



11 DUPONT CIRCLE NW  
SUITE 800  
WASHINGTON, DC 20036  
202-588-5180  
NWLC.ORG

**Statement of Fatima Goss Graves**

**President and CEO**

**National Women's Law Center**

**House Committee on Education & Labor, Subcommittee on Civil Rights and Human Services and  
Subcommittee on Workforce Protections**

**Joint Subcommittee Hearing on Fighting for Fairness: Examining Legislation to Confront Workplace  
Discrimination**

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Thank you for the opportunity to provide testimony to the Committee and the Subcommittees on Civil Rights and Human Services and Workforce Protections, on the Paycheck Fairness Act, H.R. 7, and the Pregnant Workers Fairness Act, H.R. 1065. The National Women's Law Center (NWLC) has worked for more than 45 years to advance and protect women's equality and opportunity and has long worked to remove barriers that women face in the workplace. Protecting against pay discrimination and pregnancy discrimination are at the core of these efforts and are key to addressing longstanding gender inequality at work. Fast action on these bills is especially critical as the COVID-19 pandemic has underscored and exacerbated race and gender inequities and barriers in the workplace.

**I. THE COVID-19 PANDEMIC HAS DEVASTATED WORKING WOMEN AND ONLY INCREASED THE URGENT  
NEED FOR THE PAYCHECK FAIRNESS ACT AND THE PREGNANT WORKERS FAIRNESS ACT.**

The COVID-19 pandemic has laid bare the deep gaps in our economic and social infrastructure that have resulted from decades of underinvestment and policy choices that failed to center the needs of women, especially Black, Latina, Native American, and Asian American and Pacific Islander women, and other women of color. Women of color are bearing the brunt of the COVID-19 pandemic and recession: as essential workers risking their lives for minimum wage, as those who have most borne devastating job losses, and those who are shouldering the majority of responsibility for caregiving without necessary supports.

Women are especially likely to be on the front lines of the pandemic; at the same time, they are also being paid less than their male counterparts.<sup>1</sup> For example, 93% of child care workers, 66% of grocery store cashiers/salespeople, 70% of waiters and waitresses, and 77% of clothing/shoe stores cashiers/salespeople are women.<sup>2</sup> Women—disproportionately Black women and Latinas—make up more than eight in ten of those working as home health aides, personal care aides, and nursing assistants<sup>3</sup>; they are also at great risk for contracting COVID-19. Women of color also are overrepresented in the child care workforce; one in five (20%) child care workers are Latina, and an additional 19% are Black women.<sup>4</sup>

Even before the pandemic, women typically lost more than \$10,000 per year to the gender wage gap, with even higher losses for women of color.<sup>5</sup> Earnings lost to the wage gap are exacerbating the financial

effects of the COVID-19 pandemic, falling particularly heavily on women of color and the families who depend on their income, and preventing them from being able to build a financial cushion to weather the health and economic impacts of the pandemic.

COVID-19 also has brought home the many ways pregnant workers are left unprotected at work. Three in ten pregnant workers are employed in the same ten occupations, and two of the occupations with the greatest share of pregnant workers are nurses and nursing and home health aides.<sup>6</sup> These jobs are physically demanding—requiring prolonged standing, long work hours, irregular work schedules, heavy lifting, and high physical activity. Therefore, pregnant workers in these occupations are likely to need accommodations.<sup>7</sup> During COVID-19, an accommodation could be properly fitting personal protective equipment, or placement in a non-COVID wing of a healthcare facility. The need for a clear accommodations standard is especially urgent given data on COVID infection rates for pregnant women; a February 2021 study published in the *American Journal of Obstetrics and Gynecology* found that the COVID-19 infection rate in pregnant people was 70% higher than similarly aged adults.<sup>8</sup> Home health aides, personal care aides, and nursing assistants are among the lowest paid workers across all industries and occupations, meaning they are frequently risking their lives to care for patients while being paid poverty-level wages with no cushion to fall on. Low-paid jobs also frequently lack health insurance or other benefits—like paid sick days and paid family and medical leave—making the need for access to pregnancy accommodations all the more important.<sup>9</sup>

In addition to being overrepresented in essential jobs, women have borne the majority of job losses since the pandemic hit. The unemployment rate for women of color remains exceptionally high: nearly 1 in 11 Black women ages 20 and over (8.9%) were unemployed in February 2021, more than 1 in 12 Latinas ages 20 and over (8.5%), and nearly 1 in 16 Asian women ages 20 and over (6.0%).<sup>10</sup> At the same time, the lack of supports during the pandemic for individuals who are caregivers as well as breadwinners has forced women out of the workforce in droves. The total number of women who have left the labor force since the start of the pandemic reached over 2.3 million in January 2021, leaving women's labor force participation rate—the percent of adult women who are either working or looking for work—at 57.0%.<sup>11</sup> Before the pandemic, women's labor force participation rate had not been this low since 1988.<sup>12</sup> Black women and Latinas continue to be hit particularly hard by the economic crisis,<sup>13</sup> and workers in low-paid jobs, like retail, hospitality, and child care have shouldered much of the job loss. January 2021 jobs data indicates that many unemployed people have been out of work for most of the COVID-19 crisis.<sup>14</sup> Among adult women ages 20 and over who were unemployed last month, 2 in 5 (40.3%) had been out of work for 6 months or longer.<sup>15</sup>

The repercussions of women's unemployment will reverberate for years to come, as women navigate not only the loss of seniority and advancement opportunities, but also barriers to re-entering the workforce in an economy that has fundamentally shifted available job opportunities. These high jobless numbers and low workforce participation numbers threaten to exacerbate gender wage gaps when women return to employment. Women workers seeking to re-enter the workforce after the COVID-19 crisis will need every tool at their disposal to avoid long term harm to their wages, and the ability to challenge discrimination that may arise. The pandemic has heightened the need for both the Paycheck Fairness Act and the Pregnant Workers Fairness Act. We urge Congress to act quickly to pass these critical bills.

## **II. CONGRESS MUST PASS THE PAYCHECK FAIRNESS ACT TO STRENGTHEN EQUAL PAY LAWS AND ENSURE WOMEN AND FAMILIES' ECONOMIC SECURITY.**

Over the past fourteen years, the push for equal pay has shifted state laws across the country and transformed the way companies do business, but Congress has failed to keep up. In 2007, when five members of the U.S. Supreme Court held that the law provided no remedy to Lilly Ledbetter for the pay discrimination she suffered for years at Goodyear it sparked a new movement for equal pay. In 2009, Congress passed the Lilly Ledbetter Fair Pay Act, rejecting the Supreme Court's decision and making clear in the law what is clear to every person who has been shortchanged by pay discrimination—that every time you receive a paycheck that is smaller due to discrimination is a new discriminatory act that may be challenged under the law. But rather than the end of the fight, this was the beginning of a new opportunity to finally make the promise of the Equal Pay Act a reality. In recent years, polling has consistently shown that equal pay is a priority for voters, regardless of party: in an 2020 election eve poll, 77% of voters surveyed agreed, and 63% strongly agreed, that the next President and Congress should focus on “closing the gender wage gap and ensuring equal pay.”<sup>16</sup> The fight for equal pay and critical policy reforms such as the Paycheck Fairness Act, H.R. 7, has now taken on a new urgency in light of the impact of the COVID-19 pandemic.

### **A. The wage gap harms women and their families.**

The Paycheck Fairness Act would help close longstanding gender and racial wage gaps by updating and strengthening the Equal Pay Act of 1963 to ensure that it provides robust protection against sex-based pay discrimination—and as a consequence, promote family economic security. Women are increasingly the primary or co-breadwinner in their families and cannot afford to be shortchanged any longer by persistent gender pay gaps. Overall, when the wages of all women are compared to the wages of all men, women in the United States are only paid 82 cents for every dollar paid to men.<sup>17</sup> The gender wage gap is widest for many women of color; among women who hold full-time, year-round jobs in the United States, Black women are typically paid 63 cents, Native American women 60 cents, and Latinas just 55 cents for every dollar paid to white, non-Hispanic men.<sup>18</sup> White, non-Hispanic women are paid 79 cents and Asian women 87 cents for every dollar paid to white, non-Hispanic men, and wage gaps for Asian American and Pacific Islander women of some ethnic and national backgrounds are much larger.<sup>19</sup>

This wage gap has remained stagnant for a decade.<sup>20</sup> Women are still paid less than men in nearly every occupation,<sup>21</sup> and studies show that even controlling for race, region, unionization status, education, experience, occupation, and industry leaves 38% of the pay gap unexplained.<sup>22</sup>

The gender wage gap significantly diminishes the earning power of women. In 2019, women's median earnings were \$10,157 less per year than the median earnings for men.<sup>23</sup> Put another way: that is equal to about three months of rent, three months of child care payments, three months of health insurance premiums, two months of groceries, four months of student loan payments, and six tanks of gas.<sup>24</sup>

The wage gap affects women as soon as they enter the labor force, expands over time, and leaves older women with a gap in retirement income. Over the course of a 40-year career, a woman beginning her career today typically stands to lose \$406,280 to the wage gap.<sup>25</sup> Women of color stand to lose the most, with Black women typically losing \$964,400, Native American women losing \$986,240, and Latinas losing \$1,163,920 over their lifetime to the wage gap as compared to white, non-Hispanic men.<sup>26</sup>

The gender wage gap is one contributing factor that has pushed millions of women out of the workforce during the COVID-19 pandemic as our nation's caregiving infrastructure broke down and families were forced to make impossible decisions about whose income they could "afford" to lose. Women's high jobless numbers and low workforce participation numbers also threaten to exacerbate gender wage gaps when women return to employment. Lost earnings due to the wage gap and unemployment not only leave women without a financial cushion to weather the current crisis, but also make it harder for them to build wealth, contributing to racial and gender wealth gaps and creating barriers to families' economic prosperity.

Women were already struggling to make ends meet before the pandemic; closing the wage gap is essential for helping to lift women and children out of poverty. In 2019, nearly one in nine women in the U.S. lived in poverty, with high rates for women of color, including 18% of Native American women, 18% of Black women, and 15% of Latinas.<sup>27</sup> More than 1 in 3 families headed by unmarried mothers lived in poverty in 2019, and 60% of all poor children lived in families headed by unmarried mothers.<sup>28</sup> Six months into the pandemic, in October 2020 one in six Latinas (16.5%) and one in five Black, non-Hispanic women (20.1%) reported not having enough food in the past week, and many reported being behind on rent or mortgage payments.<sup>29</sup> Closing the wage gap is not only fair, it is urgently needed to address the economic impacts of the pandemic.

#### **B. Equal pay would provide an enormous economic boost.**

Addressing discrimination and closing the gender wage gap would have a significant positive impact on the economy. A recent study found that if women received the same compensation as their comparable male co-workers, the poverty rate for all working women would be reduced by half, from 8.1% to 3.9%.<sup>30</sup> Increased wages would augment these workers' consumer spending power and benefit businesses and the economy.<sup>31</sup> Another study by McKinsey estimates that by closing the wage gap entirely, women's labor force participation would increase and \$4.3 trillion in additional gross domestic product could be added in 2025, about 19% more than would otherwise be generated in 2025.<sup>32</sup>

#### **C. Current law falls short.**

Pay discrimination remains difficult to detect in the first instance. Because pay often is cloaked in secrecy, when a discriminatory salary decision is made, it is seldom as obvious to an affected employee as a demotion, a termination, or a denial of a promotion.<sup>33</sup> Employees face significant obstacles in gathering the information that would suggest that they have experienced pay discrimination, which undermines their ability to challenge such discrimination. Punitive pay secrecy policies and practices allow this form of discrimination not only to persist, but to become institutionalized.

Lilly Ledbetter's story demonstrates how the culture of secrecy around pay allows pay discrimination to persist for years, unchecked, and the difficulties workers face in successfully challenging and being made whole for pay discrimination under our current laws. Lilly worked at Goodyear for 19 years before discovering that she was being paid less than her male counterparts, thanks to an anonymous note. When she brought a Title VII pay discrimination suit against her employer, the jury awarded her over \$3 million in damages, which were promptly reduced to \$300,000 due to statutory damages caps. And

when her suit came before the Supreme Court, the Court ruled against her, holding that employers could not be sued for pay discrimination under Title VII if the employer's original discriminatory pay decision occurred more than 180 days before the employee initiated her claim.<sup>34</sup> In other words, the Court held that Lilly Ledbetter would have had to challenge her unfair pay as one of her first acts on the job. Congress acted quickly in response, and the Lilly Ledbetter Fair Pay Act of 2009 restored the protection against pay discrimination stripped away by the Court, making clear that each discriminatory paycheck, not just an employer's original decision to engage in pay discrimination, resets the 180-day time period.

The Ledbetter Act has resulted in real, concrete gains for victims of pay discrimination, ensuring that the doors of the courthouse remain open. Because of the Ledbetter Act, workers who learn that they have been paid unfairly—like Lilly Ledbetter—have been able to challenge and remedy pay discrimination that otherwise would have gone unchecked.<sup>35</sup>

But while the Ledbetter Act was a necessary and important victory, it simply restored the law to the status quo that existed before the Supreme Court's *Ledbetter* decision. It did not address the significant deficiencies in our equal pay laws, which are limited in the tools they provide to detect and combat wage discrimination, and have been further weakened by a series of judicial interpretations. For instance, the problems created by pay secrecy are compounded by inadequate remedies under the law that fail to incentivize employers to consistently take proactive steps to address and correct pay discrimination in the first instance. Courts' narrow interpretations of the required elements of an Equal Pay Act claim have made it exceedingly difficult for workers to prevail. At the same time, and as set out in greater detail below, courts have also opened loopholes in the Equal Pay Act, interpreting it in ways that undermine its basic goal, allowing employers to justify sex-based pay disparities based on practices and factors that have nothing to do with the experience, education, or skills required for the job, such as relying on an applicant's prior salary, negotiation skills, or family economic situation. The remedial purposes of the Equal Pay Act have been gravely undermined over the years, creating an urgent need for the critical reforms in the Paycheck Fairness Act outlined below.

#### **D. The Paycheck Fairness Act would provide critically important protections.**

The Paycheck Fairness Act would update and strengthen the Equal Pay Act in several critical ways to ensure that it provides robust protection against sex-based pay discrimination and promotes pay transparency.

##### **1. Protecting employees from retaliation for discussing pay.**

You can't remedy pay discrimination if you have no idea that you are making less than the man across the hall. When workers fear retaliation for talking about their pay, any wage gap they face is likely to continue to grow, undiscovered, in the shadows. By restricting employees' ability to talk about their pay, employers seek to rob employees of the power that pay transparency can unlock. About 60% of workers in the private sector nationally are either forbidden or strongly discouraged from discussing their pay with their colleagues.<sup>36</sup>

The significantly narrower gender wage gap for employees working in the public sector—where pay secrecy rules are uncommon and pay is often publicly disclosed—suggests the difference that transparency makes. Only 15.1% of public sector employees report that discussing their wages is either prohibited or discouraged.<sup>37</sup> In the federal government, where pay rates and scales are more transparent and publicly available, and unionization rates are higher, the overall gender wage gap is 7%—significantly smaller than the overall gender wage gap of 18%.<sup>38</sup>

The Paycheck Fairness Act stops employers from prohibiting or punishing employees for asking about, discussing, or disclosing information about pay and makes clear that employees cannot contract away or waive their rights to discuss and disclose pay. This reform is necessary because protection for talking about pay shouldn't depend on where you live or whether you work in a particular kind of job. Nineteen states—including Massachusetts, Connecticut, New Hampshire, New York, New Jersey, and Vermont—and the District of Columbia have enacted such protections in recent years.<sup>39</sup> And under federal law, employees have a patchwork of insufficient protections. Pursuant to Executive Order 13665 of 2014, federal contractors are prohibited from discriminating against employees and job applicants who inquire about, discuss, or disclose either their own or others' compensation; but that rule does not reach all private employers.<sup>40</sup> Section 7 of the National Labor Relations Act (NLRA) protects workers' rights to have conversations about wages as "concerted activities for the purpose of collective bargaining or other mutual aid or protection"<sup>41</sup>; courts and the National Labor Relations Board have also found that pay secrecy rules can be unfair labor practices under the NLRA because they restrain protected concerted activity.<sup>42</sup> But NLRA protections do not extend to supervisors, public sector employees, domestic and agricultural workers, and various employees of railways and airlines,<sup>43</sup> and remedies for violations of employee rights under the NLRA are often not robust enough to act as a significant deterrent to employers.<sup>44</sup> Finally, the fact that employers continue to maintain punitive pay secrecy policies demonstrates that our existing laws are not enough to protect workers from these policies. The Paycheck Fairness Act would ensure that *all* workers enjoy robust protections for talking about their pay.

## **2. Collecting pay data to help identify and address pay discrimination.**

Because pay is often cloaked in secrecy, women and people of color can be paid less for doing the same job for many years without knowing it. Receiving equal pay shouldn't have to depend on an anonymous note writer letting you know you are being underpaid. That is why we need strong federal enforcement of pay discrimination laws and why we need employers to look at their own pay practices and close any pay gaps that aren't justified by legitimate factors like differences in qualifications. The Paycheck Fairness Act would further both goals by requiring employers to report pay data by race, ethnicity, and gender to the Equal Employment Opportunity Commission (EEOC), and for that data to be shared with the Office of Federal Contract Compliance Programs (OFCCP).

The Paycheck Fairness Act also clarifies that OFCCP has the authority to collect and analyze compensation data. OFCCP is required by law to affirmatively conduct reviews to ensure that businesses with federal contracts comply with equal employment measures, including Executive Order 11246, which prohibits discrimination in employment based on race, color, religion, national origin, and gender. Federal law also imposes affirmative action plan requirements on contractors, which include identifying

compensation disparities, and conducting self-audits on federal contractors or first prime subcontractors with fifty or more employees and a contract of at least \$50,000.<sup>45</sup>

The current COVID-19 pandemic and its immediate and long-term economic impacts heighten the importance of proactive efforts to address gender, race, and ethnicity-based wage gaps and pay discrimination. The pandemic and the unemployment/underemployment crisis it has ushered in has exposed and exacerbated existing inequities and economic insecurities that increase risk of workplace discrimination and harassment, including pay discrimination. Now, workers are more desperate to keep a paycheck at any cost; they are less willing to uncover and challenge discrimination and workplace abuses, and face retaliation for doing so. The threat of retaliation is all too real; retaliation continued to be the most frequently cited claim in all charges filed with the EEOC in FY 2020.<sup>46</sup> The pandemic is also likely to exacerbate the challenges women face in hiring, promotion, and advancement.

Pay data reporting by employers promises to shine light on race and gender pay disparities, increase the likelihood of employer self-analysis and self-correction, and identify areas of concern for further investigation by enforcement agencies. It ensures that employers are reviewing wage data by sex, race, and ethnicity. The reporting requirement provides an opportunity and strong incentive for employers to proactively self-evaluate their pay practices and not only correct unjustified pay disparities, but prevent them from occurring in the first place. Countries around the world have passed legislation requiring analysis and disclosure of compensation data,<sup>47</sup> and research shows the positive effects of pay data and wage-gap reporting and public disclosure mandates.<sup>48</sup> Disclosure requirements are a key driver of pay audits internationally; according to a recent survey of businesses in the U.K., which implemented a public disclosure requirement in 2018, “54% of U.K. respondents cite pay data reporting requirements from federal/national and regional governments as external drivers for them to perform pay equity analyses, versus 28% for their U.S. counterparts.”<sup>49</sup>

Reporting this data also will allow the EEOC to see which employers have racial or gender pay gaps that differ significantly from the pay patterns from other employers in their industry and region. By comparing wage data for firms employing workers in the same job categories, in the same industry, in the same location, in the same year, the EEOC will be able to tell which employers’ pay practices may present problems and investigate pay discrimination more efficiently.

The Paycheck Fairness Act’s requirement of pay data collection is especially critical because of opposition from employers and prior administrations to efforts by the EEOC and OFCCP to collect this type of pay data.<sup>50</sup> For instance, in 2017 the Trump administration halted an Obama administration initiative that required companies with 100 or more employees to report confidentially employee pay by job category, sex, race, and ethnicity as part of their annual Employer Information Report (EEO-1) to the EEOC.<sup>51</sup> Following litigation initiated by the National Women’s Law Center and its partners, the EEOC was ordered to collect compensation information from employers for 2017 and 2018, and did so.<sup>52</sup> Nevertheless, in 2019, the EEOC revised the EEO-1 form to eliminate future Component 2 reporting,<sup>53</sup> and OFCCP announced that it would neither seek nor rely on the Component 2 compensation data collected by the EEOC for its enforcement efforts.<sup>54</sup> Finally, in the summer of 2020, the EEOC announced it had contracted with the National Academy of Science, Engineering and Medicine’s Committee on National Statistics to select an expert panel to evaluate the utility of the 2017 and 2018 compensation data it collected pursuant to court order.<sup>55</sup> That effort is ongoing<sup>56</sup> and its impact on future pay data collection initiatives by the EEOC and OFCCP is unknown. In the meantime, the Paycheck Fairness Act

ensures that employers will not be able to continue to sweep pay discrimination under the rug, deepening the harm to women and their families struggling to survive the current crisis. Congress could further promote equal pay by ensuring that OFCCP has the authority to enforce the Equal Pay Act against federal contractors.

### **3. Limiting employers' reliance on salary history in the hiring process.**

The Paycheck Fairness Act prohibits employers from relying on prior salary history in setting pay, a key measure for closing the gender wage gap. Employers commonly rely on this information to determine what salary to offer an applicant, and for applicants who have received unequal pay or suffered pay discrimination in a past job, salary history information ensures that the effects of past discrimination will follow them from one job to the next.

According to a recent study by Harvard Business Review, a significant percentage of employers who conduct pay equity audits found that relying on applicants' salary history is a key driver of gender pay gaps within their companies.<sup>57</sup> It is well-documented that women, especially women of color, face overt discrimination and unconscious biases in the workplaces, including in pay.<sup>58</sup> By using a woman's salary history to evaluate her suitability for a position or to set her new salary, new employers allow past discrimination to drive hiring and pay decisions, which in turn, keeps women's pay stagnant.<sup>59</sup> Gender-based discrimination in pay is further compounded by race for women of color.

Use of salary history as a pay-setting mechanism not only perpetuates these gender- and race-based disparities in the workforce, but it is also an imperfect proxy for an applicant's value or interest in a position. For example, particularly relevant as COVID-19 has driven millions of women out of the workforce, extended time out of the workforce further limits the relevance of an applicant's salary history. Relying on salary history can lead to depressed wages for individuals who have previously worked in the public sector or in non-profits and are moving into the private sector. It can also deprive senior individuals with higher salaries who are looking to change jobs or re-enter the workforce the opportunity to be considered for lower paying jobs they might seek.

In 2016, Massachusetts became the first state to prohibit employers from seeking salary history from job applicants,<sup>60</sup> and thirteen states and Puerto Rico have followed.<sup>61</sup> Several governors and mayors have issued executive orders<sup>62</sup> and local municipalities have passed ordinances or issued human resources policies incorporating similar bans.<sup>63</sup>

Recent research shows that state salary history bans are helping to narrow gender and racial wage gaps, including increasing employer transparency when it comes to pay.<sup>64</sup> These bans have resulted in higher wages for job-changers by an average of 8% for women and 13% for African Americans compared to control groups, according to a Boston University analysis of the effects of salary history bans in several states.<sup>65</sup>

Many companies, such as Amazon, American Express, and Bank of America, have recognized that reliance on salary history information perpetuates gender wage gaps, and that such a practice is neither necessary nor good for business.<sup>66</sup> In fact, ending reliance on salary history helps businesses attract and retain diverse and qualified talent. One human resources professional called the practice of relying on salary history "intrusive and heavy-handed . . . It's a Worst Practice . . . It hurts an employer's brand and drives the best candidates away."<sup>67</sup> Moreover, a recent study showed that when salary history



information was taken out of the equation, the employers studied ended up widening the pool of workers under consideration, and interviewing and ultimately hiring individuals who had made less money in the past.<sup>68</sup> Finally, by ending reliance on salary history, a practice that unjustifiably perpetuates gender and racial gaps in a workplace, employers will also be able to decrease their exposure to litigation.<sup>69</sup>

#### **4. Eliminating a loophole in the “factor other than sex” affirmative defense that perpetuates pay disparities.**

In cases brought under the Equal Pay Act, a plaintiff has the substantial initial burden of establishing that she is being paid less than a male employee for performing substantially equal work, requiring equal skill, effort, and responsibility under similar working conditions. If she makes this showing, an employer still may avoid liability for pay discrimination by proving that a wage disparity is justified by one of four affirmative defenses, including that the employer set wages based on a “factor other than sex.”

Some courts have adopted interpretations of this affirmative defense that create a large loophole in the guarantee of equal pay for women. For instance, some courts have interpreted this affirmative defense so broadly that factors such as a male worker’s stronger salary negotiation skills or higher previous salary qualify, even if these factors themselves may be “based on sex.”<sup>70</sup> In addition, some courts have accepted the argument that employers can rely on vague, ill-defined “market forces” excuses to justify pay discrimination between men and women doing equal work.<sup>71</sup> Relying on “market forces” or market value alone as a justification for offering a male employee a higher salary than a similarly situated female employee to prevent him from leaving, or to recruit him from another employer, is the type of compensation practice that invites stereotyping and faulty assumptions about women’s competence and value. In contrast, other courts have scrutinized employers’ proffered justifications for sex-based wage disparities, and have recognized that the Equal Pay Act requires that any “factor other than sex” that justifies paying a woman less than a man for the same work must be closely tied to an employer’s business needs.<sup>72</sup>

The Paycheck Fairness Act would resolve the uncertainty in the law and ensure that employers would no longer be able to justify paying women less for the same work as men based on faulty and invalid justifications that are not related to the job or any business necessity. The Paycheck Fairness Act closes the “factor other than sex” loophole by adding a requirement that the factor proffered by the employer be “bona fide,” ensuring that the factor is, in fact, neutral and unrelated to sex. It makes clear that the “factor other than sex” affirmative defense only excuses a pay differential when that factor is related to the position in question, forwards a business necessity, and accounts for the entire pay differential. In addition, the Paycheck Fairness Act would ensure that if an employee demonstrates that there is an alternative practice that would serve the employer’s same business purpose without producing the pay disparity, which the employer has refused to adopt, the employee can succeed in her Equal Pay Act claim. A growing chorus of states have taken similar steps to close the legal loopholes courts have created in this defense, including Maryland, New Jersey, New York, Washington, and California.<sup>73</sup>

Through these robust protections, the Paycheck Fairness Act would help ensure that the Equal Pay Act's promise of equal pay for equal work is not swallowed by a loophole that allows pay discrimination to persist.

#### **5. Modifying the “establishment” requirement to strengthen employees’ ability to prove pay discrimination.**

The Paycheck Fairness Act prevents an employer from paying a male employee more than a female employee who is doing the same job for the employer on the other side of town—because a few miles’ distance is no justification for pay discrimination. Currently, in order to succeed in an Equal Pay Act claim, not only must the employee show that the employer paid her less for performing substantially the same work as a male employee, she must show they were both working in the “same establishment.”<sup>74</sup> The term “same establishment” is not defined, but courts have interpreted it to mean “a distinct physical place of business.”<sup>75</sup> This can be an obstacle for an employee who seeks to compare her job to a male employee who does the same work in a different physical location for the same employer in the same town. The Paycheck Fairness Act clarifies that comparisons may be made between employees in workplaces in the same county or similar political subdivision as well as between broader groups of workplaces in some commonsense circumstances. This is consistent with changes that states, including California and New York, have already made to their equal pay laws.<sup>76</sup>

#### **6. Facilitating class action equal pay act claims**

Class actions are important for ending workplace discrimination because they reduce the barriers to seeking justice and decrease the likelihood of disparate results. When workers can come together to challenge systemic discrimination, they are less likely to face retaliation, are better able to find legal representation and share information and resources, gain strength from each other’s experiences, and can obtain a uniform resolution that will benefit many workers.

But procedures for enforcing the Equal Pay Act make it difficult for plaintiffs to come together as a class to prove systemic wage discrimination. The Equal Pay Act, which was enacted prior to adoption of the current Federal Rule of Civil Procedure governing class actions, requires that all plaintiffs opt *into* a suit<sup>77</sup> unlike in other civil rights claims, in which class members are automatically considered part of the class until they choose to opt *out*. Some women may decline to opt into Equal Pay Act cases due to fear that the notice they must provide to their employer of an interest in participating in the case will subject them to retaliation. The Paycheck Fairness Act ensures that workers can come together to challenge an employer’s company-wide pay discrimination in court in conformity with other civil rights laws, and that class members are automatically considered part of the class until they choose to opt out, consistent with the Federal Rules of Civil Procedure.

#### **7. Providing strengthened penalties that deter discrimination and make workers whole.**

When a woman is paid less than a man for doing the same work, she is getting a second-class salary. We should not add insult to injury by giving her a second-class remedy for discrimination, as the law does today. She deserves to be made whole.

Robust remedies for violating equal pay laws are also essential to incentivizing employers to lead the way in tackling the wage gap and to fully compensating victims of pay discrimination. Weak remedies for

pay discrimination mean that employers that discriminate in pay can come out ahead by gambling that they won't get caught. And when paired with pay secrecy they likely will not get caught. Unlike those who challenge wage disparities based on race or ethnicity, who are entitled to receive full compensatory and punitive damages pursuant to Section 1981, successful plaintiffs who challenge sex-based wage discrimination under the Equal Pay Act may receive only back pay and, in limited cases, an equal amount as liquidated damages.<sup>78</sup> Even where liquidated damages are available the amounts available to compensate plaintiffs tend to be insubstantial. Furthermore, because plaintiffs with Equal Pay Act claims are not entitled to compensatory or punitive damages, they will not be made whole for out-of-pocket expenses caused by the discrimination—like a new job search or medical expenses—and for any emotional harm and pain and suffering caused by the discrimination, such as humiliation, anxiety, or depression.

Workers also may challenge sex-based pay discrimination under Title VII, which does provide for the recovery of compensatory and punitive damages. However, an individual's recovery of compensatory and punitive damages is capped under federal law depending on the size of the employer. These caps were set in 1991 and have not been adjusted for inflation or any other reason in the last 30 years. For a plaintiff succeeding in a pay discrimination case against an employer with 15-100 employees, for example, damages are capped at \$50,000, regardless of the magnitude of harm experienced or the culpability of the employer. Even for employers with more than 500 employees, damages are capped at \$300,000.<sup>79</sup> This means that in the most egregious cases of sex-based pay discrimination, if a jury awarded a plaintiff millions of dollars in compensatory and punitive damages, the most she could recover from a large employer is \$300,000, which will often be insufficient to compensate her for the injuries she suffered. That is what happened to Lilly Ledbetter—a jury found in her favor and awarded her back pay and approximately \$3.3 million in compensatory and punitive damages. However, due to the damages caps, her award was reduced to \$300,000. She subsequently lost that award when the Supreme Court adopted a restrictive interpretation of the statute of limitations that prevented recovery.

These limitations on remedies not only deprive women subjected to wage discrimination of full relief – they also substantially limit the deterrent effect of the Equal Pay Act. Limited remedies and damages caps mean that employers can refrain from addressing, or even examining, pay disparities in their workforces without fear of substantial penalties for this failure.<sup>80</sup> Arbitrary limits on damages also encourage employers to frame the discrimination faced by women of color as only sex-based, and therefore subject to limitations—ignoring the complex and often intersectional nature of the discrimination employees have suffered. These are all reasons why an increasing number of states have recognized the need for robust remedies and penalties for pay discrimination, including Utah, Illinois, and Oregon,<sup>81</sup> which have all taken steps to increase damages and penalties for equal pay violations in the last few years.

Over the years, some have suggested that strengthening remedies in the Equal Pay Act would inappropriately expand litigation. Those arguments of course ignore the reality of how difficult it is for workers to uncover pay discrimination, find and afford legal counsel, and file and successfully litigate pay discrimination claims. Nor have critics of the Paycheck Fairness Act provided evidence of increased litigation in states that have strengthened their equal pay laws in similar ways.

Moreover, proposals to limit contingency fee arrangements would only serve to skew the balance of power further in favor of employers. Such efforts would limit the ability of a worker to hire a lawyer but

place no such limitation on a defendant employer. A contingency fee arrangement can enable a worker to engage representation without significant up-front resources. Employers often are highly resourced and can hire high-powered attorneys—and pay them enormous fees—without any limitation. Limitations on contingency fees are designed to make it even harder for workers to succeed in challenging pay discrimination, thereby perpetuating harmful gender and racial wage gaps. It is workers in low-paid jobs—many of whom are on the front lines of this crisis—who would feel this restriction the most and would be left unable to find legal counsel because of their inability to pay out of pocket up front, allowing unscrupulous employers in low-wage industries to violate the law without significant fear of consequences.

The Paycheck Fairness Act would ensure that victims of pay discrimination could be made whole and would make it less likely that employers would conclude that pay discrimination was worth the risk. It would make compensatory and punitive damages available under the Equal Pay Act, ensuring that those experiencing sex-based pay discrimination have access to the same remedies as those experiencing race-based pay discrimination.

\* \* \*

Women in the U.S. are loudly demanding a change in the systems that have shortchanged them and the families who depend on their earnings for far too long. We cannot build back an economy that works for everyone without ensuring that all women can work with equality, safety, and dignity, starting with pay equity. The Paycheck Fairness Act is part of the response to our urgent call for a shift in the ways of doing business that have persistently devalued women’s work. We urge you to prioritize the Paycheck Fairness Act by swiftly passing this important legislation.

### **III. THE NATIONAL WOMEN’S LAW CENTER STRONGLY SUPPORTS H.R. 1065, THE PREGNANT WORKERS FAIRNESS ACT.**

Before Congress passed the federal Pregnancy Discrimination Act of 1978, it was common for employers to categorically exclude pregnant women from the workplace. The Pregnancy Discrimination Act changed this forever by making indisputably clear that the right to be free from discrimination on the basis of sex includes: (1) the right not to be treated adversely because of pregnancy, childbirth, or related medical conditions; and (2) the right of workers affected by pregnancy, childbirth, or related medical conditions to be treated the same as other employees who are not so affected but are “similar in their ability or inability to work” with respect to all aspects of employment, including benefits, insurance, leave policies, and workplace accommodations.<sup>82</sup>

Over 40 years after passage of the Pregnancy Discrimination Act, however, pregnant workers still face challenges on the job. This is especially so in jobs that require physical activity like lifting, standing, or repetitive motion—activities that may pose difficulty to some workers during some stages of pregnancy. Many of these pregnant workers could continue to work without risk to themselves or their pregnancies with temporary, and often minor, job modifications. But in the absence of such a modification, a pregnant worker may face a choice no one should have to make—between the health of her pregnancy and her job.

The Pregnant Workers Fairness Act, H.R. 1065, would ensure that pregnant workers can continue to do their jobs and support their families by setting out a simple, easy to apply legal standard that would

provide clarity for employers and employees alike; it would require employers to make reasonable workplace adjustments for those workers who need them due to pregnancy, childbirth, and related medical conditions, like lactation, unless the accommodation imposes an undue hardship on the employer. Because pregnancy itself is temporary, these accommodations are short-term and are frequently low-cost, such as providing a stool to sit on rather than requiring a worker to stand during a shift or allowing a pregnant worker to keep a bottle of water by her workstation. The COVID-19 pandemic has only further exacerbated the need for a clear standard for accommodations for pregnant workers, and robust measures to keep women—who have borne the brunt of COVID-19 job losses—attached to the workforce. Providing accommodations ensures that pregnant workers can work safely while pregnant instead of getting pushed out of work at the very moment when they and their families are preparing for the expenses associated with a new baby.<sup>83</sup>

Public support for the Pregnant Workers Fairness Act is high. In March 2019, the National Women’s Law Center commissioned a poll to assess voters’ views on core issues related to gender equity. In a national survey of 2,000 registered voters, we found extremely strong support across the political spectrum for the Pregnant Workers Fairness Act. Eighty-nine percent of voters, including 96% of Democrats, 84% of Republicans, and 85% of Independents, supported Congress acting to “require employers to make reasonable accommodations for pregnant workers who have a medical need for temporary changes at work,” with more than half of all voters voicing “strong” support for this proposal.<sup>84</sup> In February 2020, polling found that 89% of voters favor this bill, including across party lines. The lowest level of support comes from “very conservative” voters, 80% of whom support the Pregnant Workers Fairness Act.<sup>85</sup>

This overwhelming voter support has been a factor leading to a wave of bipartisan legislation in the states ensuring reasonable accommodations for pregnant workers. Thirty states and the District of Columbia have passed bills or issued Executive Orders to explicitly grant pregnant employees, or certain categories of pregnant employees, the right to reasonable accommodations at work. Twenty-five of these bills have been passed in the last eight years alone, all with bipartisan support, and in the majority of cases with unanimous or near-unanimous support.<sup>86</sup> States including South Carolina, Kentucky, Nebraska, North Dakota, West Virginia, and Utah, as well as states such as Massachusetts, Oregon, Delaware, and New Jersey, have passed legislation to ensure that pregnant workers receive reasonable accommodations when they need them to continue working safely.<sup>87</sup>

But the right to reasonable accommodations should not depend on where you happen to live, and pregnant workers across the country, particularly the many Black and brown women who are essential workers on the front lines of COVID-19, cannot afford to continue to wait for Congress to act. On September 17, 2020, the House of Representatives passed the PWFA in a bipartisan 329-73 vote—with 103 Republicans voting in support of the bill. The National Women’s Law Center urges the 117<sup>th</sup> Congress to seize the opportunity to make a real difference in the lives of women and their families and pass the Pregnant Workers Fairness Act without delay.

**A. Women who work in low-wage jobs disproportionately need accommodations, and without them, they face dire economic and health consequences.**

Many women can work through their pregnancies without any changes in their jobs. However, for some pregnant women, particular job activities—such as lifting, bending, or standing for long periods—can pose a challenge at some point during a pregnancy. For example, workers employed in four of the ten

most common occupations for pregnant workers—retail salesperson; waiter or waitress; nursing, psychiatric and home health aide; and cashier<sup>88</sup>—report continuously standing on the job,<sup>89</sup> and prolonged standing at work has been shown to more than triple the odds of pregnant women taking leave during pregnancy or becoming unemployed.<sup>90</sup> These women may have a medical need for temporary adjustments of job duties or work rules so that they can continue to work safely and support their families. But too often when pregnant workers ask for modest accommodations recommended by their doctors, like a stool to sit on or the right to drink water during a shift, they are instead forced onto unpaid leave or even fired.<sup>91</sup> Indeed, one survey estimated that a quarter of a million pregnant workers are denied their requests for reasonable workplace accommodations nationally every year.<sup>92</sup> When an employer refuses an accommodation request, requiring a pregnant worker to choose between following medical advice and following a boss's orders, it can have grave implications for her health and the health of her pregnancy, as well as serious financial repercussions.

Workers in low-paid occupations, where work rules and work culture are often particularly inflexible, appear to be especially likely to be denied accommodations for pregnancy.<sup>93</sup> For instance, over 40% of full-time workers in low-paid jobs report that their employers do not permit them to decide when to take breaks, and roughly half report having very little or no control over the scheduling of hours.<sup>94</sup> This culture of inflexibility can lead to reflexive denials when workers in low-paid jobs seek pregnancy-related accommodations, which is of particular concern given that more than one in five (20.9%) pregnant workers is employed in a low-paid job.<sup>95</sup> Moreover, pregnant Black women and Latinas are disproportionately represented in low-paid jobs. Nearly one in three Black and Latina pregnant workers hold low-paid jobs (30.0% and 31.3%, respectively).<sup>96</sup> This means a lack of clear legal rights to pregnancy accommodations likely hits Black women and Latinas particularly hard. Many of the same Black and Latina workers in low-paid jobs, for whom pregnancy accommodations are most urgently needed, have been hardest hit by the COVID-19 pandemic.

When women who have limitations stemming from pregnancy are forced off the job instead of being accommodated, their families can suffer a devastating loss of income at the very moment their financial needs are increasing. Mothers' earnings are crucial to most families' financial security and well-being—in 2017, 41% of mothers nationally were sole or primary breadwinners, and nearly another one-quarter of mothers were co-breadwinners, bringing home 25% to 49% of earnings for their families.<sup>97</sup>

For this reason, many pregnant workers denied the accommodations they need to continue working safely will have no choice other than to continue to work; these women are often put at risk of serious health consequences, such as miscarriage, pre-term birth, pregnancy-induced hypertension and preeclampsia, congenital anomalies, and low birth weight.<sup>98</sup> Premature birth is the leading cause of death during the first month of a baby's life, and can cause developmental delays and intellectual disabilities.<sup>99</sup> Low birth weight babies face increased health risks at birth such as breathing difficulties, bleeding in the brain, heart problems, intestinal issues, and potential vision problems.<sup>100</sup> While many measures must work in lock-step to ensure the best possible health outcomes for pregnant people—including ensuring that workers and their dependents have access to comprehensive and affordable pregnancy and post-partum health coverage—the Pregnant Workers Fairness Act is a critical measure to help address our nation's unacceptable pregnancy-related health outcomes.

While the stakes are high for pregnant workers with a medical need for accommodation, only a small number of employees will need pregnancy accommodations in any given year, meaning that the

employers' burden in providing such accommodations is slight. Only about 1.5% of workers give birth each year, and only a fraction of those pregnant workers would require accommodations.<sup>101</sup> Even in the occupations where they are most likely to be employed, pregnant women represent a negligible share of total workers. For example, pregnant women are most likely to work as elementary and middle school teachers, but only 3.2% of all elementary and middle school teachers are pregnant in a given year.<sup>102</sup>

Those workers who are pregnant, however, typically work late into their pregnancies, which may increase the need for an accommodation. The United States Census Bureau shows that, out of all first-time mothers who worked while pregnant between 2006 and 2008 (the most recent years for which data is available), 88% worked into their last trimester, while 65% worked into their last month of pregnancy.<sup>103</sup>

#### **B. Federal law too often leaves pregnant workers unprotected and without recourse.**

The existing federal laws on the books are not sufficient to protect pregnant workers with medical needs for accommodation from discrimination. Some pregnant workers experiencing significant pregnancy complications have been able to obtain accommodations under the Americans with Disabilities Act or state law equivalents.<sup>104</sup> These laws implement the fundamental principle that physical limitations that can be reasonably accommodated without an undue hardship to the employer should not force people out of work. However, courts have been reluctant to treat the physical limitations and medical needs that can arise out of a normally-progressing pregnancy as disabilities.<sup>105</sup> Pregnancy is not considered a disability as a matter of law or logic, and thus courts have typically required plaintiffs seeking a pregnancy-related accommodation under the Americans with Disabilities Act to demonstrate that they have a significant pregnancy complication that constitutes a disability<sup>106</sup>—but this leaves many pregnant workers with physical needs for accommodation unprotected. For instance, a woman may need a bigger uniform or a new bullet-proof vest to accommodate her growing pregnancy—this need is indicative of a normally progressing pregnancy, yet may require an accommodation. In other circumstances, pregnant workers may seek accommodations precisely because they wish to prevent pregnancy complications that are likely in the absence of accommodation, yet courts have held that the Americans with Disabilities Act provides no right to such preventive accommodations.<sup>107</sup>

Pregnant workers who need to take time away from work because of pregnancy complications may be able to access unpaid leave under the Family and Medical Leave Act, if they work for an employer with at least 50 employees and otherwise meet the Family and Medical Leave Act's eligibility conditions.<sup>108</sup> While the Family and Medical Leave Act is very important and helpful to many individuals who need time off, what many pregnant workers want is to be able to continue to do their job—and many could do so and keep earning income for their families with reasonable accommodations to work rules or duties. The Family and Medical Leave Act does not provide a solution for these workers. And while the Pregnancy Discrimination Act significantly changed the landscape for pregnant workers and provides critical protections against pregnancy discrimination, many courts have unfortunately interpreted the Pregnancy Discrimination Act and state law equivalents narrowly and allowed employers to refuse to accommodate workers with medical needs arising out of pregnancy, even when they routinely accommodated other limitations.

In 2015 in *Young v. United Parcel Serv. (UPS)*,<sup>109</sup> the Supreme Court held that when an employer accommodates workers who are similar to pregnant workers in their ability to work, it cannot refuse to accommodate pregnant workers who need it simply because it “is more expensive or less convenient” to accommodate pregnant workers too.<sup>110</sup> The Court also held that an employer that fails to accommodate pregnant workers violates the Pregnancy Discrimination Act when its accommodation policies impose a “significant burden” on pregnant workers that outweighs any justification the employer offers for those policies.<sup>111</sup> Peggy Young was working as a driver for UPS when she became pregnant and was advised by her health care provider that she should not lift more than 20 pounds during her pregnancy. Although UPS accommodated needs for alternative duties for several groups of workers—those injured on the job, those protected by the Americans with Disabilities Act, and those who lost their commercial drivers’ licenses because of medical or other reasons—the company refused to accommodate Peggy Young. Instead, UPS pushed Peggy Young onto unpaid leave for the last six months of her pregnancy despite her desire and ability to work; as a result, she lost her paycheck and her UPS-provided health insurance. She sued UPS for violating the Pregnancy Discrimination Act.

In *Young*, the Supreme Court altered the legal tests for pregnancy accommodation claims in several important ways. First, the Court made clear that a plaintiff successfully makes an initial showing in a pregnancy discrimination case challenging the denial of an accommodation when she shows (1) that she was pregnant; (2) that she sought accommodation; (3) that the employer did not accommodate her; (4) that the employer did accommodate others “similar in their ability or inability to work.”<sup>112</sup> Second, the Court offered some clarification about how an employer may and may not defend an accommodation policy when the pregnant worker has made their showing. The employer may offer a “legitimate, nondiscriminatory” reason for the difference in treatment, but evidence that it is more expensive or less convenient to accommodate pregnant workers does not constitute a legitimate reason.<sup>113</sup> Third, the Court set out a new way in which a pregnant employee may prove that the employer’s stated legitimate reason is actually a pretext and that the employer is actually motivated by discrimination against pregnant women. The Court explained that when a pregnant worker shows the accommodation policies impose a significant burden on pregnant workers that outweigh any justifications offered by an employer, this can demonstrate intentional discrimination.<sup>114</sup>

The *Young* decision was an important victory for pregnant workers, but despite the Supreme Court’s affirmation that a refusal to accommodate pregnancy can run afoul of the Pregnancy Discrimination Act, in case after case in the courts since *Young*, workers denied pregnancy accommodations have had their cases thrown out.<sup>115</sup> The multi-step balancing test set out in *Young* has left courts, employers, and employees confused about when exactly the Pregnancy Discrimination Act requires pregnancy accommodations.<sup>116</sup>

**C. The Pregnant Workers Fairness Act will ensure that pregnant workers are no longer forced off the job because of limitations that can be reasonably accommodated.**

The Pregnant Workers Fairness Act has been narrowly drafted to specifically address employer requirements to provide reasonable accommodations for employees with limitations arising out of pregnancy, childbirth, or a related medical condition. For example, an employer might be required to modify a no-food-or-drink policy for a pregnant employee who experiences painful or potentially dangerous uterine contractions when she does not regularly drink water, or an employer might be



required to provide an available light duty position to a pregnant police officer who was temporarily unable to go on patrol because no bulletproof vest would fit her.

The bill would prohibit employers from discriminating against employees because they need this sort of reasonable accommodation.<sup>117</sup> The Pregnant Workers Fairness Act would also prohibit employers from forcing a pregnant employee onto leave when another reasonable accommodation would allow the employee to continue to work. Neither would she be forced to accept an unnecessary accommodation, if she did not, in fact, have a limitation arising out of pregnancy, childbirth, or a related medical condition.

The Pregnant Workers Fairness Act relies on a reasonable accommodation framework already familiar to employers accustomed to the Americans with Disabilities Act's requirements, and the text of the bill defines "reasonable accommodation" and "undue hardship" by reference to Section 101 of the Americans with Disabilities Act of 1990 and its implementing regulations.<sup>118</sup> This definition includes incorporation of the Americans with Disabilities Act's interactive process between employer and employee that will typically be used to come to agreement as to an appropriate reasonable accommodation.

The bill includes an explicit waiver of state immunity.<sup>119</sup> The remedies provided by the Pregnant Workers Fairness Act are a "congruent and proportional"<sup>120</sup> response addressing a pattern of sex discrimination in violation of the Equal Protection Clause by public employers against pregnant employees,<sup>121</sup> and thus state sovereign immunity is appropriately waived pursuant to Congress's powers under Section Five of the Fourteenth Amendment.<sup>122</sup>

As recognized by the Supreme Court, gender stereotypes about "mothers or mothers to be"<sup>123</sup> have led to pervasive sex discrimination by state government employers in violation of the Equal Protection Clause: "denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second."<sup>124</sup> The Pregnant Workers Fairness Act's accommodation requirement is a congruent and proportional response to this pattern of discrimination against pregnant employees motivated by just such stereotypes. "Legislation enacted under § 5 must be targeted at 'conduct transgressing the Fourteenth Amendment's substantive provisions,'"<sup>125</sup> but Congress is not limited to narrowly prohibiting acts forbidden by the Fourteenth Amendment itself.<sup>126</sup> Instead, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."<sup>127</sup> In particular, use of Section Five power is appropriate to remedy or deter constitutional violations involving "subtle discrimination that may be difficult to detect on a case-by-case basis."

The Pregnant Workers Fairness Act's accommodation requirement prevents and deters just such subtle and difficult to prove discrimination. The invidious gender stereotype that pregnant women are not competent or committed workers, or that it is inappropriate for pregnant women to be in the paid workforce at all, often motivates employer refusal to accommodate pregnancy.<sup>128</sup> The Pregnant Workers Fairness Act's reasonable accommodation framework remedies this pattern of discrimination while relieving individual employees of the burden of proving that an employer's inflexible imposition of workplace standards reflects sex stereotyping that flows from these stereotypes.<sup>129</sup>

#### **D. The Pregnant Workers Fairness Act is a commonsense solution.**

Accommodating the medical needs of pregnant workers is not only good for working women and families, but also for business.<sup>130</sup> Accommodations make economic and business sense, as they can increase productivity, reduce absenteeism, and improve employee satisfaction and retention, among other benefits.<sup>131</sup>

The PWFA has won the support of business groups like the U.S. Chamber of Commerce and the Society for Human Resource Management, as well as 27 businesses from across states and industries.<sup>132</sup> In a letter signed by Adobe, Amalgamated Bank, Chobani, Cigna Corp., Facebook, ICM Partners, L’Oreal USA, Levi Strauss & Co., Microsoft Corporation, and Spotify, among others, they underscored that women’s labor force participation is critical to the strength of companies and the growth of the national economy.<sup>133</sup> These employers recognize that the passage of the Pregnant Workers Fairness Act would be an important step to ensuring the health, safety, and productivity of the modern workforce.

On September 9, 2020, the Congressional Budget Office produced a score on the Pregnant Workers Fairness Act that found the cost of the bill to be negligible save for about \$3 million in the first three years after EEOC issues regulations.<sup>134</sup> A survey by the Job Accommodation Network (JAN), a technical assistance provider to the Department of Labor, found that the majority of employers that provided ADA accommodations to employees with disabilities reported that the accommodations did not impose any new costs on the employer.<sup>135</sup> Of those employers that reported a cost for accommodations, the majority reported a one-time cost of \$500 or less.<sup>136</sup> Because accommodations provided to pregnant workers are temporary, the costs associated with these accommodations, if any, are likely to be substantially less than the already low costs associated with providing accommodations to workers with permanent disabilities. Employers also report significant benefits from providing accommodations including improved recruitment and retention of employees, increased employee commitment, increased productivity, reduced absenteeism, improvements in workplace safety and increased diversity.<sup>137</sup>

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The National Women’s Law Center strongly supports H.R. 1065. Working families cannot afford to wait for the Pregnant Workers Fairness Act any longer. More than 40 years after the passage of the Pregnancy Discrimination Act, it is unconscionable that pregnant workers across the country continue to face discrimination when seeking reasonable accommodations that would allow them to continue to work safely. No one who is pregnant should be forced to choose between ignoring her doctor’s advice and losing her job at a time when both her health and the economic security of her family are absolutely crucial. We urge swift passage of this commonsense and common ground bill.

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<sup>1</sup> Maya Raghu & Jasmine Tucker, NWLC, *The Wage Gap Has Made Things Worse for Women on the Front Lines of COVID-19*, Mar. 30, 2020, <https://nwlc.org/blog/the-wage-gap-has-made-things-worse-for-women-on-the-front-lines-of-covid-19/>.

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- <sup>2</sup> NWLC, WOMEN MAKE UP THE MAJORITY OF FRONT LINE WORKERS OF THE COVID-19 CRISIS (Mar. 2020), <https://nwlc.org/resources/women-make-up-the-majority-of-front-line-workers-of-the-covid-19-crisis/>.
- <sup>3</sup> For instance, women account for 77.1% of the health care workforce, and women—disproportionately Black women and Latinas—make up more than eight in ten of those working as home health aides, personal care aides, and nursing assistants. Claire Ewing-Nelson, NWLC, MORE THAN THREE IN FOUR OF THE HEALTH CARE WORKERS FIGHTING COVID-19 ARE WOMEN (Dec. 2020), <https://nwlc.org/resources/more-than-three-in-four-of-the-health-care-workers-fighting-covid-19-are-women/>.
- <sup>4</sup> Claire Ewing-Nelson, NWLC, ONE IN FIVE CHILD CARE JOBS HAVE BEEN LOST SINCE FEBRUARY, AND WOMEN ARE PAYING THE PRICE (Aug. 2020), <https://nwlc.org/resources/one-in-five-child-care-jobs-have-been-lost-since-february-and-women-are-paying-the-price/>.
- <sup>5</sup> See NWLC, THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO (Oct. 2020), <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/>.
- <sup>6</sup> See Morgan Harwood & Sarah David Heydemann, NWLC, BY THE NUMBERS: WHERE DO PREGNANT WOMEN WORK? 2 (Aug. 2019), <https://nwlc.org/wp-content/uploads/2019/08/Pregnant-Workers-by-the-Numbers-v3-1.pdf>. NWLC calculations based on American Community Survey (ACS) 2017 1-year estimates using IPUMS-USA, available at <http://usa.ipums.org/usa>. The percentage of pregnant workers in the occupation is calculated by reference to the share of women in the occupation who have given birth in the last year.
- <sup>7</sup> *Id.*
- <sup>8</sup> Erica M. Lokken et al., *Higher SARS-CoV-2 Infection Rate in Pregnant Patients*, American Journal of Obstetrics and Gynecology (2021), [https://www.ajog.org/article/S0002-9378\(21\)00098-3/pdf](https://www.ajog.org/article/S0002-9378(21)00098-3/pdf).
- <sup>9</sup> NWLC, WHEN HARD WORK IS NOT ENOUGH: WOMEN IN LOW-PAID JOBS (Apr. 2020), <https://nwlc.org/press-releases/low-paid-women-workers-on-the-front-lines-of-covid-19-are-at-high-risk-of-living-in-poverty-even-when-working-full-time/>.
- <sup>10</sup> Claire Ewing-Nelson & Jasmine Tucker, NWLC, A YEAR INTO THE PANDEMIC, WOMEN ARE STILL SHORT NEARLY 5.1 MILLION JOBS (Mar. 2021), <https://nwlc.org/resources/feb-jobs-2021/>.
- <sup>11</sup> Claire Ewing-Nelson, NWLC, ANOTHER 275,000 WOMEN LEFT THE LABOR FORCE IN JANUARY (Feb. 2021), <https://nwlc.org/wp-content/uploads/2021/02/January-Jobs-Day-FS.pdf>.
- <sup>12</sup> *Id.*
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.*
- <sup>16</sup> See NWLC, RESULTS FROM THE NATIONAL WOMEN’S LAW CENTER’S 2020 ELECTION POLL (Dec. 2020), <https://nwlc.org/press-releases/2020-election-poll/>; YWCA USA, *What Women Want 2018: Findings from a Survey of 1,038 adult women with oversample of 100 Black women, 100 Latinas, 100 Asian/Pacific Islander women, and 100 Native American women nationwide* (Sept. 2018) (91% of women surveyed, of varying political affiliation, agreed that Congress should strengthen equal pay laws for women), [https://www.ywca.org/wp-content/uploads/WhatWomenWant2018\\_final.pdf](https://www.ywca.org/wp-content/uploads/WhatWomenWant2018_final.pdf).
- <sup>17</sup> See NWLC, THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO, *supra* note 5.
- <sup>18</sup> *Id.*
- <sup>19</sup> *Id.*
- <sup>20</sup> *Id.*
- <sup>21</sup> NWLC, WOMEN EXPERIENCE A WAGE GAP IN NEARLY EVERY OCCUPATION (Apr. 2018), <https://nwlc.org/resources/women-experience-and-wage-gap-in-nearly-every-occupation/>.
- <sup>22</sup> Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends and Explanations*, NAT’L BUREAU OF ECON. RESEARCH (Jan. 2016), <http://www.nber.org/papers/w21913.pdf>.
- <sup>23</sup> See NWLC, THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO, *supra* note 5.
- <sup>24</sup> *Id.*
- <sup>25</sup> NWLC calculations are based on U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2020 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT, Table PINC-05, available at <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-05.html>. Figures for Native American women are NWLC calculations based on U.S. CENSUS

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BUREAU, 2019 AMERICAN COMMUNITY SURVEY, Tables B20017H, B20017C, and B20017E, *available at* <https://www.census.gov/programs-surveys/acs/>.

<sup>26</sup> *Id.*

<sup>27</sup> Amanda Fins, NWLC, NATIONAL SNAPSHOT: POVERTY AMONG WOMEN AND FAMILIES, 2020 (Dec. 2020), <https://nwlc.org/resources/national-snapshot-poverty-among-women-families-2020/>.

<sup>28</sup> *Id.*

<sup>29</sup> Claire Ewing-Nelson & Jasmine Tucker, NWLC, ONE IN SIX LATINAS AND ONE IN FIVE BLACK, NON-HISPANIC WOMEN DON'T HAVE ENOUGH TO EAT (Nov. 2020), <https://nwlc.org/resources/one-in-six-latinas-and-one-in-five-black-non-hispanic-women-dont-have-enough-to-eat/>.

<sup>30</sup> Heidi Hartmann, Jeff Hayes & Jennifer Clark, *How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy*, Inst. for Women's Policy Research (hereinafter "IWPR") (Jan. 13, 2014), <http://www.iwpr.org/publications/pubs/how-equal-pay-for-working-women-would-reduce-poverty-and-grow-the-american-economy/>.

<sup>31</sup> *See id.* (finding that the U.S. economy would have produced additional income of more than \$447 billion in 2012 if women received pay equal to that of their male counterparts).

<sup>32</sup> Kweilin Ellingrud et al., *The power of parity: Advancing women's equality in the United States*, MCKINSEY GLOBAL INST. (Apr. 2016), <https://www.mckinsey.com/featured-insights/employment-and-growth/the-power-of-parity-advancing-womens-equality-in-the-united-states>. The same study estimates that even if the wage gap were only partially closed, \$2.1 trillion in additional GDP could be added in 2025.

<sup>33</sup> As Justice Ruth Bader Ginsburg noted in her dissenting opinion:

Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves. Pay disparities are thus significantly different from adverse actions "such as termination, failure to promote, . . . or refusal to hire," all involving fully communicated discrete acts, "easy to identify" as discriminatory.

*Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 645 (2007) (Ginsburg, J. dissenting).

<sup>34</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

<sup>35</sup> *See* NWLC, THE LILLY LEDBETTER FAIR PAY ACT OF 2009: EMERGING ISSUES (Apr. 2011), [https://www.nwlc.org/wp-content/uploads/2015/08/4.11.11\\_ledbetter\\_act\\_current\\_status\\_and\\_emerging\\_issues\\_1.pdf](https://www.nwlc.org/wp-content/uploads/2015/08/4.11.11_ledbetter_act_current_status_and_emerging_issues_1.pdf) (collecting cases recognizing or restoring workers' pay discrimination claims in instances in which the claims had not yet been filed, were pending, or were on appeal at the time of the Ledbetter Act). *See, e.g., Mikula v Allegheny Cty.*, 583 F.3d 181, 186 (3d Cir. 2009) (reversing grant of summary judgment to employer on plaintiff's Title VII sex discrimination claim for failure to respond to request for pay increase, because post-Ledbetter Act each discriminatory paycheck renewed the time for filing a pay discrimination claim); *Gentry v. Jackson State Univ.*, 610 F. Supp. 2d 564 (S.D. Miss. 2009) (denying employer's motion for summary judgment on professor's Title VII claim alleging sex discrimination, brought two years after denial of tenure and corresponding pay increase, because denial of tenure constituted discriminatory "other practice" within meaning of the Ledbetter Act).

<sup>36</sup> Shengwei Sun et al., IWPR, ON THE BOOKS, OFF THE RECORD: EXAMINING THE EFFECTIVENESS OF PAY SECRECY LAWS IN THE U.S. (Jan. 2021), <https://iwpr.org/wp-content/uploads/2021/01/Pay-Secrecy-Policy-Brief-v4.pdf>. "The proportion of private-sector workers who reported that they are formally prohibited from discussing their pay fell from 25 percent in 2010 to 16 percent in 2017-18, but at the same time, the share of private-sector workers reporting that they are discouraged from discussing their pay increased from 41 percent to 44 percent." *Id.*

<sup>37</sup> Sun et al., *supra* note 36.

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- <sup>38</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GENDER PAY DIFFERENCES: THE PAY GAP FOR FEDERAL WORKERS HAS CONTINUED TO NARROW, BUT BETTER QUALITY DATA ON PROMOTIONS ARE NEEDED (Dec. 2020), [https://www.gao.gov/products/gao-21-67#:~:text=The%20overall%20pay%20gap%20between,of%20Personnel%20Management%20\(OPM\).](https://www.gao.gov/products/gao-21-67#:~:text=The%20overall%20pay%20gap%20between,of%20Personnel%20Management%20(OPM).)
- <sup>39</sup> NWLC, PROGRESS IN THE STATES FOR EQUAL PAY (Nov. 2020), <https://nwlc.org/wp-content/uploads/2019/11/State-Equal-Pay-Laws-2020-11.13-v2.pdf>. Research indicates that some workers fared better in states that passed such laws. See Marlene Kim, *Pay Secrecy and the Gender Wage Gap in the United States*, INDUS. RELATIONS (Oct. 2015) (finding that “women with higher education levels who live in states that have outlawed pay secrecy have higher earnings, and that the wage gap is consequently reduced”), [https://www.researchgate.net/publication/281769563\\_Pay\\_Secrecy\\_and\\_the\\_Gender\\_Wage\\_Gap\\_in\\_the\\_United\\_States](https://www.researchgate.net/publication/281769563_Pay_Secrecy_and_the_Gender_Wage_Gap_in_the_United_States).
- <sup>40</sup> DEP'T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, *Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions*, 80 Fed. Reg. 54934 (Sept. 11, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-09-11/pdf/2015-22547.pdf>.
- <sup>41</sup> 29 U.S.C. § 157; see also *Flex Frac Logistics, L.L.C. v. N.L.R.B.*, 746 F.3d 205, 208 (5th Cir. 2014) (“A ‘workplace rule that forb[ids] the discussion of confidential wage information between employees . . . patently violate[s] section 8(a)(1)[of the NLRA].’”) (internal citations omitted); *N.L.R.B. v. Inter-Disciplinary Advantage, Inc.*, 312 F. App'x 737, 744 (6th Cir. 2008); *Campbell Elec. Co. & Local Union 153*, 340 N.L.R.B. 825, 836 (2003); *N.L.R.B. v. Main St. Terrace Care*, 218 F.3d 531, 538 (6th Cir. 2000); *Wilson Trophy Co. v. N.L.R.B.*, 989 F.2d 1502, 1510-11 (8th Cir. 1993); *N.L.R.B. v. Vanguard Tours, Inc.*, 981 F.2d 62, 66-67 (2d. Cir. 1992); *Jeannette Corp. v. N.L.R.B.*, 532 F.2d 916, 918 (3d Cir. 1976).
- <sup>42</sup> See NWLC, COMBATING PUNITIVE PAY SECRECY POLICIES (Feb. 2019), <https://nwlc.org/resources/combating-punitive-pay-secrecy-policies/>.
- <sup>43</sup> See 29 U.S.C. § 152 (defining “employer” and “employee”). In 2006, the National Labor Relations Board issued three decisions providing further guidance for determining supervisor status under the NLRA. See *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 (Sept. 29, 2006); *Croft Metals Inc.*, 348 NLRB No. 38 (Sept. 29, 2006); and *Golden Crest Health Care Ctr.*, 348 NLRB No. 39 (Sept. 29, 2006).
- <sup>44</sup> 29 U.S.C. § 152.
- <sup>45</sup> 41 C.F.R. § 60-2.1.
- <sup>46</sup> In FY 2020, retaliation accounted for 55.8% of all charges filed. See EEOC, EEOC Releases Fiscal Year 2020 Enforcement and Litigation Data, Feb. 26, 2021, <https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data>.
- <sup>47</sup> See NWLC, PROMOTING PAY TRANSPARENCY TO FIGHT THE GENDER WAGE GAP: CREATIVE INTERNATIONAL MODELS (Mar. 2020), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/06/International-Pay-Transparency-Models-v2.pdf> (providing an overview of the legislation); FAWCETT SOCIETY, THE GLOBAL INSTITUTE FOR WOMEN'S LEADERSHIP AND THOMSON REUTERS FOUNDATIONS, GENDER PAY GAP REPORTING: A COMPARATIVE ANALYSIS (Sept. 2020), <https://www.kcl.ac.uk/giwl/assets/gender-pay-gap-reporting-a-comparative-analysis.pdf>.
- <sup>48</sup> See Morten Bennedsen et al., *Research: Gender Pay Gaps Shrink When Companies Are Required to Disclose Them*, HARV. BUS. REV. (Jan. 23, 2019), <https://hbr.org/2019/01/research-gender-pay-gaps-shrink-when-companies-are-required-to-disclose-them>; AUSTRALIA'S GENDER PAY GAP STATISTICS 2020, <https://www.wgea.gov.au/data/fact-sheets/australias-gender-pay-gap-statistics-2020>; Progress Report, 2017-18, Australian Government Workplace Equality Agency (2019), <https://www.wgea.gov.au/sites/default/files/documents/wgea-progress-report-2017-18.pdf>.
- <sup>49</sup> See HARV. BUS. REV. ANALYTIC SERVS., *Pulse Survey: Navigating the Growing Pay Equity Movement: What Employers Need to Know About What To Do 3* (2019), <https://resources.trusaic.com/pay-equity-resources-hub/harvard-business-review-trusaic-pulse-survey>.
- <sup>50</sup> See U.S. DEP'T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP), NON-DISCRIMINATION IN COMPENSATION; COMPENSATION DATA COLLECTION TOOL, ADVANCED NOTICE OF PROPOSED RULEMAKING, 76 Fed. Reg. 49398 (Aug. 10, 2011); OFCCP, GOVERNMENT CONTRACTORS, REQUIREMENT TO REPORT SUMMARY DATA ON EMPLOYEE COMPENSATION, NOTICE OF PROPOSED RULEMAKING, 79 Fed. Reg. 46561 (Aug. 8, 2014).

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- <sup>51</sup> U.S. OFFICE OF MGM'T AND BUDGET, NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION (Sept. 29, 2016), <https://www.reginfo.gov/public/do/DownloadNOA?requestID=275763>.
- <sup>52</sup> *Nat'l Women's Law Ctr. v. Office of Mgm't & Budget*, Civ. Action No. 17-cv-2458 (D.D.C.), Order dated Oct. 29, 2019; Order dated Feb. 10, 2020.
- <sup>53</sup> EEOC, Notice of Information Collection – Request for New Control Number for a Currently Approved Collection: Employer Information Report (EEO-1) Component 1; Revision of Existing Approval for EEO-1 Component 2, 84 Fed. Reg. 48138 (Sept. 12, 2019).
- <sup>54</sup> OFCCP, INTENTION NOT TO REQUEST, ACCEPT, OR USE EMPLOYER INFORMATION REPORT (EEO-1) COMPONENT 2 DATA, 84 Fed. Reg. 64932 (Nov. 25, 2019).
- <sup>55</sup> EEOC, *EEOC Announces Analysis of EEO-1 Component 2 Pay Data Collection* (July 16, 2020), <https://www.eeoc.gov/newsroom/eeoc-announces-analysis-eeo-1-component-2-pay-data-collection>.
- <sup>56</sup> NAT'L ACADS. OF SCI., ENG'G, AND MED., PANEL TO EVALUATE THE QUALITY OF COMPENSATION DATA COLLECTED FROM U.S. EMPLOYERS BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION THROUGH THE EEO-1 FORM, <https://www.nationalacademies.org/our-work/panel-to-evaluate-the-quality-of-compensation-data-collected-from-us-employers-by-the-equal-employment-opportunity-commission-through-the-eeo-1-form#sectionCommittee>.
- <sup>57</sup> HARV. BUS. REV. ANALYTIC SERVS., *Navigating the Growing Pay Equity Movement*, *supra* note 49, at 5.
- <sup>58</sup> For example, in a recent experiment where scientists were presented with identical resumes—one with the name John and the other with the name Jennifer—the scientists offered the male applicant for a lab manager position a salary of nearly \$4,000 more than the female applicant. Corrine A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, PROCEEDINGS OF THE NAT'L ACAD. OF SCI. OF THE UNITED STATES OF AMERICA (Aug. 2012), available at <http://www.pnas.org/content/109/41/16474.abstract#aff-1>.
- <sup>59</sup> The class action lawsuit *Beck v. Boeing*, 203 F.R.D. 459 (W.D. Wash. 2000), settled in 2004 for \$72.5 million, illustrates how reliance on past salary leads to employers paying women less. Boeing set the salaries of newly hired employees as their immediate past pay plus a hiring bonus which was set as a percentage of their past salary. Raises were also set as a percentage of an employee's salary. Boeing claimed it set pay based on a neutral policy, but since women had lower average prior salaries than men, these pay practices led to significant gender disparities in earnings that compounded over time and could not be justified by performance differences or other objective criteria.
- <sup>60</sup> M.G.L. ch. 149 § 105A.
- <sup>61</sup> Cal. Lab. Code § 432.3; 2019 Colo. Legis. Serv. Ch. 247 (S.B. 19-085); Conn. Gen. Stat. Ann. § 31-40z; Del. Code Ann. tit. 19 § 709B; Haw. Rev. Stat. § 378-2.4; Ill. Pub. Act 101-017; 2019 Me. Legis. Serv. Ch. 35 (S.P. 90) (L.D. 278); 2018 NJ A.B. 1094 (enacted); 2019 Sess. Law News of N.Y. Ch. 94 (S. 6549); Or. Rev. Stat. §§ 652.210, 652.220, 652.230, 659A.820, 659A.870, 659A.875, 659A.885; P.R. Laws Ann. tit. 29 § 251-259; 21 V.S.A. § 495(m); 2019 WA H.B. 1696 (enacted); H.B. 123, 2020 Leg., 441st Sess. (Md. 2020).
- <sup>62</sup> See, e.g., Exec. Order No. 2019-02 (Jan. 15, 2019); Mi. Exec. Order No. 2019-10 (Jan. 8, 2019); N.J. Exec. Order No. 1 (Feb. 1, 2018); N.Y. Exec. Order No. 161 (Jan. 9, 2017); N.C. Exec. Order No. 93 (April 2, 2019); Pa. Exec. Order No. 2018-18-03 (Sept. 4, 2018); Chi. Exec. Order No. 2018-1 (Apr. 10, 2018); *Mayor Keisha Lance Bottoms Bans "Salary History Box" Requirement on City of Atlanta Applications*, ATLANTAGA.GOV (Feb. 18, 2019), available at <https://www.atlantaga.gov/Home/Components/News/News/11942/672>; Pittsburgh, PA Ord. No. 2017-1121 (Jan. 30, 2017); Jackson, MS Ord. No. 2019-13(1); Columbia, SC Ord. No. 2019-022 (August 9, 2019); *Mayor Biskupski signs Gender Pay Equity policy on first day of Women's History Month*, SLC.GOV (Mar. 8, 2018) <https://www.slc.gov/blog/2018/03/01/mayor-biskupski-signs-gender-pay-equity-policy-on-first-day-of-womens-history-month/>; Louisville, KY Ord. No. 066 (May 22, 2018); Kansas City, MO Ord. No. 190380 (May 23, 2019); St. Louis, MO Ord. No. 71095 (Jan. 2020).
- <sup>63</sup> *Governor Northam Announces Employment Equity Initiative for State Agencies*, VIRGINIA.GOV (June 20, 2019), available at <https://www.governor.virginia.gov/newsroom/all-releases/2019/june/headline-841165-en.html>; Montgomery County, MD, County Code art. II, § 33-25 (2019); *Richland County votes to 'Ban the Box,' won't ask job applicants about criminal past* (June 5, 2019), available at <https://www.thestate.com/news/local/article231151348.html>; D.C. Dep't of Hum. Res., District Personnel



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Instruction No. 11-92 (Nov. 17, 2017), *available at* [https://dchr.dc.gov/sites/default/files/dc/sites/dchr/publication/attachments/edpm\\_11B\\_92\\_salary\\_history\\_instruction.pdf](https://dchr.dc.gov/sites/default/files/dc/sites/dchr/publication/attachments/edpm_11B_92_salary_history_instruction.pdf); New Orleans Exec. Order No. mjl 17-01 (Jan. 25, 2017); Cincinnati, OH Ord. No. 0083-2019 (Mar. 13, 2019); Toledo, OH Ord. No. 173-19 (June 26, 2019); Kansas City, MO Ord. No. 190380 (May 23, 2019); San Francisco, CA Ord. No. 170350 (July 19, 2017); Philadelphia, PA Ord. No. 160840; N.Y.C. Exec. Order No. 21 (Nov. 4, 2016); Albany Cty. Loc. L. No. P for 2016 (Dec. 17, 2017); Westchester Cty. Res. No. 28-2018 (July 9, 2018); Suffolk Cty. Loc. L. No. 25-2018 (No. 20, 2018).

<sup>64</sup> Benjamin Hansen & Drew McNichols, *Information and the Persistence of the Gender Wage Gap; Early Evidence from California's Salary History Ban* (Feb. 1, 2019), *available at* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3277664](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3277664).

<sup>65</sup> NWLC, ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION FROM JOB TO JOB (Dec. 2020), <https://nwlc.org/wp-content/uploads/2020/01/Asking-for-Salary-History-2020-12.7.2020.pdf>.

<sup>66</sup> *Id.*

<sup>67</sup> Liz Ryan, *When Someone Demands Your Salary History, Give Your Salary Requirements Instead*, FORBES (Jan. 16, 2017), <https://www.forbes.com/sites/lizryan/2017/01/16/when-they-demand-your-salary-history-give-your-salary-requirement-instead/?sh=76a9fd755a8b>.

<sup>68</sup> Moshe A. Barach & John J. Horton, *How do Employers Use Compensation History?: Evidence from a Field Experiment*, 39 *Journal of Labor Econ.* (Jan. 2021), <https://www.journals.uchicago.edu/doi/full/10.1086/709277>.

<sup>69</sup> *See, e.g., Cole v. N. Am. Breweries*, No. 1:13-cl-236, 2015 WL 248026, at \*10 (S.D. Ohio Jan. 20, 2015) (citing *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (finding that a beer distributor improperly used a female hire's previous salary to set her pay significantly lower than that of her male predecessor, her male successor, and other male employees performing the same job); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) (prior salary alone cannot justify a pay disparity); *Faust v. Hilton Hotels Corp.*, 1990 WL 120615, at \*5 (E.D. La. 1990) (reliance on prior salary as a factor other than sex would "allow employer to pay one employee more than an employee of the opposite sex because that employer or a previous employer discriminated against the lower paid employee"); *Angove v. Williams-Sonoma, Inc.*, 70 F. App'x 500, 508 (10th Cir. 2003) (citing *Irby* to conclude that the Equal Pay Act "precludes an employer from relying solely upon a prior salary to justify pay disparity"); *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020), cert. denied, 142 S. Ct. 189 (July 2, 2020) (No. 19-1176).

<sup>70</sup> *See Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904 (7th Cir. 2017) (holding that pay disparity between male and female employees based on their prior salary was justified by a "factor other than sex," and following Seventh Circuit precedent "that a difference in pay based on the difference in what employees were previously paid is a legitimate 'factor other than sex'"); *Muriel v. SCI Ariz. Funeral Servs., Inc.*, No. CV-14-0816, 2015 WL 6591778 (D. Ariz. Oct. 30, 2015) (holding that pay disparity between male and female employee was justified by "a factor other than sex" because male employee had a prior higher salary and negotiated his higher salary).

<sup>71</sup> *See Drury v. Waterfront Media, Inc.*, No. 05 Civ. 10646, 2007 WL 737486, at \*4 (S.D.N.Y. Mar. 8, 2007) (accepting the employer's argument that higher pay for the male comparator was necessary to "lure him away from his prior employer").

<sup>72</sup> *See Thibodeaux-Woody v. Houston Cmty. Coll.*, 593 F. App'x 280, 283 (5<sup>th</sup> Cir. 2014) (holding salary negotiation could not be a bona fide "factor other than sex" where female job applicant was not allowed to negotiate for higher salary and male applicant for same position was allowed to negotiate); *Dreves v. Hudson Group (HG) Retail, LLC*, No. 2:11-cv-4, 2013 WL 2634429 (D. Vt. June 12, 2013) (rejecting employer's proffered justification for sex-based pay disparity and finding employer's argument that it had to pay male successor more to induce him to take the job and to relocate his family to a new city, and to satisfy his demands when he negotiated for more money than initially offered, was not related to the job itself or the general business of the company); *Sauceda v. Univ. of Texas at Brownsville*, 958 F.Supp.2d 761 (S.D. Tex. July 26, 2013) (finding evidence regarding faculty salary levels—such as the school's practice of paying less to non-tenure track professors—could be inconsistent with the school's assertion that it paid more purely to attract professors with the necessary qualifications for accreditation, and that the University failed to show that the market for new faculty was not shaped by sex discrimination and stereotyping).

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<sup>73</sup> H.B. 1003, 2016 Gen. Assemb. (Md. 2016) (amending Md. Lab. & Emp. Code §§ 3-301, 3-304, 3-306, 3-307 (2015)); S. 1, 2015 Gen. Assemb. (N.Y. 2015) (amending N.Y. Lab. Law §§ 194, 198 (Consol. 2015)); H.B. 1506, 65th Leg., Reg. Sess. (Wash. 2017) (amending Wash. Rev. Code § 49.12.175; adding a new chapter to Wash. Rev. Code, Tit. 49); S.B. 358, 2015 Reg. Sess. (Cal. 2015) (amending CAL. LAB. CODE § 1197.5 (West 2015)); S. 104, 218th Leg., Reg. Sess. (N.J. 2018) (amending N.J. Rev. Stat. § 34:11-56.1 et seq.).

<sup>74</sup> 29 U.S.C. § 206(d)(1).

<sup>75</sup> *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496 (1945); 29 C.F.R. § 1620.9(a).

<sup>76</sup> See S.B. 358, 2015 Reg. Sess. (Cal. 2015) (amending Cal. Lab. Code § 1197.5 to eliminate the requirement that employees whose wages are compared work within the same establishment); N.Y. Lab. Law §§ 194(3) (“For the purposes of subdivision one of this section, employees shall be deemed to work in the same establishment if the employees work for the same employer at workplaces located in the same geographical region, no larger than a county, taking into account population distribution, economic activity, and/or the presence of municipalities”). See also Equal Employment Opportunity Commission, EEOC COMPLIANCE MANUAL, SECTION 10: COMPENSATION DISCRIMINATION, § IV(D), [https://www.eeoc.gov/policy/docs/compensation.html#N\\_44](https://www.eeoc.gov/policy/docs/compensation.html#N_44) (2000).

<sup>77</sup> 29 U.S.C. § 216(b).

<sup>78</sup> 29 U.S.C. § 216(b); 29 C.F.R. § 1620.33.

<sup>79</sup> 42 U.S.C. § 1981a(b)(3).

<sup>80</sup> See, e.g., Equal Employment Opportunity Commission, Press Release, *Royal Tire Will Pay \$182,500 for Wage Discrimination Against Female Executive* (Aug. 4, 2014), <https://www.eeoc.gov/eeoc/newsroom/release/8-4-14.cfm>. In that case, the EEOC alleged the employer violated Title VII and the Equal Pay Act when it paid its female human resources director \$35,000 a year less than a male employee in the same position, and \$19,000 less than the minimum salary for the position under the employer’s own compensation system. The employer failed to address the pay disparity even after the female employee complained and asked to be compensated fairly. The consent decree resolving the case required the employer to evaluate its pay structure to ensure compliance with the Equal Pay Act and Title VII and correct any pay disparities by raising wages for the employees negatively affected.

<sup>81</sup> S.B. 185, 2016 Gen. Sess. (Utah 2016) (amending Utah Lab. Code Ch. 5 §§ 104, 107); H.B. 3619, 99th Gen. Assem. (Ill. 2015) (amending 820 Ill. Comp. Stat. Ann. 112 § (West 2015)); H.B. 2005, 2017 Reg. Sess. (Or. 2017) (amending Or. Rev. Stat. §§ 652.210, 652.220, 652.230, 659A.820, 659A.870, 659A.875, 659A.885).

<sup>82</sup> See 42 U.S.C. § 2000e(k); 29 C.F.R. §1604, App. Q&A 5.

<sup>83</sup> While this statement makes mention of pregnant women, the Pregnant Workers Fairness Act applies to all employees for pregnancy, childbirth, and related medical conditions, including transgender men and nonbinary individuals.

<sup>84</sup> NWLC, NWLC SURVEY FINDS OVERWHELMING SUPPORT FOR GENDER JUSTICE POLICIES (MAY 2019), <https://nwlc.org/resources/nwlc-survey-finds-overwhelming-support-for-gender-justice-policies>.

<sup>85</sup> Brian Nienaber & Ed Goetas, *Pregnant Workers Fairness Act Polling Memo*, THE TARRANCE GROUP (Feb. 2020) (commissioned by ACLU), available at [https://www.aclu.org/sites/default/files/field\\_document/pwfa\\_survey\\_memo\\_2-20-20\\_1\\_1\\_2.pdf](https://www.aclu.org/sites/default/files/field_document/pwfa_survey_memo_2-20-20_1_1_2.pdf).

<sup>86</sup> See NWLC, PREGNANCY ACCOMMODATIONS IN THE STATES (Jan. 2021), <https://nwlc.org/resources/pregnancy-accommodations-states/>.

<sup>87</sup> *Id.*

<sup>88</sup> Occupational data are from O\*NET OnLine, National Center for O\*NET Development, available at [www.onetonline.org/](http://www.onetonline.org/) (last visited April 17, 2019). In some cases, researchers selected similar but not exact occupation(s) to serve as a proxy for ACS and/or O\*NET occupation(s) due to inconsistencies between data sources. Occupations were considered physically demanding or hazardous if 40% of workers or more responded performing activities continuously or almost continuously while at work. Researchers combined O\*NET data from nursing assistants, home health aides, and psychiatric aides to serve as a proxy for the ACS occupation nursing, psychiatric and home health aides. O\*NET Occupational data for nursing assistants were used in the table: “Common jobs for pregnant workers: Standing” (i.e., 50% of nursing assistants responded standing continuously or



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almost continuously at work). In addition, 41% of home health aides and 51% of psychiatric aides stood more than half the time.

<sup>89</sup> Workers in other common occupations among pregnant women reported standing a significant amount at work. For instance, 40% of elementary school teachers, except special education; 48% of middle school teachers, except special education; and 35% of first-line supervisors of retail sales workers reported standing more than half the time. *Id.*

<sup>90</sup> See Sylvia Guendelman et al., *Biomechanical and Organisational Stressors and Associations with Employment Withdrawal Among Pregnant Workers: Evidence and Implications*, 59 *ERGONOMICS* 1613 (2016).

<sup>91</sup> For stories of women pushed out of work because they were denied the temporary accommodations that they sought during pregnancy, see generally NWLC & A BETTER BALANCE (ABB), *IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS* (2013), [http://www.nwlc.org/sites/default/files/pdfs/pregnant\\_workers.pdf](http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf); see also Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination is Rampant Inside America's Biggest Companies*, N.Y. TIMES (Feb. 8, 2019), available at <https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html>; Bryce Covert, *The American Workplace Still Won't Accommodate Pregnant Workers*, THE NATION (Aug. 12, 2019), available at <https://www.thenation.com/article/pregnant-workers-discrimination-workplace-low-wage/>.

<sup>92</sup> See NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, *LISTENING TO MOTHERS: THE EXPERIENCE OF EXPECTING AND NEW MOTHERS IN THE WORKPLACE* 3 (Jan. 2014), <http://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf>.

<sup>93</sup> See Covert, *supra* note 911.

<sup>94</sup> See LIZ WATSON & JENNIFER SWANBERG, *WORKPLACE FLEXIBILITY 2010: GEORGETOWN LAW, FLEXIBLE WORKPLACE SOLUTIONS FOR LOW-WAGE HOURLY WORKERS: A FRAMEWORK FOR A NATIONAL CONVERSATION* 19 (May 2011), [https://www.researchgate.net/publication/283088549\\_Flexible\\_workplace\\_solutions\\_for\\_low-wage\\_hourly\\_workers](https://www.researchgate.net/publication/283088549_Flexible_workplace_solutions_for_low-wage_hourly_workers).

<sup>95</sup> See Morgan Harwood & Sarah David Heydemann, *supra* note 6. NWLC calculations are based on American Community Survey (ACS) 2017 1-year estimates using IPUMS-USA, available at <http://usa.ipums.org/usa>. In this analysis, NWLC defined low-wage occupations as jobs that pay \$11.50 per hour or less (the annual equivalent of about \$23,920 per year (\$11.50 x 2080 hours), which assumes a 40-hour workweek for 52 weeks. See *id.* at 7, n.11.

<sup>96</sup> *Id.* at 5.

<sup>97</sup> See SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, *BREADWINNING MOTHERS CONTINUE TO BE THE U.S. NORM* (May 2019), <https://cdn.americanprogress.org/content/uploads/2019/05/12070012/Breadwinners2019-report1.pdf>.

<sup>98</sup> NWLC & ABB, *supra* note 911, at 12.

<sup>99</sup> MARCH OF DIMES, *PREMATURE BABIES* (OCT. 2019), <https://www.marchofdimes.org/complications/premature-babies.aspx>.

<sup>100</sup> *Id.*

<sup>101</sup> NWLC calculations based on 2019 American Community Survey using Steven Ruggles et al., *IPUMS USA: Version 11.0* [dataset]. Minneapolis, MN: IPUMS, 2021. <https://doi.org/10.18128/D010.V11.0>

<sup>102</sup> See Morgan Harwood & Sarah David Heydemann, *supra* note 6. The percentage of pregnant workers in the occupation is calculated by reference to the share of women in the occupation who have given birth in the last year.

<sup>103</sup> LINDA LAUGHLIN, US CENSUS BUREAU, *CURRENT POPULATION REPORTS, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961-2008* at Table 2, <https://www.census.gov/prod/2011pubs/p70-128.pdf>.

<sup>104</sup> 42 U.S.C. § 12111 et seq.; 21 V.S.A. § 495 et seq.

<sup>105</sup> NWLC & ABB, *supra* note 911, at 14.

<sup>106</sup> See, e.g., *Lang v. Wal-Mart Stores E., L.P.*, 2015 WL 1523094, at \*2 (D.N.H. Apr. 3, 2015) (“[P]regnancy is not an actionable disability, unless it is accompanied by a pregnancy-related complication.”); *Annobil v. Worcester Skilled Care Ctr., Inc.*, 2014 WL 4657295, at \*11 (D. Mass. Sept. 10, 2014) (granting summary judgment for defendant where plaintiff “provides no legal argument as to whether such symptoms [including headaches, nausea and vomiting] differ from normal symptoms of pregnancy and how these complications are disabling”); *Mayorga v. Alorica, Inc.*, 2012 WL 3043021, at \*5 (S.D. Fla. July 25, 2012) (Post-ADAAA, “[p]regnancy, absent unusual

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circumstances, is not considered a disability under the ADA.” (collecting cases)); *Spees v. James Marine, Inc.*, 617 F.3d 380, 397 (6th Cir. 2010) (“Pregnancy-related conditions have typically been found to be impairments where they are not part of a ‘normal’ pregnancy.”)

<sup>107</sup> See e.g., *Swanger-Metcalf v. Bowhead Integrated Support Servs.*, LLC, No. 1:17-cv-2000, 2019 WL 149334, \*11 (M.D. Pa. March 31, 2019) (“While Plaintiff argues that working in the sand room could have caused her to sustain pregnancy complications at some point in the future, Plaintiff does not allege that she suffered from any pregnancy-related complications at the time she sought an accommodation. As a result, Plaintiff’s claim of discrimination under the ADA fails because she has not alleged facts sufficient to support a reasonable inference that she is disabled under the ADA.”).

<sup>108</sup> 29 U.S.C. § 2601 et seq.

<sup>109</sup> *Young v. UPS*, 135 S. Ct. 1338 (2015).

<sup>110</sup> *Id.* at 1354.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (The Court emphasized that this does not mean that a pregnant worker must identify a nearly identical coworker that the employer accommodated.)

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1354–55.

<sup>115</sup> See DINA BAKST, ELIZABETH GEDMARK, & SARAH BRAFMAN, ABB, LONG OVERDUE: IT IS TIME FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT (May 2019), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf> (surveying caselaw since the 2015 *Young* decision and finding that in over two-thirds of post-*Young* pregnancy accommodations cases, courts held that employers were permitted to deny pregnant workers accommodations under current federal law).

<sup>116</sup> *Legg v. Ulster Cty.*, No. 109CV550 (FJS/RFT), 2017 WL 3207754 (N.D.N.Y. July 27, 2017), *aff’d*, 832 F. App’x 727 (2d Cir. 2020) (lower court found against Ann Marie Legg after a judge gave jury instructions misinterpreting the significant burden standard under *Young v. UPS*. The Court found that Legg did not have a valid PDA claim after she sued for being denied light duty accommodations. The Circuit Court affirmed on grounds that the light duty policy was not inherently discriminatory and the plaintiff failed to show disparate impact); *Santos v. Wincor Nixdorf, Inc.*, No. 19-50046, 2019 WL 3720441 (5th Cir. Aug. 7, 2019) (affirming grant of summary judgment against employee seeking pregnancy accommodations, Michelle Santos, by relying on a pre-*Young* decision by the Fifth Circuit that required the circumstances of the employee-comparator be “nearly identical”); *Swanger-Metcalf v. Bowhead Integrated Support Servs. LLC.*, No. 1:17-CV-2000, 2019 WL 1493342 (M.D. Pa. Mar. 31, 2019) (dismissing the case of Elizabeth Swanger-Metcalf, because she did not provide “factual details as to how other employees” were accommodated in her complaint, prior to any discovery on these issues); *Adduci v. Fed. Express Corp.*, 298 F. Supp. 3d 1153 (W.D. Tenn. 2018) (finding that comparators provided by the plaintiff, Cassandra Adduci, did not “address the relevant aspects of [her] employment situation” and therefore were not a sufficient example of similarly situated comparators, despite providing a spreadsheet documenting over 261 other part-time employees who were given temporary work reassignments in the same calendar year); *Jackson v. J.R. Simplot Co.*, 666 F. App’x 739 (10th Cir. 2016) (finding against Plaintiff, Stacey Jackson, who requested light duty and to limit exposure to chemicals. Although Plaintiff was able to present evidence of five other employees who were granted light duty when they requested an accommodation, the Court rejected the argument that the failure to accommodate was discriminatory because the other employees did not also request limiting exposure to chemicals).

<sup>117</sup> Small businesses with fewer than 15 employees would be exempt from the federal Pregnant Workers Fairness Act requirements. However, the Pregnant Workers Fairness Act as written does not supersede or invalidate city or state Pregnant Workers Fairness Acts, some of which cover employers with less than 15 employees, or otherwise preempt or invalidate any other law providing greater or equal protections.

<sup>118</sup> 42 U.S.C. § 12111.

<sup>119</sup> *Id.*

<sup>120</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

<sup>121</sup> *Waite v. Bd. of Trustees of Univ. of Alabama*, No. 2:16-CV-01244-JEO, 2018 WL 5776265, at \*16 (N.D. Ala. Nov. 2, 2018) (alleging pregnancy discrimination by a public research university); *Vidovic v. City of Tampa*, No. 8:16-cv-T-

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17AAS, 2017 WL 10294807, at \*9 (M.D. Fla. Oct. 12, 2017) (alleging pregnancy discrimination by a Tampa city fire department); *Webster v. U.S. Dep't of Energy*, 267 F. Supp. 3d 246, 264 (D.D.C. 2017) (alleging pregnancy discrimination claims against the federal Department of Energy); *Diaz v. Florida*, 219 F. Supp. 3d 1207, 1218 (S.D. Fla. 2016) (alleging pregnancy discrimination against the state of Florida); *Lawson v. City of Pleasant Grove*, No. 2:14-CV-0536-JEO, 2016 WL 2338560, at \*10–11 (N.D. Ala. Feb. 16, 2016), *rep. and recommendation adopted*, No. 2:14-CV-536-KOB, 2016 WL 1719667 (N.D. Ala. Apr. 29, 2016) (alleging pregnancy discrimination against a city police department).

<sup>122</sup> See Reva B. Siegel, *The Pregnant Citizen: From Suffrage to the Present*, 108 GEORGETOWN L.J. 167, 218–26 (2020).

<sup>123</sup> *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

<sup>124</sup> *Id.*; see *United States v. Virginia*, 518 U.S. 533–34 (“[Sex] classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.”) (citing *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948)).

<sup>125</sup> *Coleman v. Maryland Court of Appeals*, 132 S.Ct. 1327, 1334 (2012).

<sup>126</sup> “Congress’ power ‘to enforce’ the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.” *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

<sup>127</sup> *Hibbs*, 538 U.S. at 727.

<sup>128</sup> See Siegel, *supra* note 122, at 221 (discussing stereotypes of pregnant workers as lacking competence and commitment); Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. ON POVERTY L. & POL’Y 1, 26 (2012) (“The inflexibility of many low-wage jobs is often compounded by rigid attendance policies that penalize workers for justifiable absences, for being minutes late, or even for assumption of future absences—for example, the stereotype that a single mother will be ‘unreliable.’”).

<sup>129</sup> Siegel, *supra* note 122, at 225 (“The reasonable accommodation framework relieves individual employees of the burden of proving animus: of showing that an employer’s inflexible imposition of workplace standards reflects sex stereotyping that flows from the invidious assumption that pregnant workers are not competent or committed workers.”). In this way, the protections offered by the Pregnant Workers Fairness Act would be analogous to Title VII’s disparate impact provision, justified under Section 5, as a remedy for intentional discrimination that is difficult to prove. *In re Empt. Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1321–23 (11th Cir. 1999); see also *Okralik v. Univ. of Ark.*, 255 F.3d 615, 626 (8th Cir. 2001) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987, 990 (1988)); Claude Platton, *Title VII Disparate Impact Suits Against State Governments After Hibbs and Lane*, 55 DUKE L.J. 641 (2005).

<sup>130</sup> NWLC, ACCOMMODATING PREGNANT WORKERS IS GOOD FOR Business (Sept. 2020), <https://nwlc.org/resources/business-case-accommodating-pregnant-workers/>.

<sup>131</sup> *Id.*

<sup>132</sup> House Committee on the Judiciary, *Chairman Nadler Celebrates Pregnant Workers Fairness Act Reaching 223 Cosponsors* (Feb. 2021), available at <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4386>; Coalition Letter on H.R. 2694, *The “Pregnant Workers Fairness Act*, U.S. CHAMBER OF COM. (Jan. 13, 2020), available at <https://www.uschamber.com/letters-congress/coalitionletter-hr-2694-the-pregnant-workers-fairness-act>; *An Open Letter in Support of the Pregnant Workers Fairness Act from Leading Private-Sector Employers*, NAT’L P’SHIP FOR WOMEN & FAMILIES (Sept. 15, 2020), available at <https://www.nationalpartnership.org/our-work/resources/economic-justice/coalition/an-open-letter-in-support-of-PWFA-from-private-sector-employers.pdf>; SOC’Y FOR HUMAN RES. MGMT. GOV’T AFFAIRS DIV., PREGNANT WORKERS FAIRNESS ACT (Mar. 2020), available at <http://advocacy.shrm.org/wp-content/uploads/2020/03/03.03.20-PWFA-Fact-Sheet-1.pdf>, *Letter in Support of the Pregnant Workers Fairness Act*, *Pregnant Workers Fairness Act*, SOC’Y FOR HUMAN RES. MGMT. (February 27, 2020), available at [https://www.shrm.org/hr-today/public-policy/hr-public-policy-issues/Documents/SHRM%20Letter%20HR%202694%20PWFA\\_Final\\_022720.pdf](https://www.shrm.org/hr-today/public-policy/hr-public-policy-issues/Documents/SHRM%20Letter%20HR%202694%20PWFA_Final_022720.pdf).

<sup>133</sup> NAT’L P’SHIP FOR WOMEN & FAMILIES, *supra* note 132.

<sup>134</sup> *H.R. 2694, Pregnant Workers Fairness Act: Cost Estimate*, CONG. BUDGET OFFICE (Sept. 9, 2020), available at <https://www.cbo.gov/publication/56568>.

<sup>135</sup> JOB ACCOMMODATION NETWORK (JAN), WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 4 (Sept. 2019), available at <https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*