workers like Ms. Legros with limitations related to pregnancy, childbirth, and related medical conditions can get immediate relief to stay healthy and working.

Now, we look forward to EEOC issuing final regulations to realize this intent. We are grateful to EEOC for issuing a proposed rule that considerately implements the PWFA with sound legal reasoning. The proposed rule considers the needs of workers and employers and provides the clarity necessary to ensure the PWFA fulfills its purpose of forming a workforce that supports pregnancy, childbirth, and other related conditions.

Implementing a strong and clear rule is essential to protect the rights of both employers and employees. The proposed rule will help ensure that a worker who needs an accommodation for a limitation related to pregnancy, childbirth or a related medical condition, including a temporary suspension of an essential function, can receive the accommodation quickly, with minimal burden on either the work or the employer.

We offer the following comments in support of the rule and propose suggestions aligned with the purpose and intent of the PWFA, to help ensure robust implementation of the law. Our comment will address:

1. The interpretation of the term “pregnancy, childbirth, or related medical conditions”
2. The scope of the rule of construction on religious employment
3. Strengthening language around unnecessary delays
4. Provisions related to supporting documentation
5. Interpreting leave as a reasonable accommodation
6. Defining “in the near future”

The Interpretation of the Term “Pregnancy, Childbirth, or Related Medical Conditions”

We strongly support the EEOC’s clear reading of the term “related medical conditions” as applying to the termination of pregnancy, including abortions, along with many other types of conditions such as lactation, fertility, and miscarriage.

The proposed rule gives the term “pregnancy, childbirth, or related medical conditions” the same meaning as under Title VII.⁸ EEOC rightly interpreted this term, drawing from decades of federal case law and EEOC guidance interpreting identical language to prohibit discrimination on a range of pregnancy-related conditions in the Pregnancy Discrimination Act (“PDA”), which includes but is not limited to, lactation, infertility, miscarriage, and abortion.

The express congressional purpose of the PWFA is to supplement the protections available under the PDA, and EEOC correctly recognizes that this identical language in these statutes must be interpreted consistently.⁹ The PWFA’s House sponsor Congressman Jerrold Nadler (NY-12) recognized this intent on the House floor during consideration of the bill, saying, “The Pregnant Workers Fairness Act aligns with Title VII in providing protections and reasonable accommodations for ‘pregnancy, childbirth, and related medical conditions’, like lactation.”¹⁰

⁷ Jessica Mason and Katherine Gallagher Robbins. “Discrimination While Pregnant,” <https://nationalpartnership.org/report/discrimination-while-pregnant/>.

⁸ 1636.3(b)

⁹ 88 Fed. Reg. 54774 & n. 10 (citing Antonin Scalia & Bryan A. Garner, Reading Law 323 (2012)).

¹⁰ Rep. Nadler, speaking on H.R. 2617, 117th Cong., 2nd sess., 168 (December 23, 2022): H. 10528.

The language “pregnancy, childbirth, and related medical conditions” was used in the PWFA to encompass the wide range of needs and conditions that workers may experience related to pregnancy and childbirth, including termination of pregnancy. This language in the PDA has always been understood to include abortion as a medical condition related to pregnancy. In enacting the PDA, Congress expressly stated that the statute applied to workers who chose to terminate their pregnancies.¹¹ EEOC reaffirmed this interpretation that abortion is a “related medical condition” in its 2015 guidance.¹² Congress understood that the PWFA applied to the termination of pregnancy, including abortion, as demonstrated by the statements of legislators opposing the PWFA because it would require accommodations related to abortion.

Rule of Construction on Religious Employment

We support the approach taken by the EEOC to consider the application of the PWFA rule of construction on a case-by-case basis, consistent with its approach to evaluating assertions under Section 702(a) of Title VII. We encourage EEOC to provide a more detailed interpretation of the rule of construction on religious employment that clarifies its narrow scope.

The proposed rule restates the PWFA’s rule of construction on religious employment and clarifies that this rule of construction does not limit the Constitutional rights of employers or the rights of employees under other civil rights statutes. The rule of construction in the PWFA references and relies on Section 702(a) of Title VII, which provides a narrow exemption from Title VII’s prohibition of employment discrimination based on religion to allow religious institutions to prefer people practicing that religion in employment decision-making. While Section 702(a) allows religious institutions to make relevant hiring and firing decisions based on religious preference, it does not exempt religious employers from Title VII entirely, and it does not allow them to discriminate on the basis of other protected categories.

As Congressman Nadler explained on the House floor, the application of Section 702(a) to the PWFA allows “religious institutions to continue to prefer coreligionists in making pregnancy accommodations. For example, if a religious employer were choosing between making an available role related to “religious employment” available to a pregnant worker as a light-duty assignment or hiring a co-religionist for that role, it could do the latter without running afoul of the PWFA.”¹³

Importantly, however, the rule of construction does not exempt employers from their obligations under the PWFA to provide reasonable accommodations that do not pose an undue hardship. In this way, the rule of construction differs from an amendment offered by Congresswoman Foxx during committee markup, which was subsequently defeated.¹⁴ The Congresswoman’s amendment would have changed the definition of those employers covered by the PWFA and thus exempted certain employers from the reach of the PWFA entirely. The rejection of this amendment demonstrates Congress’s intent to ensure employers of all types provide accommodations to workers with known limitations related to pregnancy, childbirth, or related medical conditions under the PWFA.

We believe EEOC should clarify the narrow scope of the rule of construction on religious employment to ensure maximal clarity for employers and employees to comply with the legislation.

¹¹ See H.R. Conf. Rep. No. 95-1786, at 4 (1978).

¹² Equal Employment Opportunity Commission, Enforcement Guidance on Pregnancy Discrimination and Related Issues (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IA4a>.

¹³ Rep. Nadler, speaking on H.R. 2617, 117th Cong., 2nd sess., 168 (December 23, 2022): H. 10528.

¹⁴ U.S. Congress, House, *Substitute Amendment to the Nature of a Substitute to H.R. 2694 Offered by Ms. Foxx of North Carolina*, 116th Cong., 2nd sess. Introduced January 14, 2020. https://edworkforce.house.gov/uploadedfiles/hr_2694_gop_substitute.pdf

Strengthening Language around Unnecessary Delays

We applaud EEOC for making clear that unnecessary delays in providing accommodations could lead to a violation of the PWFA and encourage EEOC to strengthen the principle regarding unnecessary delays in providing accommodations. This principle speaks to the heart of the PWFA, which is that pregnant and postpartum workers cannot wait weeks or months for accommodations. The EEOC's proposed appendix stresses the importance of expediency in responding to requests for accommodation, and this importance should be underscored in the regulation itself.

We also encourage EEOC to strengthen this principle in the final rule by adding a sentence to the definition of *Interactive Process* in § 1636.3(k) as follows:

“Unnecessary delay, as defined in § 1634.4(a)(1), in the interactive process may result in a violation of the PWFA.”

We encourage the EEOC to consider ways to further minimize delays for workers seeking accommodations.

Provisions Related to Supporting Documentation

The EEOC rightfully acknowledges that employers need not seek documentation for accommodation requests and creates a framework that limits when employers may do so. We encourage EEOC to add to the accommodations for which employers cannot seek medical documentation.

As EEOC recognizes in the proposed appendix, many workers face barriers in obtaining appointments with health care providers in a timely way, posing significant barriers to obtaining medical documentation.¹⁵ This is especially true for workers in rural areas and low-wage workers who may not have consistent access to health care and disproportionately lack control over their work schedules.¹⁶ Furthermore, women of color, particularly Black women, often face medical racism that may inhibit or delay their ability to secure supporting documentation.¹⁷ Additionally, some medical care providers impose fees to fill out forms, which can grow to significant amounts over time, as needs change and as employers request new or different documentation.¹⁸

¹⁵ 88 Fed. Reg. 54787 & n.87 (Aug. 11, 2023).

¹⁶ See, e.g., C. Brigance et. al, March of Dimes, Nowhere to Go: Maternity Deserts Across the U.S. 5, 11 (2022), https://www.marchofdimes.org/sites/default/files/2022-10/2022_Maternity_Care_Report.pdf (noting half of women who live in rural communities must travel over 30 minutes to access an obstetric hospital); see also Jasmine Tucker, *Hard Work Is Not Enough*, (National Women's Law Center, July 2023), https://nwl.org/wp-content/uploads/2020/04/%C6%92.NWLC_Reports_HardWorkNotEnough_LowPaid_2023.pdf.

¹⁷ See, e.g., Brittany D. Chambers et al, *Clinicians' Perspectives on Racism and Black Women's Maternal Health*, 3 *Women's Health Rep.* 476, 479 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9148644/> (Clinicians acknowledge racism impacts the provision of inequitable care provided to Black women.); see also Black Mamas Matter Alliance and A Better Balance, *Centering the Experiences of Black Mamas in the Workplace* (2022), <https://www.abetterbalance.org/centering-black-mamas-pwfa/> (One participant in a listening session on difficulties Black pregnant people experience obtaining accommodations prior to the PWFA said: “How do I prioritize going to the doctor's office, when it's gonna take me forever when I get there, because I'm at a public clinic, but I need this money, and I'm gonna be in there with a doctor for 10 minutes, but I spent all day trying to get those 10 minutes. Just the entry point, the access, sometimes is an issue.”).

¹⁸ Kimberly Danebrook, *Charging Patients for Completing Forms*, Cooperative of American Physicians (Apr. 15, 2014), <https://www.caphysicians.com/articles/charging-patients-completing-forms>; *Can Doctors Charge Employees a Fee for Completing FMLA Certifications?*, SHRM, see also Meredith Cohn and Jessica Calefati, *Johns Hopkins Medicine Joins National Move to Charge Patients for Messaging Their Doctor*, The Baltimore Banner (July 3, 2023), <https://www.thebaltimorebanner.com/community/public-health/johns-hopkins-mychart-messaging-fees-7HJ6GX7NGNE7NPYQQ7E7C5EHXE/> (discussing health care systems charging for My Chart messages).

We also encourage EEOC to add to the list the following straightforward accommodations for which it would not be reasonable for employers to seek documentation once a worker has confirmed they are pregnant and seeks such an accommodation:

- Time off, up to 8 weeks, to recover from childbirth.¹⁹
- Time off to attend healthcare appointments related to pregnancy, childbirth, or related medical conditions, including, at minimum 16 healthcare appointments.²⁰
- Flexible scheduling or remote work for nausea.²¹
- Modifications to uniforms or dress code.
- Allowing rest breaks, as needed.
- Eating or drinking at a workstation.
- Minor physical modifications to a workstation, such as a fan or chair.
- Moving a workstation, such as to be closer to a bathroom or lactation space, or away from toxins.
- Providing personal protective equipment.
- Reprieve from lifting over 20 pounds.
- Access to closer parking.

Interpreting Leave as a Reasonable Accommodation

We want to underscore EEOC’s interpretation that leave can be a reasonable accommodation under the PFWA. Leave provided as an accommodation under PFWA will provide a lifeline to many who would have otherwise been fired for seeking basic medical care or taking time to recover from childbirth. Further, leave as a PFWA accommodation will protect the employment of the many workers who have access to state-administered paid leave, but previously had inadequate job protection.

Defining “In the Near Future”

We recommend EEOC further clarify the framework to determine if an employee or applicant is qualified if they cannot perform one or more essential functions due to pregnancy, childbirth, or other related conditions.

EEOC drafted a thoughtful framework to determine whether an employee or applicant is qualified if they cannot perform one or more essential functions. We recommend that the definition of “in the near future” post-pregnancy be one year rather than forty weeks, except with respect to lactation, which we believe should be extended to 2 years.

¹⁹ NYC Commission on Human Rights Legal Enforcement, *Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions* 10 (2021), https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2021.pdf.


²⁰ Nearly every state paid sick time law permits employers to request a healthcare provider note only if the person needs time off for 3 or more consecutive days. *See A Better Balance, Know Your Rights: State and Local Paid Sick Time Laws FAQs* (last updated July 7, 2022), <https://www.abetterbalance.org/resources/know-your-rights-state-and-local-paid-sick-time-laws/>. We suggest a minimum of 16 appointments as it reflects the average number of appointments for prenatal and postnatal care for low-risk pregnancies. *See Alex Friedman Peahl et. al, A Comparison of International Prenatal Care Guidelines for Low-Risk Women to Inform High-Value Care*, 222 *American Journal of Obstetrics & Gynecology* 505, 505 (2020), [https://www.ajog.org/article/S0002-9378\(20\)30029-6/fulltext](https://www.ajog.org/article/S0002-9378(20)30029-6/fulltext) (stating that the median number of recommended prenatal care visits for a low-risk pregnancy in the United States is 12-14 visits); ACOG Committee Opinion No. 736: *Optimizing Postpartum Care*, 131 *Obstetrics & Gynecology* 140, 141 (2018), https://journals.lww.com/greenjournal/fulltext/2018/05000/acog_committee_opinion_no__736__optimizing.42.aspx (recommending at least two postpartum care appointments, with ongoing care as needed).

²¹ *See* 29 CFR § 825.115(f) (“Absences attributable to incapacity [due to pregnancy] qualify for FMLA leave even though the employee... does not receive treatment from a health care provider during the absence... An employee who is pregnant may be unable to report to work because of severe morning sickness.”).


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We applaud EEOC for its comprehensive proposed rule on PWFA, which fairly balances the interest of employers with the interest of employees to protect their pregnancy and reproductive health without compromising their health or their family's economic security. Thank you for the opportunity to comment on the proposed regulation and express the legislative intent behind the law. We look forward to your response.

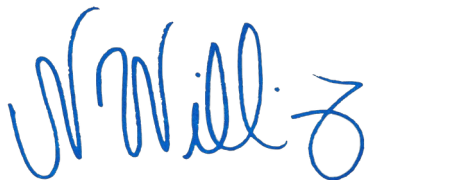
Sincerely,



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Member of Congress




Lois Frankel
Chair
Democratic Women's Caucus




Nikema Williams
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Judy Chu
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Summer Lee
Member of Congress



Shri Thanedar
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Barbara Lee
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Henry C. "Hank" Johnson, Jr.
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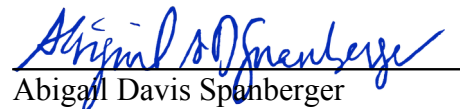
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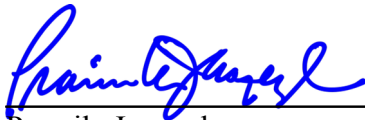
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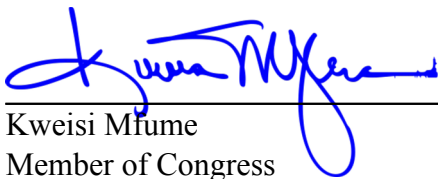
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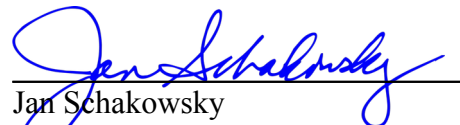
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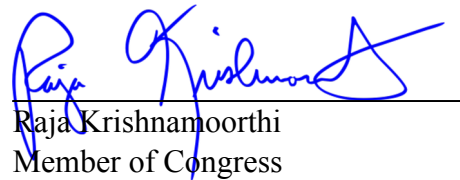
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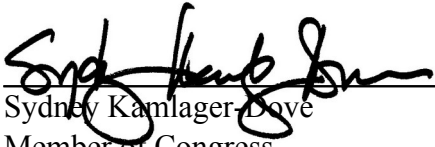
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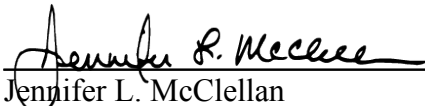
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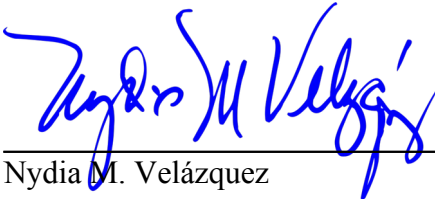
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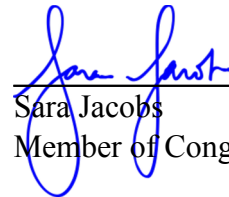
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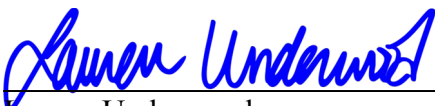
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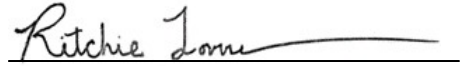
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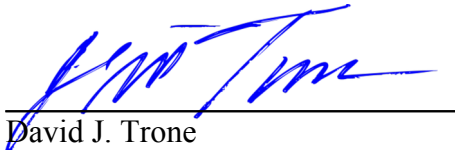
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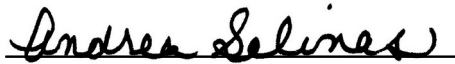
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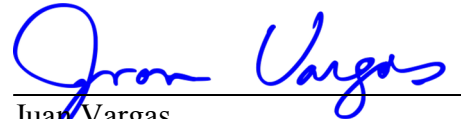
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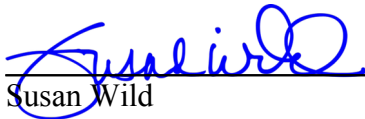
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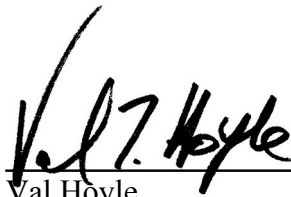
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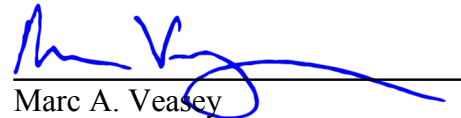
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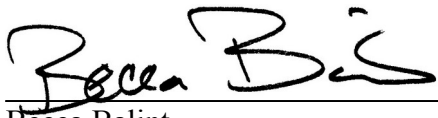
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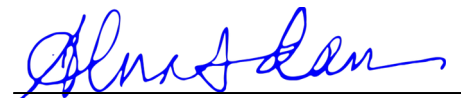
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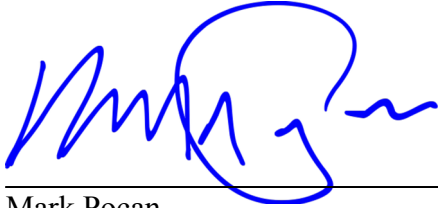
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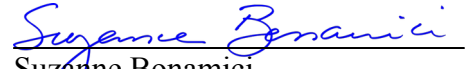
Becca Balint
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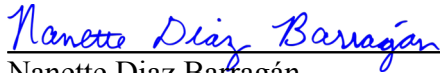
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Suzanne Bonamici
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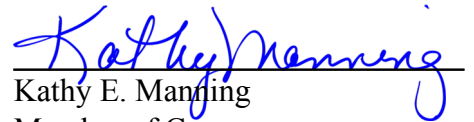
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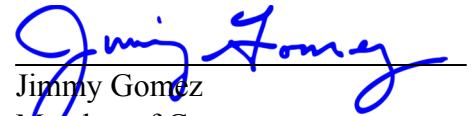


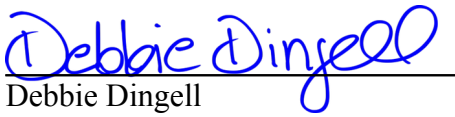
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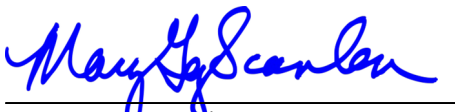

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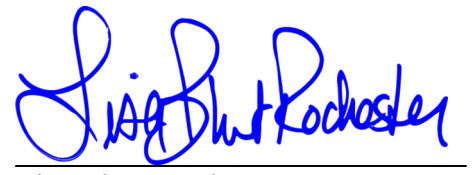

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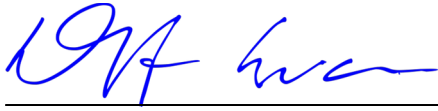

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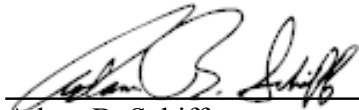
James P. McGovern
Member of Congress



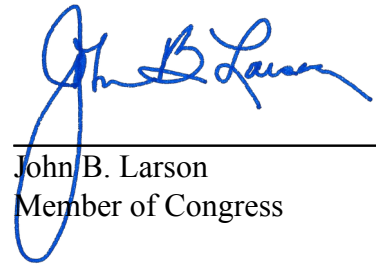
Dina Titus
Member of Congress



Donald M. Payne, Jr.
Member of Congress



Adam B. Schiff
Member of Congress



John B. Larson
Member of Congress



Daniel T. Kildee
Member of Congress



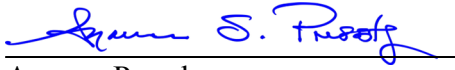
Lori Trahan
Member of Congress



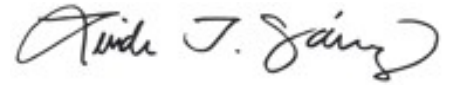
Darren Soto
Member of Congress



Ro Khanna
Member of Congress



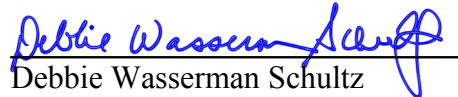
Ayanna Pressley
Member of Congress



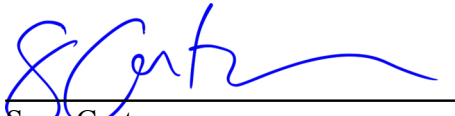
Linda T. Sánchez
Member of Congress



Scott H. Peters
Member of Congress



Debbie Wasserman Schultz
Member of Congress



Sean Casten
Member of Congress