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Testimony of Dina Bakst, J.D., Co-Founder & Co-President, A Better Balance

**Subcommittees on Civil Rights and Human Services and Workforce Protections
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“Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination”

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My name is Dina Bakst and I am a Co-Founder and Co-President of A Better Balance. Thank you to Chair Bonamici, Chair Adams, Ranking Member Fulcher, and Ranking Member Keller and to the Members of the Education & Labor Subcommittees on Civil Rights and Human Services and Workforce Protections for allowing me the opportunity to provide my testimony today.

A Better Balance is a national legal advocacy organization, using the power of the law to advance justice for workers, so they can care for themselves and their loved ones without risking their economic security. We founded A Better Balance fifteen years ago because we recognized that a lack of fair and supportive work-family laws and policies, or more broadly, a “care crisis”¹ was harming a majority of workers, particularly women, especially Black and Latina women, in low-wage jobs. Gaps and limitations in our nation’s laws and policies make it difficult, often impossible, for them to work and adequately care for their families.² This bias and inflexibility often starts when women become pregnant and snowballs into lasting economic³ and health

¹ A BETTER BALANCE, MOVING FAMILIES FORWARD: REFLECTIONS ON A DECADE OF CHANGE 3 (2016), https://www.abetterbalance.org/wp-content/uploads/2017/03/Moving_Families_Forward_Report.pdf.

² See Dina Bakst, Opinion, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES, Jan. 30, 2012, at A25, <https://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html>; A BETTER BALANCE, OUR ISSUES: BREASTFEEDING WHILE WORKING, <https://www.abetterbalance.org/our-issues/breastfeeding-while-working/> (last visited Mar. 11, 2021) (outlining federal and state advocacy efforts to strengthen laws for lactating workers).

³ See *Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab.*, 116th Cong. (2019) [hereinafter *Bakst Testimony*], <https://edlabor.house.gov/download/10/22/2019/baksttestimony102219> (testimony of Dina Bakst) (explaining how when pregnant workers are forced off the job, they lose income, retirement contributions, health insurance, and “other long-term benefits earned on the job,” leading to “economic inequality over the long run, exacerbating the wage gap, and negatively affecting families as a whole, not to mention the harm it causes the economy . . . in its effect on women’s labor force participation”) (footnotes omitted); DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE 23–24 (2019) [hereinafter LONG OVERDUE], <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf> (noting that, “losing out on even one paycheck, let alone multiple, can spell financial ruin for families”).

disadvantages.⁴ At A Better Balance, we call this the “pregnancy penalty.”⁵ As a result of hearing day in and day out from pregnant workers and new mothers who lacked clear protections under federal law,⁶ we spearheaded and continue to lead the movement at the federal, state, and local level to ensure pregnant workers can receive the accommodations they need to remain healthy and on the job and are leaders in ensuring lactating workers have the reasonable break time and space they need to express milk at work.⁷

The COVID-19 pandemic has laid bare the urgent need for solutions. Workers, disproportionately Black and Latina women,⁸ have exited the workforce in droves due to caregiving responsibilities⁹ and a lack of supportive work-family policies.¹⁰ At the same time, millions of women remain in the workforce, with women of color disproportionately represented

⁴ See LONG OVERDUE, *supra* note 3, at 25–26 (noting that heavy lifting, long work hours, and extensive standing can lead to miscarriage and preterm birth); LOUISVILLE DEP’T OF PUB. HEALTH & WELLNESS, PREGNANT WORKERS HEALTH IMPACT ASSESSMENT 7 (2019), <https://louisvilleky.gov/document/pregnant-workers-hia-final-02182019pdf> (“Accommodating pregnant workers, upon their request, is critical for reducing poor health outcomes including miscarriage; low birth weight; preterm birth; birth defects; dehydration; insufficient amniotic fluid and related birth outcomes; unnecessary pain resulting from excessive standing, bending, or lifting; [and] urinary tract infections and related risk of preeclampsia.”); *Bakst Testimony*, *supra* note 3, at 17–20.

⁵ DINA BAKST & PHOEBE TAUBMAN, A BETTER BALANCE, THE PREGNANCY PENALTY: HOW MOTHERHOOD DRIVES INEQUALITY & POVERTY IN NEW YORK CITY 3 (2014) [hereinafter THE PREGNANCY PENALTY], https://www.abetterbalance.org/wp-content/uploads/2016/11/ABB_PregnancyPenalty-Report-2014.pdf.

⁶ See, e.g., A BETTER BALANCE, THE CASE FOR THE PREGNANT WORKERS FAIRNESS ACT, IN STORIES, <https://www.abetterbalance.org/the-case-for-the-pregnant-workers-fairness-act-in-stories/> (last visited Mar. 11, 2021).

⁷ See A BETTER BALANCE, OUR ISSUES: PREGNANT WORKERS FAIRNESS, <https://www.abetterbalance.org/our-issues/pregnant-workers-fairness/> (last visited Mar. 11, 2021).

⁸ See Ella Koeze, *A Year Later, Who Is Back to Work and Who Is Not?*, N.Y. TIMES (Mar. 9, 2021), <https://www.nytimes.com/interactive/2021/03/09/business/economy/covid-employment-demographics.html> (reporting that Black and Hispanic women experienced more dramatic job loss after the onset of the pandemic than any other demographic, with Hispanic women experiencing a 24 percent decrease and Black women a nearly 20 percent decrease in employment from February 2020 to April 2020, compared to less than 15 percent for white men; and also have experienced the slowest recovery, with nearly 10 percent fewer Black women employed in March 2021 than were employed a year ago, compared with 5 percent fewer white men); see also Jocelyn Frye, *On the Frontlines at Work and at Home: The Disproportionate Economic Effects of the Coronavirus Pandemic on Women of Color*, CTR. FOR AM. PROGRESS (Apr. 23, 2020, 9:00 AM),

<https://www.americanprogress.org/issues/women/reports/2020/04/23/483846/frontlines-work-home/> (finding that women of color disproportionately work in industries experiencing significant pandemic-related job losses).

⁹ See *New Survey: Facing Caregiving Challenges, Women Leaving the Workforce at Unprecedented Rates*, BIPARTISAN POL’Y CTR. (Oct. 28, 2020), <https://bipartisanpolicy.org/blog/facing-caregiving-challenges/> (finding that “nearly one quarter of the women who have left work since the coronavirus pandemic began did so to manage their caregiving responsibilities”); see also Nate Rattner & Thomas Franck, *Black and Hispanic Women Aren’t Sharing in the Job Market Recovery*, CNBC (Mar. 5, 2021, 2:08 PM EST), <https://www.cnbc.com/2021/03/05/black-and-hispanic-women-arent-sharing-in-the-job-market-recovery.html>.

¹⁰ See, e.g., Gary Claxton & Larry Levitt, *Paid Sick Leave is Much Less Common for Lower-Wage Workers in Private Industry*, HENRY J. KAISER FAM. FOUND. (March 10, 2020), <https://www.kff.org/other/issue-brief/paid-sick-leave-is-much-less-common-for-lower-wage-workers-in-private-industry/>; Diana Boesch, *The Urgent Case for Permanent Paid Leave: Lessons Learned from the COVID-19 Response*, CTR. FOR AM. PROGRESS (Sept. 1, 2020, 9:00 AM), <https://www.americanprogress.org/issues/women/reports/2020/09/01/489914/urgent-case-permanent-paid-leave/>.

in frontline, often low-wage, jobs such as fast-food, retail, and cashiering,¹¹ where they continue to face structural biases that prevent them from caring for themselves and loved ones and maintaining economic security.

My testimony today will focus primarily on two critical pieces of legislation that will help eradicate the persistent biases pregnant and caregiving workers face and enable them to stay healthy and attached to the workforce: the Pregnant Workers Fairness Act (H.R. 1065) and the PUMP for Nursing Mothers Act.

The Pregnant Workers Fairness Act: The Need for Reasonable Accommodations Has Grown More Urgent

Last Congress, in October 2019, I submitted detailed testimony¹² outlining the crucial need for the Pregnant Workers Fairness Act (PWFA). Forty-two years after the passage of the Pregnancy Discrimination Act (PDA), pregnant workers, disproportionately Black and Latina women, in low-wage, inflexible, and physically demanding jobs, are routinely fired or forced out on unpaid leave—or are forced to risk their health—instead of being granted a temporary, reasonable accommodation that would allow them to keep working and maintain a healthy pregnancy. The PWFA would remedy this injustice by creating an affirmative right to reasonable accommodations for known limitations related to pregnancy, childbirth, and related medical conditions absent undue hardship on employers—a similar standard to the one in place for workers with disabilities under the Americans with Disabilities Act (ADA).

Sixteen months and a global pandemic later, and amidst a national reckoning around the systemic racism that pervades every aspect of this country, the need for this legislation has grown ever more urgent. Though the world has changed, the failings in the law that gave rise to the need for the PWFA remain. The PDA and the ADA remain inadequate for pregnant workers in need of accommodation, routinely causing them to be forced off the job weeks or months before childbirth.

Since the Committee’s 2019 hearing, hundreds more pregnant workers have called A Better Balance’s free and confidential legal helpline because they are unable to receive accommodations to stay healthy and working due to glaring gaps in federal legal protections.

In November 2020, for example, we heard from Jordan, a cashier at a large retailer in Mississippi.¹³ When Jordan began to experience preterm contractions, her health care provider requested that she stop lifting heavy objects and reduce her schedule. Her employer ignored her request and required that she continue to lift boxes. Her employer also refused to grant her more frequent breaks to drink water or sit, even though she experienced severe dehydration that required medical attention. Worried about the consequences of not receiving these

¹¹ See Hye Jin Rho, Hayley Brown, & Shawn Fremstad, *A Basic Demographic Profile of Workers in Frontline Industries*, CTR. FOR ECON. & POLICY RESEARCH (Apr. 7, 2020), <https://cepr.net/a-basic-demographic-profile-of-workers-in-frontline-industries/>.

¹² See *Bakst Testimony*, *supra* note 3.

¹³ Mississippi does not have a state Pregnant Workers Fairness Act.

accommodations, her doctor advised that she go on unpaid leave, forcing her to lose critical income.

The pandemic has also exacerbated the challenges pregnant workers face in profound ways, especially as data now shows contracting COVID-19 while pregnant can lead to an increased risk of severe illness and death.¹⁴ At the height of the pandemic, we heard from Tesia, a pregnant retail worker in Missouri.¹⁵ Tesia worked in an area of the store with hot temperatures and little access to water. She called us because the store’s water fountain had been shut down due to COVID-19 safety concerns. To avoid experiencing dehydration, which can trigger significant health consequences during pregnancy, she asked her manager if she could keep a water bottle behind the counter. He refused. Frightened for the health of her pregnancy, she was forced out of her job.

The Legal Problems Necessitating the Pregnant Workers Fairness Act

The Pregnancy Discrimination Act and the Americans with Disabilities Act do not provide the legal protections necessary to ensure pregnant workers with known limitations can receive reasonable accommodations to stay healthy and working. The history and trajectory of these laws in the courts illuminate why pregnant workers continue to face structural inequality in the workplace.

The Pregnancy Discrimination Act is inadequate for pregnant workers in need of accommodation.

The Pregnancy Discrimination Act (PDA) of 1978 bans discrimination against pregnant workers. The PDA specifies in its second clause that pregnant workers should be treated the same as those who are “similar in their ability or inability to work.”¹⁶ This “comparator” standard places a unique burden on pregnant workers to identify someone else in the workplace who was provided accommodations in order to obtain their own medically necessary accommodation,¹⁷ a burden not placed on workers with disabilities. In 2015, in *Young v. UPS*,¹⁸ the Supreme Court attempted to address the second clause of the PDA for the first time since the law’s passage.¹⁹

As outlined in my prior testimony:

¹⁴ See Erica M. Lokken et al., *Disease Severity, Pregnancy Outcomes, and Maternal Deaths Among Pregnant Patients with Severe Acute Respiratory Syndrome Coronavirus 2 Infection in Washington State*, AM. J. OBSTETRICS & GYNECOLOGY 1.e1, 1.e3, 1.e5 (2021), <https://www.ajog.org/action/showPdf?pii=S0002-9378%2821%2900033-8> (finding that pregnant patients were hospitalized and died at significantly higher rates than similarly-aged non-pregnant patients in Washington State); *Pregnant People*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnant-people.html> (Mar. 5, 2021) (noting that “pregnant people are at an increased risk for severe illness from COVID-19 when compared to non-pregnant people”).

¹⁵ Missouri also does not have a state Pregnant Workers Fairness Act.

¹⁶ 42 U.S.C. § 2000e(k).

¹⁷ See LONG OVERDUE, *supra* note 3, at 18–19.

¹⁸ *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015). For a full explanation of the *Young* framework, see *Bakst Testimony*, *supra* note 3, at 13–17.

¹⁹ See *Young*, 135 S. Ct. at 1345.

The most salient aspect of Justice Breyer’s opinion for the majority [in *Young v. UPS*] rested on a new modified *McDonnell Douglas* burden-shifting framework that pregnant women must use to prove individual unlawful treatment when an employer fails to accommodate her pregnancy and there is no other clear evidence of wrongdoing on the employer’s part.

The three-step disparate treatment test first requires a plaintiff to show that she was protected under the law (i.e. pregnant), that she sought, and was denied, an accommodation, and that her employer accommodated others “similar in their ability or inability to work.” If a worker can meet this first step—which even after *Young* often proves insurmountable—the employer may then counter the plaintiff’s claim by putting forward a “legitimate, non-discriminatory reason for denying the accommodation,” though the [C]ourt clarified that expense and inconvenience do not independently qualify as legitimate justifications. Finally, the plaintiff can respond to the employer’s justification by offering evidence that said reasoning was simply pretext for intentional discrimination. One way a plaintiff can prove pretext, the Court said, is by a showing that an employer’s policy placed a “significant burden” on women in the workplace, and that the employer’s justification was not “sufficiently strong” to justify that burden.²⁰

While the Supreme Court’s ruling in *Young* in some ways furthered the purpose of the PDA, in A Better Balance’s report, “Long Overdue,” we found that two-thirds of women lost their PDA pregnancy accommodation claims in court post-*Young*.²¹ A high percentage of these losses can be traced to courts’ rejection of pregnant workers’ comparators or to workers’ inability to find a comparator.²² The *Young* standard also has done little to create clarity in the law, sowing confusion among lower courts, juries, and litigants alike.²³

In my 2019 Congressional testimony, I outlined many of these cases in detail, noting:

In case after case we reviewed, women in jobs ranging from nursing to law enforcement[,] and in both the public and private sector[,] were denied accommodations because courts found they could not produce valid comparators. We also found these cases spanned the nation, with women denied accommodations everywhere from Michigan to Pennsylvania to Oklahoma.²⁴

The oppressive comparator standard persists through today.²⁵ For example, in an August 2020 case, Julia Barton, a corrections officer, needed minor pregnancy accommodations to avoid toxic

²⁰ See *Bakst Testimony*, *supra* note 3, at 13 (footnotes omitted).

²¹ See LONG OVERDUE, *supra* note 3, at 13.

²² See *id.* at 14–16; see also *Bakst Testimony*, *supra* note 3, at 15 & n.67 (citing *Luke v. CPlace Forest Park SNF*, 747 F. App’x 978, 980 (5th Cir. 2019); *Turner v. Hartford Nursing and Rehab*, No. 16 Civ. 12926, 2017 WL 3149143, at *6 (E.D. Mich. July 25, 2017)).

²³ See LONG OVERDUE, *supra* note 3, at 20.

²⁴ See *Bakst Testimony*, *supra* note 3, at 15 & n. 67–73; see also LONG OVERDUE, *supra* note 3, at 14–16.

²⁵ See LONG OVERDUE, *supra* note 3, at 14–16; *Equal Emp’t Opportunity Comm’n v. Wal-Mart Stores East, LP*, No. 18-cv-783-bbc, 2021 WL 664929 (W.D. Wis. Feb. 19, 2021) (granting summary judgment for employer in case where pregnant and breastfeeding employees were denied lifting accommodations and time and space to pump, because the plaintiff could not demonstrate that non-pregnant employees who were injured off the job were treated more favorably); *Reyes v. Westchester County Health Care Corporation*, No. 19-CV-08916 (PMH), 2021 WL

fumes, high temperatures, prolonged standing, and pushing over 100 pounds—a request her employer denied.²⁶ As a result, Barton was forced onto unpaid leave and lost her health insurance at the very moment she needed it most.²⁷ The court affirmed her employer’s refusal to accommodate, reasoning that, under *Young*, Barton’s inability to “describe what, if any, reasonable accommodations were offered to other corrections officers outside of the protected group (pregnant women),” was fatal to her claim.²⁸

Likewise, in a February 2021 case, low-wage pregnant Walmart workers needed modifications to their jobs to reduce the weight they were required to lift and the amount of time they were forced to stand.²⁹ Walmart refused, under the guise of a national policy of only accommodating workers injured on the job.³⁰ The Western District of Wisconsin endorsed Walmart’s failure to accommodate due to insufficient comparator evidence.³¹ Invoking *Young*, the court reasoned that, even though “100 percent of employees injured on-the-job” were accommodated—while no pregnant employees were even eligible for accommodation under Walmart’s policy—the EEOC had failed to present sufficient comparator evidence.³²

Indeed, seven years after the Supreme Court published its complicated *Young* decision, some courts fail even to apply the Court’s modified *McDonnell Douglas* test in PDA accommodation cases.³³ Recently, one court even stated, incorrectly, that plaintiffs “must show that a comparator

310945 (S.D.N.Y. Jan. 29, 2021) (granting motion to dismiss on PDA claim where employer refused to provide respiratory therapist assistance with lifting or permit her not to work with unsafe CT scanner); *Barton v. Warren Cty.*, No. 1:19-CV-1061 (GTS/DJS), 2020 WL 4569465 (N.D.N.Y. Aug. 7, 2020) (dismissing PDA claim where employer denied reasonable accommodations to pregnant plaintiff, a corrections officer, because she did not plead any facts suggesting that the defendant accommodated other corrections officers similar in their ability or inability to work); *White v. Marquis Companies I, Inc.*, No. 3:18-cv-00613-YY, 2020 WL 5949244 (D. Or. June 30, 2020) (granting summary judgment on PDA claim for employer who failed to provide requested modified work schedule to pregnant plaintiff), *report and recommendation adopted*, 2020 WL 5947885 (D. Or. Oct. 7, 2020); *Gilbert v. Kroger Co.*, No. 19-0496, 2020 WL 2549700 (W.D. La. May 19, 2020) (granting summary judgment on PDA claim to employer who refused to provide pregnant plaintiff with a lifting restriction and a schedule change, resulting in a serious injury, because she couldn’t demonstrate that similarly-situated non-pregnant employees had received accommodations); *Allred v. Home Depot USA, Inc.*, No. 1:17-cv-00483-BLW, 2019 WL 2745731 (D. Idaho Jun. 28, 2019) (granting summary judgment on PDA claim for employer after the plaintiff resigned due to her supervisor’s failure to respond to her request for lactation accommodations); *Mestecky v. N.Y.C. Dep’t of Educ.*, No. 13-CV-4302, 2018 WL 10509457 (E.D.N.Y. Mar. 20, 2018) (granting defendants summary judgment on PDA claim because the plaintiff, who was denied tenure and terminated after taking leave to address postpartum symptoms, could not demonstrate that defendants had treated anyone who took leave for a reason unrelated to pregnancy more favorably), *aff’d* 791 F. App’x 236 (2d Cir. 2019).

²⁶ See Pls. Br. in Opp’n to Mot. to Dismiss at 4, *Barton v. Warren Cty.*, No. 1:19-cv-01061-GTS-DJS (N.D.N.Y. Aug. 7, 2020), ECF No. 5.

²⁷ *Id.*

²⁸ See *Barton*, 2020 WL 4569465, at *14. The court only addressed Barton’s federal claims, since her state law claims were time-barred. *Id.* at *7–8.

²⁹ See *Wal-Mart Stores East, LP*, 2021 WL 664929, at *13.

³⁰ *Id.* at *2. Walmart subsequently changed its policy. *Id.* at *4.

³¹ *Id.* at *10–11.

³² *Id.* at * 10 (noting that the EEOC failed to provide evidence of “what percentage of non-pregnant workers not injured on the job were provided accommodations or forced to take leave”).

³³ See, e.g., *Tomiwa v. PharmEDIUM Servs., LLC*, No. 4:16-CV-3229, 2018 WL 1898458, at *4–5 (S.D. Tex. Apr. 20, 2018) (failing to cite *Young* or apply the Court’s modified *McDonnell Douglas* test when granting the employer summary judgment on a PDA claim brought by a pharmacy technician who was fired after requesting bed rest because, among other reasons, she could not identify similarly situated employees who were provided

was treated more favorably in *nearly identical circumstances*³⁴—an overly rigid standard unsupported by the Court’s decision in *Young*.

These recent decisions further illustrate how steep a barrier *Young* and its comparator standard have erected to proving pregnancy discrimination in court.³⁵ Workers, especially low-wage workers—and particularly women of color—typically do not have access to their coworkers’ personnel files and do not otherwise know how they are being treated. Often, this information is rightly confidential, which means a pregnant worker would be unable to find the information needed to show they are entitled to an accommodation. Most pregnant workers do not have the resources, time, or desire to engage in time-consuming and stressful litigation to attempt to obtain such information. They want, and need, to be able to receive an accommodation promptly, so they can continue earning income while maintaining a healthy pregnancy.

Decades after the PDA’s passage, pregnant workers still face pernicious and unconstitutional gender stereotypes.

Though well-intentioned, the Pregnancy Discrimination Act (PDA), through a combination of legislative blind spots and narrow judicial interpretations, has failed to adequately address sex stereotyping surrounding pregnancy.³⁶ For instance, a study published in June 2020 surveying pregnant women who work in physically demanding jobs, including manufacturing and retail, found that 63 percent of women surveyed worried about facing negative stereotypes related to their pregnancy, and many avoided asking for accommodations, sensing instead that they needed to overexert themselves physically in order to avoid stereotyping.³⁷ As a result, the study’s

accommodations); *Pawlow v. Dep’t of Emergency Servs. & Pub. Prot.*, 172 F. Supp. 3d 568, 575 (D. Conn. 2016) (failing to cite *Young* or apply the Court’s modified *McDonnell Douglas* test when dismissing a PDA claim brought by a police officer who alleged that she was required to go home to express breast milk, was forced to pump in an area used to make bullets, and was punished for needing to pump); *Agee v. Mercedes-Benz U.S. Intern., Inc.*, No. 7:12-cv-4014-SLB, 2015 WL 1419080, at *2 (N.D. Ala. Mar. 26, 2015) (failing to cite *Young* or apply the Court’s modified *McDonnell Douglas* test when granting the employer summary judgment on an assembly line worker’s PDA claim that she was terminated after requesting to work no more than forty hours per week, reasoning that the information she provided about co-workers who were accommodated was not based on her “personal knowledge”).

³⁴ *Penucci-Anderson v. Ochsner Health Sys.*, No. CV 19-271-DPC, 2021 WL 242862, at *5 (E.D. La. Jan. 25, 2021) (emphasis added); see also *Santos v. Wincor Nixdorf, Inc.*, No. 19-50046, 2019 WL 3720441 (5th Cir. Aug. 7, 2019) (finding that the plaintiff failed to make out her *prima facie* case because she “did not present sufficient evidence to allow the conclusion that a non-pregnant employee was treated differently in *nearly identical circumstances*” (emphasis added)).

³⁵ *Bakst Testimony*, *supra* note 3, at 16–17.

³⁶ See *id.* at 21–22 (“Congress enacted the PDA to end longstanding practices by which employers forced women out of the workplace as a matter of course when they became pregnant. These practices were based on the notions that pregnancy is incompatible with work, that a pregnant woman’s proper place was at home, and that pregnancy should signal the end of a woman’s working life.” (quoting Br. of Am. C.L. Union & A Better Balance et al. as Amici Curiae Supporting Petitioner, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (No. 12-1226), at 8)); see also 123 Cong. Rec. 7,539 (1977) (statement of Sen. Williams) (stating that PDA intended to address “the outdated notion that women are only supplemental or temporary workers—earning ‘pin money’ or waiting to return home to raise children full-time”).

³⁷ See Sara Zaske, *Pregnancy Stereotypes Can Lead to Workplace Accidents*, WSU NEWS (June 29, 2020), <https://news.wsu.edu/2020/06/29/pregnancy-stereotypes-can-lead-workplace-accidents>; Lindsey M. Lavaysse & Tahira M. Probst, *Pregnancy and Workplace Accidents: The Impact of Stereotype Threat*, 35 WORK & STRESS 93, 98, 104 (2020), <https://www.tandfonline.com/doi/abs/10.1080/02678373.2020.1774937>; see also Kaylee J. Hackney

authors recommended “creat[ing] better social support for utilizing pregnancy accommodation.”³⁸ Those women who are let go or pushed out for needing accommodation face a dual burden based on stereotyping: they lose critical income and must then fight to re-enter a job market that is especially brutal on pregnant women and new mothers.³⁹

Despite Congress’s efforts via the PDA to eradicate “the pervasive presumption that women are mothers first, and workers second,”⁴⁰ employers, including state actors, continue to participate in and foster unconstitutional gender-role stereotyping⁴¹ in the provision of accommodations to pregnant workers.⁴² For instance, in late 2015, Devyn Williams, a correctional officer trainee,

et al., *Examining the Effects of Perceived Pregnancy Discrimination on Mother and Baby Health*, J. APPLIED PSYCH. 1, 8 (2020), <https://doi.apa.org/doiLanding?doi=10.1037%2Fap10000788>.

³⁸ Zaske, *supra* note 37.

³⁹ Dina Bakst, Opinion, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES, Jan. 30, 2012, at A25.

⁴⁰ *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor–Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor*, 99th Cong., 100 (1986)).

⁴¹ The constitutional right to be free of invidious sex-role stereotyping “at the faultline between work and family” is now well-established. *Hibbs*, 538 U.S. at 738; *see also id.* at 731 & n.5 (rejecting the “sex-role stereotype” that “women’s family duties trump those of the workplace”); *Craig v. Boren*, 429 U.S. 190, 198–99 (1976) (rejecting “outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas’” (internal citations omitted)); *Califano v. Westcott*, 443 U.S. 76, 88 (1979) (rejecting “the baggage of sexual stereotypes that presumes the father has the primary responsibility to provide a home and its essentials, while the mother is the center of home and family life” (internal quotation marks and citations omitted)). Notably, courts and scholars have read such case law to narrow the Court’s 1974 pronouncement in *Geduldig v. Aiello* that “not . . . every legislative classification concerning pregnancy is a sex-based classification.” 417 U.S. 484, 496 n.20 (1974). *See, e.g., Zambrano-Lamhaouhi v. N.Y.C. Bd. of Educ.*, 866 F. Supp. 2d 147, 174 n.11 (E.D.N.Y. 2011) (noting that “*Geduldig* has not been overruled, though *Hibbs* and *Back [v. Hastings on Hudson Union Free Sch. Dist.]*, 365 F.3d 107 (2d Cir. 2004) make clear that discrimination based on *stereotypical assumptions regarding pregnant women* does violate the Equal Protection Clause”); Reva Siegel, *You’ve Come A Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1892 (2006) (“We might read *Hibbs* as limiting *Geduldig* sub silentio, but it seems as reasonable to read *Hibbs* as answering the question *Geduldig* reserved. Where regulation of pregnant women rests on sex-role stereotypes, it is sex-based state action.”); *see also U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (suggesting that the regulation of pregnancy, which may be used to “promot[e] equal employment opportunity,” is a sex-based classification triggering heightened scrutiny) (quoting *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987)).

⁴² *See, e.g., Allen-Brown v. District of Columbia*, 174 F. Supp. 3d 463, 468 (D.D.C. 2016) (police officer denied temporary reassignment); *Burch v. N.C. Dep’t of Pub. Safety*, 158 F. Supp. 3d 449, 455–56 (E.D.N.C. 2016) (special agent denied temporary work assignment); *Jackson v. Battaglia*, 63 F. Supp. 3d 214, 218–19, 223 (N.D.N.Y. 2014) (state employee, a nurse technician, denied daytime shift and assistance changing patients; accused of “using her pregnancy as an excuse for not doing her work”; and fired); *Caravantes v. Oregon*, No. 3:13-cv-00355-PK, 2014 WL 4199204 (D. Or. Aug. 22, 2014) (state employee, a caregiver, denied accommodation for lifting restrictions); *Burnett v. Univ. of Tennessee-Knoxville*, No. 3:09-CV-017, 2010 WL 1687062, at *2 (E.D. Tenn. Apr. 26, 2010) (state employee, a veterinary assistant, denied request to have “minimal contact” with diseased animals); *Borchert v. Oklahoma*, No. 04CV0839 CVE/SAJ, 2006 WL 228913 (N.D. Okla. Jan. 30, 2006) (state employee, a child care attendant, denied accommodation for lifting restriction); *Atteberry v. Dep’t of State Police*, 224 F. Supp. 2d 1208, 1211 (C.D. Ill. 2002) (state police officer denied light duty); *Porter v. Kansas*, 757 F. Supp. 1224, 1227–28 (D. Kans. 1991) (state employee, a psychiatric aide, denied accommodation for lifting restriction); *Davis v. Cal. Dep’t of Corr.*, No. CIV. S-93-1307DFLGGH, 1996 WL 271001 (E.D. Cal. Feb. 23, 1996) (corrections officers denied light duty); *Duffy v. Se. Pa. Transp. Co.*, Civ.A. No. 94-4260, 1995 LW 612922, at *3 (E.D. Pa. Oct. 12, 1995) (transit police officer denied light duty); *Gregory v. Illinois*, No. 87 C 10704, 1989 WL 105243, at *1 (N.D. Ill. Sept. 7, 1989) (state employee, a toll collector, denied accommodation for lifting restriction); *see also Bakst Testimony*, *supra* note 3, at 5 n.15 (collecting cases of public employers’ discriminatory denial of accommodations to pregnant workers). This evidence of persistent discrimination by state actors against pregnant workers in need of

informed her employer, the Alabama Department of Corrections, that she was pregnant.⁴³ Corrections officials immediately began to discuss how to terminate Williams, with one deputy commissioner commenting in an email, “Let me guess, we have to pay this person [Williams] through the entire pregnancy[?]”⁴⁴ At officials’ urging, Williams provided a doctor’s note recommending she be excused from the state’s monthly physical training session due to her pregnancy.⁴⁵ Upon receipt of the note, one corrections official emailed the others, “[t]his [doctor’s note] will give us grounds to separate [Plaintiff] from service.”⁴⁶ The state promptly fired Williams.⁴⁷

In one sense, Williams was lucky: Alabama officials had the poor judgment to document their animus. Their emails made explicit the unconstitutional sex stereotypes motivating their refusal to accommodate. Employers do not always put the animus underlying their failures to accommodate in discoverable emails.⁴⁸ The PDA has failed to root out such intentional yet “subtle [forms of] discrimination that [are] difficult to detect on a case-by-case basis,”⁴⁹ thanks in part to a proof structure that demands onerous and lengthy litigation.⁵⁰ (Williams was still litigating her case nearly five years after she requested accommodation.)

Williams’s experience is not unique. Pregnant workers across the country suffer insidious on-the-job sex stereotyping, too often told that they must choose between being pregnant and being a worker.⁵¹ Stereotyping surrounding pregnancy and motherhood is pervasive, and biases can be intentional, implicit, unconscious, or structural.⁵² For pregnant workers of color, sex stereotyping is accompanied by additional layers of biases stemming from structural racism.⁵³

accommodation warrants Congress’s exercise of power granted to it under Section 5 of the Fourteenth Amendment to remedy and deter violations of equal protection. *See* Reva Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEORGETOWN L. J. 167, 220–221, 225–26 & n.324 (2020) [hereinafter *The Pregnant Citizen*] (documenting “the centuries of state action that helped engender the sex-role understandings about a mother’s place that continue to limit prospects, both for the pregnant and the potentially pregnant, in the marketplace, education, and politics”).

⁴³ *Williams v. Ala. Dep’t of Corr.*, 477 F. Supp. 3d 1236, 1241 (N.D. Ala. 2020).

⁴⁴ *Id.* at 1241–42.

⁴⁵ *Id.* at 1242.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1242–43.

⁴⁸ *See Bakst Testimony*, *supra* note 3, at 7 & n.18.

⁴⁹ *Hibbs*, 538 U.S. at 736.

⁵⁰ *See Bakst Testimony*, *supra* note 3 at 16–17.

⁵¹ *Bakst Testimony*, *supra* note 3, at 4–9 (detailing stories of workers forced to choose between their job and the health of their pregnancy, despite needing only modest accommodations).

⁵² *See Bakst Testimony*, *supra* note 3, at 6–8.

⁵³ *See* JOCELYN FRYE, CTR. FOR AM. PROGRESS, *THE MISSING CONVERSATION ABOUT WORK AND FAMILY: UNIQUE CHALLENGES FACING WOMEN OF COLOR* 11 (2016):

Contemporary researchers have noted that both white women and women of color continue to be constrained by narrow—but sometimes different—views of what are considered their proper roles. Some researchers argue that working white women with children sometimes are questioned about whether they can be both good mothers and good workers, but many women of color with children are expected to go to work and are questioned if they want to stay home. Perhaps stemming from the historical view of family matters being confined to the home, some women of color may find that their success at work hinges—and is judged—on their willingness to deprioritize family in favor of work obligations (footnotes omitted).

The PDA’s failure demands further action by Congress. Where, as here, “Congress ha[s] already tried unsuccessfully” to remedy violations of equal protection and such “previous legislative attempts ha[ve] failed,” then “added prophylactic measures” are justified.⁵⁴ The PWFA is just such a measure, one that is narrow, tailored, and targeted to combat invalid stereotypes about the place of “mothers or mothers-to-be”⁵⁵ in the work sphere. By requiring the reasonable accommodation of pregnant workers only absent undue hardship, the PWFA is carefully crafted to deter and remedy unconstitutional sex discrimination in the hiring, retention, and promotion of women who could potentially become pregnant and soon-to-become mothers.⁵⁶

The Americans with Disabilities Act is inadequate for pregnant workers in need of accommodation.

Although the Americans with Disabilities Act (ADA),⁵⁷ provides an explicit right to reasonable accommodation for workers with disabilities, most pregnancy-related conditions are not deemed “disabilities” as required to trigger protection under the law, even though Congress expanded the ADA in 2008.⁵⁸ As one court recently concluded in 2018, “[a]lthough the 2008 amendments broadened the ADA’s definition of disability, these changes only have had a modest impact when applied to pregnancy-related conditions.”⁵⁹ Another court said, following the expansion of the ADA, that “[o]nly in extremely rare cases have courts found that conditions that arise out of pregnancy qualify as a disability.”⁶⁰

The ADA framework presents two challenges to workers seeking accommodations for pregnancy, childbirth, and related medical conditions. First, the ADA does not protect pregnant workers without complications, but who may require medically necessary accommodations to

See also Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. ON POVERTY L. & POL’Y 1, 39–40 (2012).

⁵⁴ *Hibbs*, 538 U.S. at 737; *see also* *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 314 (1966) (recognizing that additional legislation was “an appropriate means for carrying out Congress’ constitutional responsibilities” to enforce the Fifteenth Amendment, because litigation under the existing statutory scheme was too “onerous,” “slow,” and “ineffective” to eliminate race discrimination in voting).

⁵⁵ *Hibbs*, 538 U.S. at 736 (citation omitted).

⁵⁶ *See The Pregnant Citizen*, *supra* note 42, 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.”); *id.* at 225 n.322 (citing A BETTER BALANCE & NAT’L WOMEN’S LAW CTR., IT SHOULDN’T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS 7 (2013),

<https://www.abetterbalance.org/resources/it-shouldnt-be-a-heavy-lift/> (“When a woman worker is already seen as an outsider, her pregnancy and any requests for changes in her job related to the pregnancy can be taken as further evidence that the job is inappropriate for a woman, leading employers to refuse to make accommodations.”)).

⁵⁷ 42 U.S.C. §§ 12101–12213 (2012).

⁵⁸ *See Bakst Testimony*, *supra* note 3, at 17.

⁵⁹ *Scheidt v. Floor Covering Assocs., Inc.*, No. 16-cv-5999, 2018 WL 4679582, at *6 (N.D. Ill. Sept. 28, 2018).

⁶⁰ *Sam-Sekur v. Whitmore Grp., Ltd.*, No. 11-CV-4938 (JFB)(GRB), 2012 WL 2244325, at *8 (E.D.N.Y. June 15, 2012); *see also* *Wanamaker v. Westport Bd. of Educ.*, 899 F.Supp.2d 193, 211–12 (D. Conn. 2012) (noting that “even under the ADAAA’s broadened definition of disability[,] short term impairments would still not render a person disabled within the meaning of the statute” and holding that the plaintiff, a teacher, could not survive her ADA claim because she “failed to allege that her transverse myelitis limit[ed] a major life activity and that any impairment as a result of her transverse myelitis was not for a short period of time”).

prevent disabilities from arising.⁶¹ Second, even where pregnant workers suffer serious complications related to pregnancy, courts still have been unwilling to recognize such complications as ADA-qualifying disabilities, deeming them to not amount to an “impairment” and/or substantially limit a major life activity.⁶²

Examples of pregnancy-related complications that did not merit ADA protections even after Congress amended the law include high-risk pregnancy, hyperemesis gravidarum, and pregnancy-related bleeding. For instance, although Shakirat Tomiwa, a pharmacist in Texas, had to undergo two emergency surgeries related to her high-risk pregnancy, the court concluded that she did not have an impairment that constituted a “disability” and dismissed her ADA claim.⁶³ Likewise, Sylvia Wonasue went to the emergency room because she “felt weak, ‘almost faint’ and nauseous, and she was vomiting and bleeding.”⁶⁴ There, the doctor informed her she was pregnant and diagnosed her with hyperemesis gravidarum, a severe form of morning sickness, and hypokalemia, a low level of potassium.⁶⁵ Despite these serious diagnoses, however, the court dismissed her accommodation claim, finding that the “plaintiff ha[d] not shown that she had a disability for purposes of the ADA.”⁶⁶

As recently as late 2020, courts have continued to affirm that pregnancy, absent complications, is not an ADA-qualifying disability meriting accommodation.⁶⁷ Courts also continue to limit the types of pregnancy-related complications that qualify as disabilities. For instance, in 2020, one court held that a plaintiff with pregnancy complications, including preeclampsia, did not have an ADA-qualifying disability because she had “presented no admissible evidence of her pregnancy complications or explained how they disabled her”⁶⁸—despite the fact that preeclampsia is one of the three leading causes of maternal mortality.⁶⁹

Over the last few years, states have worked to remedy the shortcomings of the PDA and ADA by enacting measures to afford additional protections to pregnant workers in need of

⁶¹ See *Bakst Testimony*, *supra* note 3, at 17–19.

⁶² See *id.* at 19–20; see also Dina Bakst, Responses to Questions for the Record at 5–8, *Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. On Ed. & Lab.*, 116th Cong. (2019) [hereinafter *Bakst Questions for the Record*].

⁶³ See *Bakst Questions for the Record*, *supra* note 62, at 7 (citing *Tomiwa v. PharMEDium Servs., LLC*, No. 4:16-CV-3229, 2018 WL 1898458, at *5 (S.D. Tex. Apr. 20, 2018) (dismissing plaintiff’s ADA claim because, despite the two emergency surgeries she had to undergo for a high risk pregnancy, “[a]bsent unusual circumstances, pregnancy and related medical conditions do not constitute a physical impairment’ under the ADA”).

⁶⁴ *Wonasue v. Univ. of Md. Alumni Ass’n*, 984 F. Supp. 2d 480, 482 (D. Md. 2013).

⁶⁵ *Id.* at 483–84, 490.

⁶⁶ *Id.* at 490. For a discussion about why the Family and Medical Leave Act is also an insufficient solution for pregnant workers in need of accommodations, see *Bakst Testimony*, *supra* note 3, at 20–21.

⁶⁷ See, e.g., *Andrews v. Eaton Metal Prods., LLC*, No. 20-CV-00176-PAB-NYW, 2020 WL 5821611, at *8 (D. Colo. Sept. 8, 2020), *report and recommendation adopted*, No. 20-CV-00176-PAB-NYW, 2020 WL 5815059 (D. Colo. Sept. 30, 2020) (holding that, under federal law, Plaintiff’s “pregnancy . . . do[es] not fall under the scope of the ADA” and “thus, Plaintiff’s allegations are insufficient to state a claim under the ADA for discrimination, failure to accommodate, or failure to promote”).

⁶⁸ *Shaw v. T-Mobile*, No. 18-2513-DDC-GEB, 2020 WL 5231309, at *12 (D. Kan. Sept. 2, 2020).

⁶⁹ Labib Ghulmiyyah & Baha Sibai, *Maternal Mortality from Preeclampsia/Eclampsia*, 36 SEMINARS IN PERINATOLOGY 56 (2012), <https://www.sciencedirect.com/science/article/abs/pii/S0146000511001571>.

accommodation.⁷⁰ Thirty states and five cities, including Tennessee, Kentucky, South Carolina, West Virginia, Illinois, Nebraska, and Utah, now have laws requiring employers to provide accommodations for pregnant employees.⁷¹ All of the laws passed in recent years are highly similar to the federal legislation, and all passed with bipartisan, and often unanimous, support.⁷² Many, including Tennessee’s and Kentucky’s laws, were championed by Republican legislators.⁷³ State-by-state change, however, is not enough. It is federal law that is at the root of the problem, and it is federal law that must be fixed. We need the PWFA.

The Pregnant Workers Fairness Act is a Critical Economic Security and Maternal Health Measure

Different pregnant workers have different needs, and many pregnant workers may require no accommodations at all. Those who stand to be most impacted by this bill are women working in physically demanding jobs, often low-wage jobs that are disproportionately held by women of color and immigrant women.⁷⁴ The PWFA is a recognition that the injustices pregnant women suffer can no longer be sidelined.

Congress must shore up familial economic security, especially during this economic recession.

Pregnant workers, especially women in low-wage and physically demanding jobs, experience dire economic consequences when pushed out or terminated for needing accommodations. Nearly two-thirds of women are the primary or co-breadwinner for their families;⁷⁵ those who are pushed onto leave often must use up saved paid or unpaid leave they had hoped to reserve to recover from childbirth, and then, unable to afford more time without a paycheck, must return to the workforce much earlier than planned or medically advisable. In addition to income, workers often lose health insurance, forcing them to delay or avoid critical pre- or post-natal care, or leaving them with crippling medical bills.⁷⁶ Prospects of promotion, advancement, and retirements savings also disappear, especially as it becomes more difficult to reenter the workforce after becoming a mother.⁷⁷

For example, Armanda Legros—a single mother forced out of work because her employer refused to provide a lifting accommodation—lost the ability to feed her children.⁷⁸ “Once my

⁷⁰ See A BETTER BALANCE, FACT SHEET: STATE AND LOCAL PREGNANT WORKERS FAIRNESS LAWS, <https://www.abetterbalance.org/resources/fact-sheet-state-and-local-pregnant-worker-fairness-laws/> (last updated Jan. 28, 2021).

⁷¹ *Id.*

⁷² *Id.*

⁷³ See Hearing on H.B. 986 Before the H. Subcomm. on Employee Affairs (Tenn. Mar. 19, 2019) (Statement of Rep. Coley); Hearing on S.B. 18 Before the S. Comm. on the Judiciary, 2019 Gen. Assemb., Reg. Sess. (Ky. Feb. 14, 2019) (statement of Sen. Alice Forgy Kerr), <https://www.ket.org/legislature/archives/?nola=WGAOS+020057&stream=aHR0cHM6Ly81ODc4ZmQxZWQ1NDIyLnN0cmVhbWxvY2submV0L3dvcnRwcmVzcy9fZGVmaW5zdF8vbXA0OndnYW9zL3dnYW9zXzIyMDA1Ny5tcDQvcGxheWxpc3QubTN1OA%3D%3D&part=2>.

⁷⁴ See *Bakst Testimony*, *supra* note 3, at 8, 27.

⁷⁵ *Id.* at 4.

⁷⁶ *Id.* at 8.

⁷⁷ *Id.* at 8–9.

⁷⁸ *Id.* at 4.

baby arrived,” she told Congress in 2014, “just putting food on the table for him and my four-year-old was a challenge. I was forced to use water in his cereal at times because I could not afford milk.”⁷⁹ Natasha Jackson—the primary breadwinner for her family—was also forced out of her job because her employer refused to let her work with a lifting restriction in place.⁸⁰ Her dream of home ownership vanished and, instead, her family struggled to find stable housing.⁸¹

Preserving pregnant workers’ economic security is especially important at a time when the COVID-19 pandemic has disproportionately harmed women, especially women of color in low-wage occupations,⁸² with many experts suggesting that it could take years to undo the damage to women’s economic equality, and that many women will experience long-term damage to their career trajectories, earnings, and retirement security.⁸³ While the PWFA was needed long before the pandemic, it has taken on a new urgency as a critical measure necessary to keep women healthy and attached to the workforce.

Pregnancy accommodations are critical for maternal health, especially during the COVID-19 pandemic.

Pregnancy accommodation are a critical maternal health measure, and one tool to help address the Black maternal health crisis, specifically. Accommodations are often low or no-cost⁸⁴ but high impact, helping to prevent miscarriage, preterm birth, low-birth weight, preeclampsia, birth defects, and more.⁸⁵ Not only are accommodations a critical public health measure but they also help drive down health care costs. As the March of Dimes noted in its 2020 Report Card, the average cost of a preterm birth is now \$65,000.⁸⁶

For Black women, “putting a national pregnancy accommodation standard in place . . . has the potential to improve some of the most serious health consequences Black pregnant people

⁷⁹ *Id.*

⁸⁰ *Id.* at 6.

⁸¹ *Id.*; see also, *id.* at 4–6, 14–16, 18–19 (describing other pregnant workers’ experiences).

⁸² See Lulu Garcia-Navarro, *The Economic Fallout of the Pandemic Has Had a Profound Effect on Women*, NPR (Jan. 31, 2021), <https://www.npr.org/2021/01/31/962528953/the-economic-fallout-of-the-pandemic-has-had-a-profound-effect-on-women>; see also Koeze, *supra* note 8.

⁸³ See, e.g., CONGRESSIONAL RES. SERV., *THE COVID-19 PANDEMIC: LABOR MARKET IMPLICATIONS FOR WOMEN* (2020), <https://fas.org/sgp/crs/misc/R46632.pdf>; Julie Kashen, Sarah Jane Glynn, & Amanda Novello, *How COVID-19 Sent Women Backward*, CTR. FOR AM. PROGRESS (Oct. 30, 2020, 9:04 AM), <https://www.americanprogress.org/issues/women/reports/2020/10/30/492582/covid-19-sent-womens-workforce-progress-backward/>; André Dua et al., MCKINSEY, *ACHIEVING AN INCLUSIVE US ECONOMIC RECOVERY* (2021), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/achieving-an-inclusive-us-economic-recovery>.

⁸⁴ JOB ACCOMMODATION NETWORK, *ACCOMMODATION AND COMPLIANCE SERIES, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 4* (2015), <https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628>.

⁸⁵ See LOUISVILLE DEP’T OF PUB. HEALTH & WELLNESS, *PREGNANT WORKERS HEALTH IMPACT ASSESSMENT 5–7* (2019), <https://louisvilleky.gov/document/pregnant-workers-hia-final-02182019pdf>; see also *Bakst Testimony*, *supra* note 3, at 26–28.

⁸⁶ *2020 March of Dimes Report Card: United States*, https://www.marchofdimes.org/materials/US_REPORTCARD_FINAL_2020.pdf (last visited Mar. 13, 2020).

experience.”⁸⁷ As the Black Mamas Matter Alliance and other organizations dedicated to promoting Black maternal health wrote in a September 2020 letter to Congress in support of the Pregnant Workers Fairness Act:

Faced with the threat of termination, loss of health insurance, or other benefits, Black pregnant people are often forced to keep working which can compromise their health and the health of their pregnancy. . . . Black women have the highest incidence of preterm birth and yet we know that workplace accommodations such as reducing heavy lifting, bending, or excessive standing can help prevent preterm birth, the leading cause of infant mortality in this country. Black women are also at higher risk of preeclampsia, which is one of the leading causes of maternal mortality. We are still learning about how to prevent this dangerous medical condition, yet we know that simply allowing workers to take bathroom breaks can prevent urinary tract infections which are strongly associated with preeclampsia.⁸⁸

In addition to the health impacts described above, workplace accommodations may also be a powerful tool to reduce COVID-19 transmission, which is especially critical since pregnant people have both a higher contraction rate of COVID-19⁸⁹ and a far higher rate of serious illness or death if infected with COVID-19.⁹⁰ Accommodations such as protective equipment, changes in schedule to avoid customer contact, protective barriers, or remote work could help reduce transmission of COVID-19, especially in frontline industries.

The Pregnant Workers Fairness Act Is the Solution

The Pregnant Workers Fairness Act will help remedy the systemic health, economic, and racial injustice pregnant workers experience. H.R. 1065, the Pregnant Workers Fairness Act (PWFA), would ensure pregnant workers are not forced off the job and denied the reasonable accommodations they need to protect their health and support their families.⁹¹ The PWFA would require employers to provide reasonable accommodations for pregnant workers with known limitations related to pregnancy, childbirth, or related medical conditions unless doing so would

⁸⁷ Letter from Black Mamas Matter Alliance, et al., to U.S. Representatives 2 (Sept. 11, 2020), https://www.abetterbalance.org/wp-content/uploads/2020/09/PWFA_SignOnLetterForFloorVote_BlackMaternalHealthLetter.pdf.

⁸⁸ *Id.* at 1–2 (internal quotations and citation omitted).

⁸⁹ See Erica M. Lokken, et al., *Higher SARS-CoV-2 Infection Rate in Pregnant Patients*, AM. J. OBSTETRICS & GYN. 1, 10 (2021), [https://www.ajog.org/article/S0002-9378\(21\)00098-3/pdf](https://www.ajog.org/article/S0002-9378(21)00098-3/pdf) (“The SARS-CoV-2 infection rate in pregnant people was 70% higher than similarly aged adults [in the state surveyed], which could not be completely explained by universal screening at delivery. Pregnant patients from nearly all racial/ethnic minority groups and patients receiving medical care in a non-English language were overrepresented.”).

⁹⁰ See Erica M. Lokken, et al., *Disease Severity, Pregnancy Outcomes, and Maternal Deaths Among Pregnant Patients with Severe Acute Respiratory Syndrome Coronavirus 2 Infection in Washington State*, AM. J. OBSTETRICS & GYN. 1.e1, 1.e2 (2020), <https://www.ajog.org/action/showPdf?pii=S0002-9378%2821%2900033-8> (“[T]he coronavirus disease 2019—associated hospitalization rate was 3.5-fold higher than in similarly aged adults in [the state surveyed]. . . . The COVID-19 case-fatality rate in pregnant patients was 13.6-fold higher than similarly aged individuals with COVID-19.”).

⁹¹ See Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. (2021).

pose an undue hardship to the employer—the same familiar standard in place for workers with disabilities.⁹²

At the Pregnant Workers Fairness Act markup in January 2020, the Committee introduced an Amendment in the Nature of a Substitute, making several key amendments to the introduced language.⁹³ That version of the bill passed the House in September 2020 by a vote of 329-73.⁹⁴

First, the House-passed version of the PWFA included a definition of the term “known limitation.”⁹⁵ “Known limitation” is defined in the bill as a “physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee’s representative has communicated to the employer whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).”⁹⁶ This definition is critical as it indicates to employers and others interpreting the law that a pregnant worker’s physical or mental condition need not meet the ADA definition of disability in order to merit accommodations. This definition therefore encapsulates scenarios where, for example, a pregnant worker may need an additional water or bathroom break to prevent dehydration or a urinary tract infection, or may need a reprieve from lifting to prevent miscarriage. This language makes clear that a physical condition or medical need may necessitate an accommodation based on pregnancy, childbirth, or a related medical condition, even though the condition is not a disability.

The House-passed version also added “qualified” language to the bill such that employers must provide reasonable accommodations “to the known limitations related to the pregnancy, childbirth, or related medical conditions of a *qualified employee*, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.”⁹⁷ The House-passed version also added a definition of “qualified employee,” to mean “an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if — (A) any inability to perform an essential function is for a temporary period; (B) the essential function could be performed in the near future; and (C) the inability to perform the essential function can be reasonably accommodated.”⁹⁸

⁹² *Id.* at § 5(7).

⁹³ Amendment in Nature of a Substitute: Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (2019), <https://edlabor.house.gov/imo/media/doc/HR2694ANS.pdf>.

⁹⁴ Pregnant Workers Fairness Act, H.R. 2694: Roll Call No. 195, 116th Cong. (2020), <https://clerk.house.gov/Votes/2020195>.

⁹⁵ Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. § 5(5) (2020), <https://www.congress.gov/bill/116th-congress/house-bill/2694/text> (Engrossed in House).

⁹⁶ *Id.*

⁹⁷ *Id.* at § 2(1).

⁹⁸ *Id.* at § 5(6). Similar to the ADA context, this temporary excusal of essential functions means that an accommodation like time off can qualify as a reasonable accommodation under the PWFA, including time off to recover from childbirth. *See, e.g. Seward v. City*, No. 1:17-cv-00109-JNP-DBP, 2020 WL 362824 (D. Utah Jan. 22, 2020) (denying employer’s motion for summary judgment in ADA accommodation case because “[a] temporary reprieve from an essential function, such as a leave of absence or a light-duty assignment, for treatment of or recovery from an injury can be a reasonable accommodation”); *Napoli v. Greenwood Gaming & Entertainment*,

Additionally, the House-passed version also included a provision making clear it is unlawful for an employer to “require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process.”⁹⁹ It also included one other notable change which aligned the bill more closely with the ADA and specified that “damages may not be awarded under section 1977A of the Revised Statutes (42 U.S.C. 1981a) if the covered entity demonstrates good faith efforts, in consultation with the employee with known limitations related to pregnancy, childbirth, or related medical conditions who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such employee with an equally effective opportunity and would not cause undue hardship on the operation of the covered entity.”¹⁰⁰

At the PWFA markup during the 116th Congress, due to concerns raised, an amendment that would exempt religious employers from complying with the PWFA was proposed.¹⁰¹ While the amendment failed, it bears explaining why such an amendment is unnecessary and potentially harmful to the health and wellbeing of pregnant workers. According to an A Better Balance legal analysis, none of the nearly 1,000 court cases invoking the Title VII religious exemption involve an employer objecting to providing pregnancy accommodations;¹⁰² therefore from a legal standpoint, inserting an exemption for religious employers is simply extraneous and unnecessary.

Moreover, employers, particularly religious employers should *want* to make sure their employees’ pregnancies are safe and healthy, especially now. In January 2021, a study found that pregnant women are 13 times more likely to die than other similarly aged people if they contract COVID-19.¹⁰³ For pregnant essential workers who must continue working in order to keep feeding their families, the ability to get an accommodation to protect themselves from contracting COVID-19 can be a matter of life and death.

In addition, let us remember that most of these accommodations are of no cost or minimal cost, such as extra bathroom breaks, access to water, and lifting restrictions.¹⁰⁴ I would hope that most

Inc., No. 18-2993, 2019 WL 6327202 (E.D. Pa. Nov. 25, 2019); *Gilbert v. Kimberly-Clark Pennsylvania, LLC*, No. 16-6602, 2018 WL 5292113 (E.D. Pa. Oct. 25, 2018) (denying employer’s motion for summary judgment for plaintiff who needed leave accommodation and citing *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 151 (3d Cir. 2004) for proposition that leave can be a reasonable accommodation under the ADA where an employee would be able to perform their essential functions in the “near future”).

⁹⁹ Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. § 2(2) (2020), <https://www.congress.gov/bill/116th-congress/house-bill/2694/text> (Engrossed in House).

¹⁰⁰ *Id.* at § 3(g).

¹⁰¹ Substitute Amendment to the Nature of a Substitute: Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (2019), <https://edlabor.house.gov/imo/media/doc/FoxxA2HR2694.pdf>.

¹⁰² Analysis on file with A Better Balance.

¹⁰³ See Erica M. Lokken et al, *supra* note 90; see also *COVID-19 Increases Mortality Rate Among Pregnant Women*, UW MEDICINE NEWSROOM (Jan. 27, 2021), <https://newsroom.uw.edu/news/covid-19-increases-mortality-rate-among-pregnant-women>.

¹⁰⁴ JOB ACCOMMODATION NETWORK, ACCOMMODATION AND COMPLIANCE SERIES, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 4 (2015), <https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628>.

employers, especially those that are religious, would be amenable to providing such simple measures to their employees to safeguard their well-being.

Finally, for an exemption that is already unnecessary, ample escape hatches already exist for religious employers. The Title VII religious exemption for religious organizations¹⁰⁵ will remain in place after the PWFA’s passage. Further, the bill does not include a carveout of the Religious Freedom Restoration Act¹⁰⁶ and a religious employer could still claim an exemption under that law. In addition, the “ministerial exception” which exempts certain religious employers from complying with Title VII and other civil rights laws as related to “ministerial” employees,¹⁰⁷ may also apply to the PWFA. Finally, religious employers could also bring a constitutional Free Exercise Clause claim that providing accommodations burdens or violates their religious exercise.¹⁰⁸

With an overwhelmingly supportive vote in the House just six months ago—with 226 Democrats and 103 Republicans voting in favor of the same exact bill as is before you today¹⁰⁹—the Pregnant Workers Fairness Act deserves to be signed into law by this Congress. For the pregnant workers whose lives this bill will indelibly change, the bill is not just due, but long overdue.

The PUMP for Nursing Mothers Act

As we hear over and over again on A Better Balance’s free legal helpline, new mothers returning to the workplace face unfair treatment because their employers refuse to provide them with the time and space needed to express breast milk, forcing them to choose between a paycheck and providing breast milk for their child. Some workers reduce their schedules, are terminated, or are forced out of the workplace, foregoing vital income and familial economic security because their workplaces are so hostile to their need to express milk.¹¹⁰ Others simply stop breastfeeding altogether, sometimes even before entering the workplace, perceiving (typically correctly) the challenges as insurmountable. Too many who continue in their jobs struggle with harassment, health repercussions, and dwindling milk supply to feed their babies. These challenges face many new working parents, but disproportionately low-wage working mothers of color. These harsh workplace conditions for breastfeeding parents represent a fundamental unfairness and inequity in our legal system—and reinforce the stereotype that motherhood and employment are irreconcilable.

¹⁰⁵ 42 U.S.C. § 2000e-1(a).

¹⁰⁶ 42 U.S.C. § 2000bb *et seq.*

¹⁰⁷ See *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012); see also *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S.Ct. 2049 (2020).

¹⁰⁸ U.S. CONST. amend. I cl. 2.

¹⁰⁹ Pregnant Workers Fairness Act, H.R. 2694: Roll Call No. 195, 116th Cong. (2020), <https://clerk.house.gov/Votes/2020195>.

¹¹⁰ LIZ MORRIS, JESSICA LEE, & JOAN C. WILLIAMS, CTR. FOR WORKLIFE LAW, EXPOSED: DISCRIMINATION AGAINST BREASTFEEDING WORKERS 4 (2018) [hereinafter EXPOSED], <https://www.pregnantatwork.org/wp-content/uploads/WLL-Breastfeeding-Discrimination-Report.pdf> (finding that “almost three-fourths of breastfeeding discrimination cases involved economic loss, and nearly two-thirds ended in job loss.”).

For instance, Sarah, a healthcare worker in Kansas, was a certified medication assistant at a long-term care facility with thousands of employees, yet faced an uphill battle when she wanted to breastfeed her new baby. Her supervisor told her she could only pump on her lunch break, despite a more frequent need. By contrast, at least six of Sarah’s co-workers regularly took outside smoking breaks on the clock—multiple times per day, for 5 to 15 minutes each—without facing any repercussions at work.

Sarah’s supervisor also made disparaging comments about her choice to breastfeed her baby, like “I gave my baby the bottle—I couldn’t imagine having a baby attached to me.” She also followed Sarah when she attempted to take pumping breaks, preventing her from taking the breaks. When Sarah eventually resorted to pumping in her car on her lunch break, her supervisor would come to the parking lot to try to stop her from pumping, prompting Sarah to ask, “if you don’t want me pumping in this facility and you don’t want me to pump in my car, where do you want me to pump?” Her supervisor responded, “I don’t know.” Even on the occasions Sarah was provided a space to pump, it was not private; one time another employee walked in on her while she was pumping, then told her to “hurry up” and refused to leave the room. Because of this harassment, Sarah frequently became engorged and suffered from painful clogged milk ducts. Her milk supply also dropped. Sarah was paid by the hour and likely covered by the 2010 Break Time for Nursing Mothers Act. Yet, because of the limited enforcement provisions available, she fell through the cracks of the law.

Izabel,¹¹¹ a dental assistant in North Carolina, was fired shortly after submitting a doctor’s note requesting three 15-minute pumping breaks during her shift. Prior to submitting the note, she had requested pumping breaks and her employer told her she could only pump once per day during her lunch break—which did not medically meet her breastfeeding needs—even though there were roughly three other dental assistants working in the office who could have helped her with her job duties while she took breaks. Although likely covered by the 2010 Break Time for Nursing Mothers Act, because of the law’s limited enforcement, Izabel’s ability to get her job back or be made whole were extremely limited.

Current Federal Law Leaves Behind Millions of Breastfeeding Workers

According to a United States Centers for Disease Control and Prevention survey, over 84 percent of infants born in 2017 were breastfed for at least some amount of time, making breastfeeding the norm among American mothers.¹¹²

More than half of employees who worked during their pregnancies return to work before their babies are three months old and as many as one in four return within just two weeks of giving birth.¹¹³ Many workers choose to continue to breastfeed after they return to work; these employees need to express (or “pump,” using a manual or electric breast pump that uses suction to remove milk for the baby to later drink) breast milk on a regular schedule in order to avoid

¹¹¹ Name changed to protect privacy and confidentiality.

¹¹² *Breastfeeding Report Card*, CTRS. FOR DISEASE CONTROL & PREVENTION (2020) [hereinafter *Breastfeeding Report Card*], <https://www.cdc.gov/breastfeeding/data/reportcard.htm>.

¹¹³ Sharon Lerner, *The Real War on Families: Why the U.S. Needs Paid Leave Now*, IN THESE TIMES (Aug. 18, 2015), <https://inthesetimes.com/article/the-real-war-on-families>.

serious health consequences.¹¹⁴ Many more might wish to continue to breastfeed, but find it challenging without workplace supports—potentially explaining why, although 84 percent of infants born in 2017 breastfed for some period of time, only slightly more than 58 percent were still breastfeeding at six months.¹¹⁵

Research shows that breastfeeding has substantial health benefits for both mothers and babies. Breastfeeding protects babies from acute illnesses, such as infections and diarrhea, which can be serious especially in very young and vulnerable babies like those born preterm, as well as from longer-term conditions like childhood obesity and asthma.¹¹⁶ Likewise, as Nikia Sankofa, the Executive Director of the U.S. Breastfeeding Committee, made clear in testimony before the House Subcommittee on Health, Employment, Labor, and Pensions and the Subcommittee on Workforce Protections in January 2020, the health benefits for mothers who breastfeed are significant, and include lower risk of breast cancer and heart disease.¹¹⁷ Medical consensus urges breastfeeding infants for at least their first year of life in order to achieve these health benefits.¹¹⁸

Congress has recognized the importance of ensuring that workers are able to have the time and space they need to express breast milk by passing section 4207 of the Patient Protection and Affordable Care Act (Public Law 111-148; 124 Stat. 577) (hereinafter referred to as the “2010 Break Time for Nursing Mothers Act”). This groundbreaking law amended section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) and requires employers to provide “reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk.”

The 2010 Break Time for Nursing Mothers Act also states that employers must provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.” This provision recognizes the recommended sanitary requirements for ensuring breast milk is not contaminated so as not to spread dangerous pathogens to infants,¹¹⁹ as well as the fact that many breastfeeding workers

¹¹⁴ See, e.g., Tara Haelle, *Women Who Have to Delay Pumping Risk Painful Breast Engorgement*, NPR (May 26, 2016, 1:53 PM), <https://www.npr.org/sections/health-shots/2016/05/26/479288270/women-who-have-to-delay-pumping-risk-painful-breast-engorgement>.

¹¹⁵ *Breastfeeding Report Card*, *supra* note 112.

¹¹⁶ See, e.g., Liesbeth Duijts et al., *Prolonged and Exclusive Breastfeeding Reduces the Risk of Infectious Diseases in Infancy*, 126 *PEDIATRICS* e18 (2010); Laura M. Lamberti et al., *Breastfeeding and the Risk for Diarrhea Morbidity and Mortality*, 11 *BMC PUB. HEALTH* 1 (2011); Thomas Harder et al., *Duration of Breastfeeding and Risk of Overweight: A Meta-Analysis*, 162 *AM. J. EPIDEMIOLOGY* 397 (2005); Christian M. Dogaru et al., *Breastfeeding and Childhood Asthma: Systematic Review and Meta-Analysis*, 179 *AM. J. EPIDEMIOLOGY* 1153 (2014).

¹¹⁷ *Expecting More: Addressing America’s Maternal and Infant Health Crisis: Hearing Before the Subcomm. on Health, Employment, Labor, & Pensions of the H. Comm. on Ed. & Lab. & the Subcomm. on Workforce Protections of the H. Comm. on Ed. & Lab.*, 116th Cong. (2020) [hereinafter *Sankofa Testimony*], <https://edlabor.house.gov/imo/media/doc/SankofaTestimony01282020.pdf> (testimony of Nikia Sankofa); see also Stanley Ip et al., *Breastfeeding and Maternal and Infant Health Outcomes in Developed Countries*, 153 *EVIDENCE REP./TECH. ASSESSMENT* 1 (2007); Sanne A.E. Peters et al., *Breastfeeding and the Risk of Maternal Cardiovascular Disease: A Prospective Study of 300,000 Chinese Women*, 6 *J. AM. HEART. ASS’N* 1 (2017).

¹¹⁸ See *Sankofa Testimony*, *supra* note 117, at 1-2; see also, e.g., AM. ACAD. OF PEDIATRICS, *Where We Stand: Breastfeeding*, <https://www.healthychildren.org/English/ages-stages/baby/breastfeeding/Pages/Where-We-Stand-Breastfeeding.aspx> (last visited March 13, 2021).

¹¹⁹ See, e.g., *Infant Feeding*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthywater/hygiene/healthychildcare/infantfeeding.html> (last visited Mar. 13, 2021); *How to*

must feel safe in order to express milk, and privacy is an important component of that physical requirement.¹²⁰ However, there are three critical problems in current law.

The 2010 Break Time for Nursing Mothers Act excludes millions of workers.

First, despite the law’s good intentions, it left millions of nursing mothers without a clear right to pump at work. Specifically, because the 2010 Break Time for Nursing Mothers Act’s provisions amended section 7—the overtime provisions—of the Fair Labor Standards Act of 1938 (“FLSA”; 29 U.S.C. 207), those workers exempted from overtime—nearly nine million women of childbearing age—are excluded from the law’s protections.¹²¹ These millions of workers have no federal right affirmatively requiring their employer to provide them break time and space to express breast milk.

FLSA exempts many categories of workers from its overtime requirements—such as many agricultural and transportation workers—and thus all those workers are also excluded from the lactation break time and space requirements.¹²² FLSA’s overtime provisions also exempt executive, administrative, and professional (EAP) employees earning at least a \$684 per week (or \$35,568 per year) salary.¹²³ Because such earnings fall well below 150 percent of the federal 2020 poverty rate for a family of four,¹²⁴ many employees who are exempt from overtime requirements—and thus have no right to break time and space to express breast milk—often struggle economically, despite a stereotype that the EAP exemption only applies to high-earning workers. Moreover, regardless of one’s salary, a right to break time and space for expressing breast milk is a necessity.

There is no principled reason why these employees should be denied the law’s protections: each industry is fully capable of standard or innovative solutions to ensure their employees do not have to choose between breastfeeding and their jobs. For example, as will be explained further below, the U.S. Department of Health and Human Services’ Office on Women’s Health maintains an extensive and detailed website describing how various industries, such as restaurant and retail, can provide lactation break time and space, including video testimonials, employer best practices examples, and other resources.¹²⁵ In 2021, there is simply no excuse not to meet the needs of breastfeeding workers.

Keep Your Breast Pump Kit Clean: Science Behind the Recommendations, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthywater/hygiene/healthychildcare/infantfeeding/science-behind-recommendations.html> (last visited Mar. 13, 2021).

¹²⁰ See, e.g., Su-Ying Tsai, *Impact of a Breastfeeding-Friendly Workplace on an Employed Mother’s Intention to Continue Breastfeeding After Returning to Work*, 8 BREASTFEEDING MED. 210, 215 (2013); Kathryn G. Dewey, *Maternal and Fetal Stress Are Associated with Impaired Lactogenesis*, 131 J. NUTRITION 3012S (2001).

¹²¹ EXPOSED, *supra* note 110, at 26.

¹²² 29 U.S.C.A. § 213 (2021).

¹²³ 29 U.S.C.A. § 213(a)(1) (2021) as defined by regulations, 29 C.F.R. Part 541.

¹²⁴ DEP’T OF HEALTH & HUMAN SERVS., POVERTY GUIDELINES, <https://aspe.hhs.gov/system/files/aspe-files/107166/2020-percentage-poverty-tool.pdf> (last visited Mar. 13, 2021).

¹²⁵ *Lactation Break Time and Space in All Industries*, U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE ON WOMEN’S HEALTH, <https://www.womenshealth.gov/supporting-nursing-moms-work/lactation-break-time-and-space-all-industries> (last visited Mar. 13, 2021).

The 2010 Break Time for Nursing Mothers Act has inadequate remedies for employees whose rights have been violated.

Second, because of the 2010 Break Time for Nursing Mothers Act’s placement in FLSA’s overtime provisions, an employee who is denied break time and space lacks any effective remedy—a likely unintentional¹²⁶ gap in protection. The remedy available for an overtime violation is to pay a worker the overtime owed to them (and an equal amount in liquidated damages).¹²⁷ Such a remedy makes sense in the context of overtime: an employee who works forty-five hours in a week without overtime pay should be compensated with the missing payment to be made whole.

For a breastfeeding worker who has been denied time and space to pump, however, this remedy is nonsensical. A breastfeeding worker who is told she cannot clock out to pump has been denied an *unpaid* break. Therefore, she has no entitlement to payment and the law’s contemplated remedy—compensation for wages—is meaningless to her. Similarly, a worker denied a sanitary, private space to pump (for example, by being directed to pump in a bathroom) is also left without any meaningful way to enforce her rights.

As the Department of Labor put it:

Section 7(r) of the FLSA does not specify any penalties if an employer is found to have violated the break time for nursing mothers requirement. In most instances, an employee may only bring an action for unpaid minimum wages or unpaid overtime compensation and an additional equal amount in liquidated damages. 29 U.S.C. 216(b). Because employers are not required to compensate employees for break time to express breast milk, in most circumstances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks.¹²⁸

Paradoxically, workers denied time or space to pump have more remedies available under a retaliation claim, but *only* when they make a complaint to their employer that their FLSA rights have been violated, and their employer then retaliates against them for making the complaint.¹²⁹

¹²⁶ See *Schmehl v. Spokane Co.*, No: 2:18-CV-0157-TOR, 2019 WL 179574 (E.D. Wa. Jan. 11, 2019) (granting employer’s motion for partial summary judgment clarifying that damages in plaintiff’s FLSA claim were limited to unpaid wages and overtime and noting in a footnote that “[i]n 2010, Congress amended the FLSA to include 29 U.S.C. § 207(r), but Congress did not amend 29 U.S.C. § 216 at that time. See Patient Protection and Affordable Care Act, PL 111-148, March 23, 2010, 124 Stat. 119 at 577-578. This left what seems to be an *accidental result* as expressed by the Department of Labor: ‘Because employers are not required to compensate employees for break time to express breast milk, in most circumstances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks.’” (emphasis added)).

¹²⁷ 29 U.S.C.A. § 216(b) (2021).

¹²⁸ Department of Labor’s Reasonable Break Time for Nursing Mothers Notice, 75 Fed. Reg 80073-01 Dec. 21, 2010).

¹²⁹ FLSA makes it unlawful for an employer “to discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on any industry committee.” 29 U.S.C.A. § 215(a)(3) (2021). See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14 (2011) (holding FLSA provides private right of action in anti-retaliation claims for written and oral complaints).

If they make no complaint that the employer is violating the law, then they have no retaliation claim. According to a report from the University of California’s Center for WorkLife Law, very few people have attempted to make this anti-retaliation argument, likely because “employees are often not familiar enough with their legal rights to make a complaint, much less comfortable doing so.”¹³⁰ A statutory scheme that provides remedies only for those facing retaliation for making a complaint rather than those suffering from an actual violation of the law (like being terminated for requesting break time) is highly problematic.

In concrete terms, if a breastfeeding worker is pushed onto unpaid leave because she takes pumping breaks, or if she is terminated because she has taken such breaks, or if she is terminated for utilizing office space for pumping, she likely has no recourse under the 2010 Break Time for Nursing Mothers Act.¹³¹ As one federal judge explained, “it does not appear that the statute

¹³⁰ EXPOSED, *supra* note 110, at 33.

¹³¹ See *Salz v. Casey’s Marketing Co.*, No. 11-CV-3055-DEO, 2012 WL 2952998, at *7 (N.D. Iowa July 19, 2012) (granting employer’s motion to dismiss on plaintiff’s claim of a direct violation of FLSA’s break time for nursing mothers provision in case where employer refused to remove video camera from room designated for plaintiff to pump breast milk, leading to a stress-induced reduction in milk supply, because “[s]ince Section 207(r)(2) provides that employers are not required to compensate employees for time spent express milking, and Section 216(b) provides that enforcement of Section 207 is limited to unpaid wages, there does not appear to be a manner of enforcing the express breast milk provisions”); *Mayer v. Prof’l Ambulance, LLC*, 211 F. Supp. 3d 408, 412-13 (D.R.I. 2016) (granting defendants’ motion to dismiss on plaintiff’s claim of a direct violation of FLSA’s break time for nursing mothers provision in case where plaintiff was terminated after raising concerns about the lack of a clean, private place for her to pump because “the only remedy for a violation of Section 207(r) is for unpaid minimum or overtime wages”); *Eddins v. SSP Am., Inc.*, No. 4:12-cv-00177-JEG, 2013 WL 12128683, at *10 (S.D. Iowa Jan. 31, 2013) (granting employer’s motion for judgment on the pleadings on plaintiff’s FLSA claims in case where plaintiff was told to pump breast milk in a bathroom stall in a public part of an airport because there is no private cause of action under the FLSA break time for nursing mothers provision); *Tolene v. T-Mobile, USA, Inc.*, 178 F. Supp. 3d 674, 680 (N.D. Ill. 2016) (granting employer’s motion for summary judgment on plaintiff’s FLSA claim because the plaintiff, who alleged that she was not provided with space to pump, had not alleged unpaid wages or overtime, and so had no remedy); *Frederick v. N.H. HHS*, No. 14-cv-403-SM, 2015 WL 5772573, at *8 (D.N.H. Sept. 30, 2015) (granting defendant’s motion to dismiss on the ground that “[w]here, as here, [Plaintiff] would [not] have been paid during her breaks when expressing milk, she cannot claim (and does not claim) any damages in the only form provided for by the FLSA—lost wages”); *Schmehl*, 2020 WL 7059578, at *5 (granting employer’s motion for summary judgment on FLSA claim of plaintiff who resigned after other employees repeatedly entered, and attempted to enter, the rooms in which she was told to pump, because she could not provide evidence of unpaid wages or overtime); *Vedros v. Fairway Med. Ctr., LLC*, No. 20-438, 2020 WL 3128838, at *6 (E.D. La. June 12, 2020) (holding that the plaintiff, who was terminated after her employer refused to provide her breaks to pump, could not state a compensable claim for lost wages due to FLSA’s “enforcement paradox”); *Allison v. City of Farmington*, No. CV 18-401 KG/SCY, 2019 WL 2436266 (D.N.M. June 11, 2019) (granting employer’s motion to dismiss on plaintiff’s FLSA complaint—where plaintiff’s supervisor refused to modify schedule to allow her to take breaks (often leaving her working ten hours without a break to pump), despite her repeated requests for accommodations—because she had not alleged unpaid wages or overtime); *Behan v. Lolo’s*, No. CV-17-02095-PHX-JJT, 2019 WL 1382462 (D. Ariz. Mar. 27, 2019) (granting defendant’s motion for summary judgment on FLSA claim of plaintiff—who alleged that she stopped taking breaks to pump at work after being told that there was no space for her to do so and that she could only take a break to pump if there was no work for her to do—because she had not alleged any lost wages and punitive damages are not available under FLSA); *Lampkins v. Mitra QSR, LLC*, No. 16-647-CFC, 2018 WL 6188779 (D. Del. Nov. 28, 2018) (granting employer summary judgment on FLSA claim brought by plaintiff who was allowed to pump only once during her ten-hour shift and was forced to pump first in a bathroom and then in a room with a camera and a window, through which a male co-worker was caught watching her pump on two occasions, because “[b]y its express terms, § 216(b) limits the remedies available for violations of § 207(r) . . . Lampkins, however, has not alleged that she is entitled to any unpaid minimum or overtime wages”); *Safirithis v. Shulkin*, No. 17-cv-2067, 2018 WL 4590325, at *6 (N.D. Ill. Sept. 25, 2018) (granting

prohibits or provides a remedy for an allegedly wrongful termination related to breastfeeding An employer faced with a request to allow an employee to take breaks to breastfeed may simply fire the employee rather than attempt to accommodate the request for breaks.”¹³² The judge called this an “absurdity.”¹³³

These weak enforcement mechanisms are antithetical to the goal of ensuring that breastfeeding workers can get the timely accommodations they need to continue breastfeeding and keep their jobs.¹³⁴

The 2010 Break Time for Nursing Mothers Act lacks clarity around breaks and compensation.

Finally, the law requires additional clarity regarding pumping breaks and compensation. Under FLSA, covered employees do not have to be compensated for pumping breaks, but must be compensated when a break is taken concurrently with a paid break. For example, an employee who uses her regularly scheduled paid break to pump, while her colleagues relax in the break room, must still be compensated the same as her coworkers. An employer may not compensate a break differently just because a worker uses it to pump.

Additionally, under the existing 2010 Break Time for Nursing Mothers Act, pumping breaks not taken during a paid break may be unpaid. For example, an employee who needs to pump an hour into her shift every day can clock out, pump, and then clock back in and only be compensated for time spent actually working, not off-the-clock pumping.

Unfortunately, too often breastfeeding workers who have clocked out to take unpaid breaks from work are then interrupted with phone calls, emails, or other work requests while pumping, and then denied compensation for their time worked. FLSA and DOL guidance do provide clear statements that an employee not entirely relieved of their work duties while on a break are not

employer’s motion for summary judgment on FLSA claim of plaintiff who was harassed by other employees when she tried to take breaks to pump, including pounding on the door to the pumping room and calling her for work while she was pumping, because she could not show that she had lost wages and therefore had no remedy); *Barbosa v. Boiler House LLC*, No. 5:17–CV–340–DAE, 2018 WL 8545855 (W.D. Tex. Feb. 23, 2018) (granting employer’s motion to dismiss on plaintiff’s FLSA claim, in case where plaintiff resigned due to concerns that the space offered for her to pump was unsanitary and equipped with video cameras, because she had not alleged unpaid minimum wages or overtime); *E.E.O.C. v. Vamco Sheet Metals, Inc.*, No. 13 Civ. 6088(JPO), 2014 WL 2619812 (S.D.N.Y. June 5, 2014) (refusing to allow plaintiff, whose employer allowed her only her lunch break and a 10-minute break in the morning to pump—which she was harassed for using—and failed to provide her with space to pump, leading her to pump in a makeshift bathroom and an air conditioning unit, to bring a FLSA claim because she had not alleged any lost compensation); *Ames v. Nationwide Mut. Ins. Co.*, No. 4:11-cv-00359 RP-RAW, 2012 WL 12861597 (S.D. Iowa Oct. 16, 2012) (granting summary judgment for employer on FLSA break time for nursing mothers claim by plaintiff who alleged that the unavailability of a lactation space upon her return from maternity leave led her to quit because there is no private right of action to enforce that provision of law).

¹³² *Hicks v. City of Tuscaloosa*, No. 7:13-cv-02063-TMP, 2015 WL 6123209, at *28–29 & n.14 (N.D. Ala. Oct. 19, 2015) (granting defendant summary judgment due to FLSA’s remedies problem, while acknowledging “the absurdity” of the law, which renders the lactation requirement “toothless[]” and “virtually useless in almost all practical application” because “[a]n employer faced with a request to allow an employee to take breaks to breastfeed may simply fire the employee rather than attempt to accommodate the request for breaks”).

¹³³ *Id.* at *29 n.14.

¹³⁴ Of course, such a worker may have a remedy available under Title VII because it could constitute illegal pregnancy-related discrimination against a breastfeeding worker. 42 U.S.C § 2000e(k).

truly on a break and, accordingly, that time must be compensable.¹³⁵ Because of the specific language in the 2010 Break Time for Nursing Mothers Act that breaks may be uncompensated, however, confusion persists and violations can occur when employers continue to ask employees to complete work-related tasks and duties while taking an unpaid pumping break.

The PUMP for Nursing Mothers Act (“PUMP Act”) Would Close Gaps in the Law, Provide Appropriate Remedies for Employees, and Give Clarity Around Compensation

The “Providing Urgent Maternal Protections for Nursing Mothers Act” or “PUMP for Nursing Mothers Act” (“PUMP Act”) will strengthen the 2010 Break Time for Nursing Mothers Act, extending the law’s protections to nearly nine million employees who are currently uncovered due to where the law is placed in the Fair Labor Standards Act, including nurses, teachers, and software engineers. The PUMP Act will also provide employers some additional clarity as to when break time can be unpaid, and will provide those in need of break time and space to express breast milk the remedies that are available for other FLSA violations if their rights are violated.

The PUMP Act will close the coverage gap.

The PUMP Act will fix the loophole in the 2010 Break Time for Nursing Mothers Act by ensuring that those previously exempted can now enjoy the law’s protections. This would include industries mentioned above, as well as teachers, registered nurses, and computer programmers, for example. Although some industries may initially have some questions about adapting to the law’s requirements, the ingenuity of the American workplace knows no bounds. Furthermore, corporate leadership, coupled with employees, advocates, and government agencies, have already devised innovative and flexible solutions for nearly every workplace environment. For example, farms have devised pop-up tents for breastfeeding workers, and traveling salespeople have used privacy shields to enable pumping in a vehicle. In addition, new breast pumps can be worn and used hands-free and ever more events and companies are utilizing mobile lactation pods.¹³⁶ Finally, there are well-recognized bottom-line benefits for employers in providing break time and space for lactating employees, such as reduced absenteeism, lower healthcare costs, and greater recruitment and retention.¹³⁷

¹³⁵ DEP’T OF LABOR, WAGE & HOUR DIV., FACT SHEET #22: HOURS WORKED UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2008), <https://www.dol.gov/agencies/whd/fact-sheets/22-flsa-hours-worked#:~:text=The%20employee%20must%20be%20completely,active%20or%20inactive%2C%20while%20eating> (“Problems arise when employers fail to recognize and count certain hours worked as compensable hours. For example, an employee who remains at his/her desk while eating lunch and regularly answers the telephone and refers callers is working. This time must be counted and paid as compensable hours worked because the employee has not been completely relieved from duty.”).

¹³⁶ *Lactation Break Time and Space in All Industries*, *supra* note 125.

¹³⁷ *What Are the Benefits to Employers?* U.S. BREASTFEEDING COMMITTEE, <http://www.usbreastfeeding.org/p/cm/ld/fid=234> (last visited Mar. 15, 2021).

The PUMP Act will provide appropriate remedies for employees.

As stated above, the remedies available under the 2010 Break Time for Nursing Mothers Act are simply an “absurdity.”¹³⁸ The PUMP Act will provide appropriate forms of relief already available in the retaliation context, namely “legal or equitable relief,”¹³⁹ including, for example, compensatory damages to make the employee whole.¹⁴⁰ In addition, having an appropriate remedy for violations of the law will also prevent problems before they start, boosting breastfeeding rates across the country and providing greater economic security for breastfeeding employees.

The PUMP Act will provide necessary clarity around breaks and compensation.

The PUMP Act includes clarifying language that the law is intended to maintain the status quo and not disrupt the current statutory framework with regard to compensating breaks. The PUMP Act clarifies that if an employee is not entirely relieved from her work duties during a pump break, such time is considered hours worked—a provision identical to FLSA protections regarding break time and not intended to alter or create any additional rights.

The PUMP Act plugs the gaps in the 2010 Break Time for Nursing Mothers Act so that all lactating employees have access to break time and space to express milk and receive the full protection of the law. Pregnant and breastfeeding workers are the caretakers of the next generation and they deserve to be treated equally both for the pivotal caretaking roles they play and for their immense contributions to the workforce. In passing both these bills, Congress has the chance to finally show these workers the respect and dignity they deserve.

The Paycheck Fairness Act and Protecting Older Workers Against Discrimination Act

Finally, throughout their working lives, the same workers described throughout this testimony continue to face other biases, be it unequal pay or mistreatment in other forms, such as age discrimination as they progress in their careers. The two other bills under consideration today—the Paycheck Fairness Act and the Protecting Older Workers Against Discrimination Act—are also critical for the advancement of the most vulnerable and marginalized workers.

Women, especially women of color, are already at risk of unequal pay caused by job segregation and biases based on pregnancy and motherhood,¹⁴¹ that depresses their wages. One tactic that

¹³⁸ *Hicks*, 2015 WL 6123209, at *29 n.14.

¹³⁹ 29 U.S.C. § 216(b).

¹⁴⁰ *See, e.g., Moore v. Freeman*, 355 F.3d 558, 563 (6th Cir. 2004) (noting that FLSA’s “statutory scheme contemplates compensation *in full* for any retaliation employees suffer” (emphasis added)); *Pineda v. JTCH Apartments, LLC*, 843 F.3d 1062, 1066 (5th Cir. 2016).

¹⁴¹ *See THE PREGNANCY PENALTY*, *supra* note 5, at 3; *see also, e.g., Jocelyn Frye, Racism and Sexism Combine to Shortchange Working Black Women*, *CTR. AM. PROGRESS* (Aug. 22, 2019, 12:01 AM), <https://www.americanprogress.org/issues/women/news/2019/08/22/473775/racism-sexism-combine-shortchange-working-black-women/>; Robin Bleiweis, *The Economic Status of Asian American and Pacific Islander Women*, *CTR. AM. PROGRESS* (Mar. 4, 2021, 9:01 AM), <https://www.americanprogress.org/issues/women/reports/2021/03/04/496703/economic-status-asian-american->

keeps women’s wages low is employers’ practice of asking prospective employees to provide their prior salary history in order to set salary pay rates. Women, especially women of color, begin earning less at the very outset of their careers.¹⁴² Therefore, when an employer asks about salary history, women are immediately disadvantaged when it comes to negotiating and setting salary rates. Asking about salary history especially harms those women that have left the job market to take on family responsibilities,¹⁴³ effectively penalizing those caregivers who take time to raise children and, once again, pitting economic and family responsibilities against one another. The Paycheck Fairness Act, among other things, offers a chance to break this cycle by ensuring that employers do not rely on salary history when determining employee compensation and ensuring that employees have the right to share information about their salaries without penalty—protections that are especially crucial for mothers returning to the workforce after time away.

Gender discrimination also continues well into women’s careers—when they are already struggling to make up the gaps from earlier pay discrimination and the pregnancy penalty—and older women often experience intersecting gender and race discrimination.¹⁴⁴ The Protecting Older Workers Against Discrimination Act will help to combat those overlapping forms of discrimination.

While the bills under consideration today are crucial steps towards eliminating workplace discrimination and inequality, working families in this country need a wide range of supports to ensure that no one must choose between a paycheck and the health of their family. While beyond the scope of this hearing, other ways to strengthen work-family policy range from promoting and advancing fair and flexible schedules to guaranteeing permanent paid sick time and permanent paid family and medical leave to ending discrimination against caregivers. With today’s hearing, Congress can take critical steps towards creating a society that truly values family.

Conclusion

Congress has an extraordinary opportunity to transform the lives of pregnant and breastfeeding workers and remedy decades of injustice. The heart-rending challenges that face the women with whom we have worked for over a decade—women like Armanda and Natasha—find a reasoned and tailored solution in the Pregnant Workers Fairness Act and the PUMP for Nursing Mothers

pacific-islander-women/; Kate Bahn & Will McGrew, *The Intersectional Wage Gaps Faced by Latina Women in the United States*, *EQUITABLE GROWTH* (Nov. 1, 2018), <https://equitablegrowth.org/the-intersectional-wage-gaps-faced-by-latina-women-in-the-united-states/>; Erin Weber, *Why is the Wage Gap for Native Women So High?*, *INST. WOMEN’S POL’Y RES.* (Oct. 1, 2020), <https://iwpr.org/media/in-the-lead/why-is-the-wage-gap-for-native-women-so-high/>.

¹⁴² See, e.g., Dina Bakst & Sarah Brafman, *Bill Would Make Job Applicant’s Salary Irrelevant*, *TIMES UNION* (June 20, 2017), <https://www.timesunion.com/tuplus-opinion/article/Bill-would-make-job-applicant-s-salary-history-11234112.php> (“[E]ven after accounting for other factors such as occupation, major, GPA and hours worked, female college graduates in the U.S. earn nearly 7 percent less than male college graduates one year after graduation.”).

¹⁴³ See, e.g. LETITIA JAMES, N.Y.C. PUBLIC ADVOCATE’S OFFICE, *POLICY REPORT: ADVANCING PAY EQUITY IN NEW YORK CITY* 4 (2016).

¹⁴⁴ See, e.g., David Neumark, Ian Burn, & Patrick Button, *Is it Harder for Older Workers to Find Jobs? New and Improved Evidence From a Field Experiment* (Nat’l Bureau of Econ. Res. Working Paper No. 21669, 2017), https://www.nber.org/system/files/working_papers/w21669/w21669.pdf (finding considerably more age discrimination against older women than against older men).

Act. We want to live in a world where women cry tears of joy because they welcomed a baby into the world while also continuing to flourish at work, not tears of anguish because they were fired and left homeless for needing a modest accommodation. Congress owes it to these women to pass the PWFA and PUMP Act. They are long overdue.