



the work and family legal center

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“Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694)”

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My name is Dina Bakst and I am a Co-Founder and Co-President of A Better Balance: The Work & Family Legal Center. Thank you to Chair Bonamici, Ranking Member Comer, and the Members of the Education & Labor Subcommittee on Civil Rights and Human Services for allowing me the opportunity to provide my testimony today.

A Better Balance is a national non-profit legal organization that advocates for women and families so they can care for themselves and their loved ones without sacrificing their financial security. Since our founding, we have heard from hundreds of women across the country whose employers either fired or forced them onto unpaid leave when they requested modest, temporary job adjustments to remain healthy and on the job. As we see up close through our free legal hotline and direct services work, this failure to accommodate often results in devastating economic and health consequences for working women and their families.

Gaps in federal law permit too many pregnant workers in need of accommodation, especially women in low-wage and physically demanding jobs, to fall through the cracks and face denial of the law's protection. I wrote about this phenomenon in my 2012 Op-Ed in *The New York Times*, "Pregnant, and Pushed Out of a Job,"<sup>1</sup> which inspired the introduction of the federal Pregnant Workers Fairness Act ("PWFA"),<sup>2</sup> and has bipartisan support in this chamber. We have led and assisted other campaigns at the state and local level to provide PWFA protections to workers across the country.

### **Introduction: No Woman Should Have to Choose Between Her Job and A Healthy Pregnancy**

The Pregnancy Discrimination Act ("PDA") of 1978<sup>3</sup> was designed to provide equal opportunity for women by barring employers from discriminating against pregnant women and specifying that pregnant workers should be treated the same as those who are "similar in their ability or inability to work." Over the last forty-one years, narrow interpretation of this comparative framework, whereby a pregnant worker must compare herself to others in order to obtain a workplace accommodation for her health, fails to adequately ensure that pregnant workers are treated fairly and equally on the job. This phenomenon is rooted in gender bias because it forces women, especially low-wage workers and those in physically demanding jobs, to make an impossible choice between earning a paycheck and maintaining a healthy pregnancy. This choice is predicated on the notion that women are somehow unable to both work and be mothers.

The Americans with Disabilities Act ("ADA"),<sup>4</sup> by contrast, has provided an explicit right to accommodation for workers with disabilities since its passage in 1990 but most pregnancy-related conditions are not deemed "disabilities" as required to trigger protection under the law.<sup>5</sup>

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<sup>1</sup> Dina Bakst, Opinion, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES, Jan. 30, 2012, at A25.

<sup>2</sup> H.R. 2694, 116th Cong. (2019) [hereinafter H.R. 2694].

<sup>3</sup> 42 U.S.C. § 2000e(k) (2012).

<sup>4</sup> 42 U.S.C. §§ 12101–12213 (2012).

<sup>5</sup> See *infra* Part III.

Therefore, although workers with disabilities have this explicit right, pregnant workers remain unequal and left behind.

In 2015, in *Young v. UPS*, the Supreme Court attempted to address the second clause of the PDA for the first time since the law's passage.<sup>6</sup> While the Supreme Court's ruling in *Young* in some ways reaffirmed the purpose of the PDA, in A Better Balance's groundbreaking report, "Long Overdue," we found a staggering statistic: over two-thirds of women lost their PDA pregnancy accommodation claims post-*Young*.<sup>7</sup>

There is a simple solution. H.R. 2694, the Pregnant Workers Fairness Act, 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. The PWFA would explicitly require employers to provide reasonable accommodations for pregnant workers unless doing so would pose an undue hardship to the employer—the same familiar standard in place for workers with disabilities.<sup>8</sup>

Over the last few years, states have been stepping in with a groundswell of support for this issue.<sup>9</sup> Legislators on both sides of the aisle are recognizing the health and business benefits of accommodation; however, we still need a uniform federal standard to level the playing field for women in every corner of the country.

Part I of my testimony lays out the devastating biases and economic impacts pregnant workers face when they are denied modest accommodations and pushed off the job.

Part II explains how this reality defies the purpose and intent of the Pregnancy Discrimination Act—to ensure equal treatment for women—and how the 2015 *Young v. UPS* Supreme Court decision has failed to put in place a pregnancy accommodation framework that meets the PDA's goal.

Part III turns to the Americans with Disabilities Act, and details why this law, too, has failed to provide adequate protections to pregnant workers with medical needs arising from pregnancy despite the ADA Amendments Act.

Part IV clarifies why the Family and Medical Leave Act is also an inadequate legal mechanism for many pregnant workers.

Part V then turns to the Pregnant Workers Fairness Act and details the practical and familiar framework it seeks to put in place, providing pregnant workers with an explicit right to reasonable accommodations.

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<sup>6</sup> See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1345 (2015).

<sup>7</sup> See DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE 13 (2019) [hereinafter LONG OVERDUE], <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.

<sup>8</sup> See H.R. 2694, *supra* note 2 (defining "reasonable accommodation" and "undue hardship" the same way those terms are defined in the ADA).

<sup>9</sup> See A BETTER BALANCE, FACT SHEET: STATE AND LOCAL PREGNANT WORKERS FAIRNESS LAWS [hereinafter ABB FACT SHEET: STATE AND LOCAL PWFAS], <https://www.abetterbalance.org/resources/fact-sheet-state-and-local-pregnant-worker-fairness-laws/> (last updated June 28, 2019).

Part VI details how this framework has proven workable in the states that have passed similar measures to H.R. 2694 and why legislators across the political spectrum have supported the issue: because it increases women’s labor force participation, improves health outcomes, leads to potential Medicaid savings, provides clarity to businesses, and more. My testimony concludes by highlighting the stories of workers who exemplify all the benefits this law can provide.

**I. Failure to Accommodate Pregnant Workers Is Rooted in Explicit Bias, Unconscious Bias, And Structural Bias and Has Lasting Economic Impacts on Women and Families**

Today, women make up almost half of the workforce and are the primary or co-breadwinner in almost two-thirds of families.<sup>10</sup> Three-quarters of women will be both pregnant and employed at some point.<sup>11</sup> When women face a physical conflict between work and childbearing, the health and economic consequences, especially for women in low-wage and non-traditional jobs, are often profound.<sup>12</sup> We have worked firsthand with many of these women, just a few of whose stories are detailed below.

For example, **ARMANDA LEGROS**, A Better Balance Community Advocate, previously testified before the United States Senate’s Health, Education, Labor and Pensions (“HELP”) Committee.<sup>13</sup> Armanda, a single mother, was pushed out of her job at an armored truck company even though she could have been accommodated, when she requested to avoid heavy lifting after pulling a muscle in her stomach while six and a half months pregnant. After one look at her note, her manager sent her home and she lost her health insurance at eight and a half months pregnant. Her manager explained that, as a matter of company policy, she could work only if she had no restrictions. As she testified:

“Once my baby arrived, 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.”

She ended up needing to rely on public benefits like food stamps just to get by. All of this happened when her employer could have simply kept her employed and earning a paycheck with a reasonable accommodation.

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<sup>10</sup> See SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, BREADWINNING MOTHERS CONTINUE TO BE THE U.S. NORM, (May 2019), <https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/>.

<sup>11</sup> ALEXANDRA CAWTHORNE & MELISSA ALPERT, CTR. FOR AM. PROGRESS, LABOR PAINS: IMPROVING EMPLOYMENT AND ECONOMIC SECURITY FOR PREGNANT WOMEN AND NEW MOTHERS 2 (2009), <https://www.americanprogress.org/issues/women/report/2009/08/03/6599/labor-pains/>.

<sup>12</sup> See, e.g., Am. Coll. of Obstetricians & Gynecologists, *ACOG Committee Opinion No. 733: Employment Considerations During Pregnancy and the Postpartum Period*, 131 *OBSTETRICS & GYNECOLOGY* e115, e119–120 (Apr. 2018) [hereinafter *ACOG Committee Opinion No. 733*], <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Obstetric-Practice/Employment-Considerations-During-Pregnancy-and-the-Postpartum-Period?IsMobileSet=false>.

<sup>13</sup> *Economic Security for Working Women: Briefing Before the S. Comm. On Health, Educ., Labor & Pensions*, 113th Cong. (2014) (testimony of Armanda Legros, A Better Balance Community Advocate), <https://www.help.senate.gov/imo/media/doc/Legros2..pdf>.

Police Officers **LYNDI TRISCHLER AND SAMANTHA RILEY** were pushed off their jobs with the Florence, Kentucky Police Department when they requested light duty, robbing them of critical income when they needed it most.<sup>14</sup> Because of the heavy equipment and physical demands of patrolling, their healthcare providers both recommended the officers seek light duty, but their requests were denied because the City maintained a discriminatory policy that provided light duty only for those with on-the-job injuries. When they were forced out of work, it took an emotional and economic toll on their families. Officer Trischler was even told that she would lose her health insurance in the middle of a very complicated pregnancy—her son was diagnosed with a rare genetic disorder and would not survive long after birth.<sup>15</sup>

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<sup>14</sup> Lyndi Trischler, Opinion, *Don't Make Women Choose Between A Job or Pregnancy*, THE CINCINNATI ENQUIRER (Mar. 23, 2018), <https://www.cincinnati.com/story/opinion/2018/03/23/opinion-dont-make-women-choose-between-job-pregnancy/440077002/>.

<sup>15</sup> Pregnancy discrimination is pervasive in the public sector. Public sector workers are routinely denied modest workplace accommodations, such as lifting restrictions, schedule adjustments, and time off, for pregnancy and related medical conditions, oftentimes in compliance with a formal policy or pattern and practice. See, e.g., *Freppon v. City of Chandler*, 528 F. App'x 892 (10th Cir. 2013) (police officer denied light duty pursuant to City's policy of offering accommodations only to employees with on-the-job injuries); *Tysinger v. Police Department*, 463 F.3d 596, 575 (6th Cir. 2006) (pregnant police officer denied light duty); *Waite v. Bd. of Trustees of Univ. of Alabama*, No. 2:16-cv-01244-JEO, 2018 WL 5776265 (N.D. Ala. Nov. 2, 2018) (graduate student and university employee denied modified schedule following childbirth); *Nagle v. E. Greenbush Cent. Sch. Dist.*, No. 116CV00214BKSBATB, 2018 WL 4214362 (N.D.N.Y. Feb. 21, 2018) (applying PDA standard to § 1983 claim in a pregnancy discrimination case); *Jones v. Brennan*, No. 16-CV-0049-CVE-FHM, 2017 WL 5586373 (N.D. Okla. Nov. 20, 2017) (postal worker denied standing restriction); *Vidovic v. City of Tampa*, No. 8:16-cv-T-17AAS, 2017 WL 10294807 (M.D. Fla. Oct. 12, 2017) (firefighter denied light duty); *Webster v. U.S. Dep't. of Energy*, 267 F.Supp.2d 246 (D.D.C. 2017) (attorney denied a different chair and modified schedule); Consent Decree, *United States v. City of Florence*, No. 2:16-cv-00190 (E.D. Ky. December 20, 2016) (City's policy of limiting light duty to officers injured on the job challenged after police officers denied pregnancy accommodations); *Diaz v. Florida*, 219 F.Supp.3d 1207 (S.D. Fla. 2016) (administrative assistant denied request to move a bit more slowly on the job); *Mercer v. Government of the Virgin Islands Dep't of Educ.*, No. 2014-50, 2016 WL 5844467 (D.V.I. Sept. 30, 2016) (compliance manager denied accommodations following a stillbirth); *Johnson v. Univ. of Alabama Health Servs. Found.*, PC, No. 2:13-CV-00512-MHH, 2016 WL 705962 (N.D. Ala. Feb. 23, 2016) (medical records specialist denied lifting restriction); *Lawson v. City of Pleasant Grove*, No. 2:14-CV-0536-JEO, 2016 WL 2338560, (N.D. Ala. Feb. 16, 2016), *report and recommendation adopted*, No. 2:14-CV-536-KOB, 2016 WL 1719667 (N.D. Ala. Apr. 29, 2016) (police officer denied light duty); *Wilson v. Ontario Cty. Sheriff's Dep't*, No. 12-CV-06706 EAW, 2014 WL 3894493 (W.D.N.Y. Aug. 8, 2014) (Sec. 1983 claim brought by pregnant police officer denied reassignment request analyzed under PDA standard); *Mocic v. Sumner Cty. Emergency Med. Servs.*, 929 F. Supp. 2d 790 (M.D. Tenn. 2013) (EMT denied maternity-sized uniform and light duty); *Falk v. City of Glendale*, No. 12-CV-00925-JLK, 2012 WL 2390556 (D. Colo. June 25, 2012) (police dispatcher denied breaks to express breast milk); *Jeudy v. Holder*, No. 10-22873-CIV, 2011 WL 5361076 (S.D. Fla. Nov. 7, 2011), *aff'd sub nom. Jeudy v. Attorney Gen., Dep't of Justice*, 482 F. App'x 517 (11th Cir. 2012) (corrections officer denied reassignment to night shift and climbing restriction); *Zambrano-Lamhaouhi v. N.Y. City Bd. of Educ.*, 866 F.Supp.2d 147 (E.D.N.Y. 2011) (applying PDA standard to § 1983 claim in a pregnancy discrimination case); *Nelson v. Chattahoochee Valley Hosp. Soc.*, 731 F. Supp. 2d 1217 (M.D. Ala. 2010) (nurse denied alternative on call schedule that would have reduced her hours); *Burnett v. Univ. of Tenn. Knoxville*, No. 3:09-CV-017, 2010 WL 1687062 (E.D. Tenn. Apr. 26, 2010) (veterinary assistant denied request to have reduced contact with diseased animals); *Blado v. City of Milan, Tennessee*, No. 06-1185-T-AN, 2007 WL 9710034 (W.D. Tenn. Oct. 19, 2007) (pregnant patrol officer denied light duty); *Dimino v. N.Y.C. Transit Authority* 64 F. Supp. 2d 136, 153 (E.D.N.Y. 1999) (pregnant officer denied restricted duty); *Davis v. State of California Dep't of Corr.*, No. CIV. S-93-1307DFLGGH, 1996 WL 271001 (E.D. Cal. Feb. 23, 1996) (corrections officers denied light duty); *Roller v. City of San Mateo*, 399 F. Supp. 358 (N.D. Cal. 1975), *aff'd*, 572 F.2d 1311 (9th Cir. 1977) (police officer denied light duty).

**BETZAIDA CRUZ CARDONA** of Rochester, NY worked as a customer service cashier for a large national retail chain. She performed typical cashier’s duties and sometimes cleaned the store’s bathrooms and floors. When she was pregnant, she met with her manager and a higher-level company representative, and brought with her a doctor’s note listing her restriction: she could not lift anything over 25 pounds. She did not think this would be a problem because she had never been asked to lift over 25 pounds. In fact, even before her pregnancy, the employer told her that if she ever needed to lift anything heavy, she should call someone in the furniture department to do it for her. But during this meeting, she was told that she “can’t work” and that she should “stay home, take care of her pregnancy, and rest.” An hour after this meeting her manager called to tell her she was officially terminated. With no paycheck, she became homeless and had to rely on family and friends for shelter, moving from couch to couch as she was preparing to be a mom.<sup>16</sup>

A Better Balance Community Advocate **NATASHA JACKSON** was the highest-ranking account executive and the only female employee at the business where she worked. When she became pregnant, Human Resources called her into a meeting and forced her onto leave because they maintained a policy of not accommodating off-the-job injuries and refused to accommodate her need for occasional help with lifting, even though she only rarely lifted and her co-workers were willing to assist her. Ultimately, the employer terminated her. Appearing before the South Carolina legislature, Natasha testified on the devastating financial impact of losing her job while pregnant:

“My husband and I had just made a down payment on a house and were about to close the deal. Without my income, we were forced to back out of the contract. . . . So I was out of a job and no longer able to support my family. And my husband and I saw our dream to own a home vanish.”<sup>17</sup>

Failure to provide accommodations or retaliating against accommodation requests for pregnant workers like Armanda, Lyndi, Betzaida, Natasha, and so many others, is rooted in gender bias in all of its various forms, which often overlap and present themselves in nuanced and layered ways.

First, employers act out of conscious bias when they assume that pregnant women are a liability, are fragile, or are unable to work because they are pregnant. When employers tell workers like Betzaida that they need to go home and “rest,” they are relying on paternalistic attitudes toward pregnant women. Rather than engaging in an individualized inquiry to determine if an accommodation is possible, as employers do for workers with disabilities and as required under the ADA, they too often resort instead to one-size-fits-all solutions about what *they* perceive

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<sup>16</sup> See A BETTER BALANCE, PREGNANT AND JOBLESS: THIRTY-SEVEN YEARS AFTER PREGNANCY DISCRIMINATION ACT, PREGNANT WOMEN STILL CHOOSE BETWEEN A PAYCHECK AND A HEALTHY PREGNANCY 11 (2015) [hereinafter PREGNANT AND JOBLESS].

<sup>17</sup> *Hearing on H. 3865 Before the H. Comm. on Judiciary*, 122nd Gen. Assemb. (S.C. Mar. 22, 2017) (testimony of A Better Balance Community Advocate Natasha Jackson in Support of South Carolina Pregnancy Accommodations Act), <https://www.abetterbalance.org/resources/natasha-jackson-testimony-south-carolina-pregnancy-accommodations-act/>.

pregnant workers need or want for their health.<sup>18</sup> It may be surprising to some, but these forms of explicit bias against pregnant women and mothers continue to be rampant in the workplace.<sup>19</sup>

Secondly, it is well documented that unconscious bias also plays a role in sex stereotyping of pregnant women and mothers in the workplace.<sup>20</sup> Employers assume that pregnant women and mothers are not competent or dedicated to their work, as exemplified by the stories of Armanda, Natasha, and the many workers we hear from who are fully able to continue their employment with modest accommodations but face significant roadblocks from their employers. Employers use accommodation requests as excuses to push out pregnant workers whom they would prefer not to have to deal with based on stereotypes that they will no longer be “ideal” workers.<sup>21</sup>

Other pregnant women find their work product overly scrutinized by managers shortly after requesting accommodations; suddenly their best is no longer good enough for these managers who seem unable to believe that pregnant workers are capable employees.<sup>22</sup>

Finally, failure to provide pregnancy accommodations can also come from a perpetuation of structural bias.<sup>23</sup> This can occur especially in traditionally male-dominated jobs where longstanding policies and practices designed for men fundamentally close off the possibility of combining pregnancy with work for almost all women.<sup>24</sup> The experiences of police officers Trischler and Riley, discussed above, are strong examples. For low-wage workers, this manifests

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<sup>18</sup> It is important to note that the Pregnancy Discrimination Act has always prohibited explicit intentional bias of this form, but unfortunately this evidence is not always easily obtainable in failure to accommodate cases.

<sup>19</sup> Joan C. Williams & Amy J.C. Cuddy, *Will Mothers Take Your Company to Court*, HARV. BUS. REV. (Sept. 2012), <https://hbr.org/2012/09/will-working-mothers-take-your-company-to-court> (“Maternal wall bias stems from the ways we think: from old-fashioned beliefs about what makes a good mother (someone who is always available to her children) and a good father (a good provider). Extensive research shows that these kinds of assumptions are widely shared and will persist unless they are brought into the light and challenged” and finding that such bias “often feels more like a sledgehammer than a paper cut” and citing Shelley Correll, Stephen Benard, & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, AM. J. OF SOC. (2007) who found that a woman with children was 79% less likely to be hired than one without children).

<sup>20</sup> See, e.g., ACT/EMP: THE BUREAU FOR EMPLOYER’S ACTIVITIES, INT’L LAB. ORG., BREAKING BARRIERS: UNCONSCIOUS GENDER BIAS IN THE WORKPLACE (Aug. 2017), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---act\\_emp/documents/publication/wcms\\_601276.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/publication/wcms_601276.pdf) (finding through survey data that “[f]ive of the barriers to women’s leadership were related to discrimination and unconscious gender bias”).

<sup>21</sup> See JOAN WILLIAMS, UNBENDING GENDER IN SOCIAL LIFE: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT, 69–70 (2000) (noting “[t]he assumption that motherhood does, and should, preclude women from performing as ideal workers”); see also Eden B. King, *What Mothers Face at Work: Why the “Opt Out” Explanation is Insufficient*, 29 PSYCH. SCI. AGENDA (2015), <https://www.apa.org/science/about/psa/2015/09/mothers-work>.

<sup>22</sup> See, e.g., Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1368–72 (2008) (citing Jane A. Halpert, Midge L. Wilson & Julia L. Hickman, *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORG. BEHAV. 649, 652–53 (1993) (detailing an experiment in which, despite all other variables remaining constant, men gave lower performance rating to visibly pregnant women over non-visibly pregnant women)).

<sup>23</sup> *Id.* at 1366 (citing Monica Biernat, *Toward a Broader View of Social Stereotyping*, 58 AM. PSYCHOLOGIST 1019, 1023 (2003) (evaluating the different standards by which men and women are judged in stereotypically male professions)).

<sup>24</sup> *Id.*

via restrictive and rigid rules that prohibit workers from receiving even the most modest accommodations even though they could easily be made.<sup>25</sup>

This bias in the form of being pushed out of the workforce during pregnancy disproportionately affects low-wage workers and women of color,<sup>26</sup> who are less likely to qualify for Family and Medical Leave Act (“FMLA”) protections, less able to find replacement income, less likely to have benefits like temporary disability insurance or paid time off, and who generally have less bargaining power and financial cushion when they must forgo income for months. Seventy-eight percent of Americans live paycheck to paycheck<sup>27</sup>—so losing out on even one paycheck, let alone several, can place a family in a precarious financial situation. Women who are let go do not just lose out on critical income; they must also fight to re-enter a job market that is especially brutal on the unemployed. Worse yet, they confront a bias against hiring pregnant women and new mothers.<sup>28</sup>

Some women lose their health benefits when they are fired or forced onto unpaid leave and then must switch providers and/or delay medical care while securing health insurance. For women who lose their health insurance shortly before going into labor, they could be looking at staggering healthcare costs for childbirth, which average \$30,000 for a vaginal delivery and \$50,000 for a C-section in the U.S.<sup>29</sup>

Of course, those facing pregnancy complications may face even higher healthcare costs. One woman who called our hotline lost her health insurance while eight months pregnant after her employer cut her hours. She requested that her doctor induce her labor early while she still had insurance so that she would not have to face exorbitantly expensive hospital bills.

Women who are forced out of the workplace when pregnant also forfeit other long-term benefits earned on the job, such as 401K or other retirement contributions, short-term disability benefits, seniority, pension, social security contributions, life insurance, and others.<sup>30</sup> Depriving women of these benefits when they become pregnant contributes to their economic inequality over the long run, exacerbating the wage gap,<sup>31</sup> and negatively affecting families as a whole, not to mention

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<sup>25</sup> SARAH JANE GLYNN & JOANNA VENATOR, CTR. FOR AM. PROGRESS, FACT SHEET: WORKPLACE FLEXIBILITY 1 (2012), [https://cdn.americanprogress.org/wp-content/uploads/issues/2012/08/pdf/flexibility\\_factsheet.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2012/08/pdf/flexibility_factsheet.pdf).

<sup>26</sup> See LONG OVERDUE, *supra* note 7, at 26.

<sup>27</sup> *Living Paycheck to Paycheck Is a Way of Life for Majority of US Workers, According to New Career Building Survey*, CAREERBUILDER (Aug. 24, 2017), <http://press.careerbuilder.com/2017-08-24-Living-Paycheck-to-Paycheck-is-a-Way-of-Life-for-Majority-of-U-S-Workers-According-to-New-CareerBuilder-Survey>.

<sup>28</sup> See Bakst, *supra* note 1.

<sup>29</sup> PREGNANT AND JOBLESS, *supra* note 16, at 10 (citing Elisabeth Rosenthal, *American Way of Birth, Costliest in the World*, N.Y. TIMES (June 30, 2013), [http://www.nytimes.com/2013/07/01/health/american-way-of-birth-costliest-in-the-world.html?hp&\\_r=2&](http://www.nytimes.com/2013/07/01/health/american-way-of-birth-costliest-in-the-world.html?hp&_r=2&)).

<sup>30</sup> See, e.g., *Orr v. Albuquerque*, 531 F.3d 1210 (10th Cir. 2008) (police officers were forced to exhaust accrued sick leave and were not allowed to use accrued compensatory time for their pregnancy-related leaves, affecting their eligibility for early retirement).

<sup>31</sup> See Brief of Am. Civil Liberties 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) [hereinafter *Young* Amicus Brief], <https://www.abetterbalance.org/resources/supreme-court-pregnancy-decision-young-v-ups/> (citing Michelle J. Budig, Third Way NEXT, *The Fatherhood Bonus & the Motherhood Penalty: Parenthood and the Gender Gap in Pay* 7–8, 13–14 (2014) (“There is a wage penalty for motherhood of 4% per child that cannot be explained by

the harm it causes the economy as a whole in its effect on women’s labor force participation.<sup>32</sup> The result is that a woman who requires, but is refused, a simple accommodation for just a few weeks or months of her pregnancy could end up suffering the financial effects of that denial for years, as Natasha Jackson’s story illustrates.

## II. Congress Intended to Eradicate Pregnancy Discrimination and Economic Harms in Passing the Pregnancy Discrimination Act, But That Goal Remains Unmet

The devastating economic consequences and gender inequality highlighted above are precisely what Congress sought to avoid in passing the Pregnancy Discrimination Act.

In 1977, thirty-nine million women were employed in the American workforce, seventy-percent of whom were their family’s sole breadwinner or higher earner.<sup>33</sup> Yet when women became pregnant, rampant discrimination imperiled their economic security.<sup>34</sup> Employers refused to hire, and routinely fired, women simply because they were pregnant or intended to become pregnant. Many employers provided non-essential benefits to employees including cosmetic surgery but categorically excluded pregnancy from disability or fringe benefit plans.<sup>35</sup> The Supreme Court offered little remedy to pregnant women when, relying on faulty reasoning, it failed to recognize pregnancy discrimination as sex discrimination under the Equal Protection Clause in *Geduldig v. Aiello*.<sup>36</sup> Two years later, in *Gilbert v. General Electric*, following the same reasoning used in *Geduldig*, the Court held sex discrimination did not include pregnancy discrimination under Title VII of the Civil Rights Act of 1964.<sup>37</sup>

After the *Gilbert* decision, Congress acted swiftly to explicitly outlaw pregnancy discrimination by passing the Pregnancy Discrimination Act of 1978 (“PDA”). Prior to the bill’s passage, Senator Harrison Williams, the sponsor of the PDA, spoke on the Senate floor about the critical need to end discrimination against, and ensure equal treatment of, pregnant workers. “The central

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human capital, family structure, family-friendly job characteristics, or differences among women that are stable over time” and “[e]vidence from experimental and audit studies support arguments of employer discrimination against mothers in callbacks for job applications, hiring decisions, wage offers, and promotions”).

<sup>32</sup> See, e.g., INT’L MONETARY FUND, WORLD ECONOMIC OUTLOOK: CYCLICAL UPSWING, STRUCTURAL CHANGE 23 (2018), <https://www.imf.org/en/Publications/WEO/Issues/2018/03/20/world-economic-outlook-april-2018#Chapter%202> (finding, in Chapter 2, that female labor force participation rates have plateaued in the United States over the last two decades); KWEILIN ELLINGRUD, ANU MADGAVKAR, JAMES MANYIKA, JONATHAN WOETZEL, VIVIAN RIEFBERG, MEKALA KRISHNAN, & MILI SEONI, MCKINSEY GLOBAL INST., THE POWER OF PARITY: ADVANCING WOMEN’S EQUALITY IN THE UNITED STATES 2 (2016), <https://www.mckinsey.com/featured-insights/employment-and-growth/the-power-of-parity-advancing-womens-equality-in-the-united-states> (finding the U.S. could add between \$2.1 trillion and \$4.3 trillion in annual GDP by 2025 through policies that help increase the number of women in the workforce).

<sup>33</sup> 123 Cong. Rec. E1487 (daily ed. Mar. 15, 1977) (remarks of Sen. Williams).

<sup>34</sup> *Id.*

<sup>35</sup> 123 Cong. Rec. S4142 (daily ed. Mar. 15, 1977) [hereinafter *March 1977 PDA Hearing*] (statement of Sen. Williams).

<sup>36</sup> *Geduldig v. Aiello*, 417 U.S. 484 n. 20 (1974) (finding that “[t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification”).

<sup>37</sup> *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (relying on *Geduldig* in upholding GE’s exclusion of pregnancy coverage from its disability insurance policy).

purpose of the bill,” Senator Williams said, “is to require that women workers be treated equally with other employees on the basis of their ability or inability to work. The key to compliance in every case will be equality of treatment.”<sup>38</sup> Senator Williams emphasized women were not in the workforce merely for “pin money” or as a stop-gap before they “return[ed] home to raise children full-time,” and the law must step in to remedy employers’ antiquated views.<sup>39</sup> As such, he explained the PDA would “protect women from the full range of discriminatory practices which have adversely affected their status in the workforce.”<sup>40</sup>

Legislators also emphasized the “unjust and severe economic [and] social...consequences that “countless women and their families” had to “suffer” as a result of being “forced to take leave without pay” and temporarily “disabled by pregnancy and childbirth.”<sup>41</sup> The devastating effects[s]” included “loss of income,” impairing the ability of families with working mothers “to provide their children with proper nutrition and healthcare,” dissipating family savings and security and being forced to go on welfare.”<sup>42</sup>

To that end, the PDA updated Title VII to recognize pregnancy discrimination as a form of sex discrimination. The first clause of the law updated the definition of “because of sex” and “on the basis of sex” under Title VII to include “pregnancy, childbirth, and related medical conditions,” which meant employers could not discriminate against pregnant women when it came to hiring, firing, hours, and other employment decisions.<sup>43</sup> The second clause required that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes...as other persons not so affected but similar in their ability or inability to work.”<sup>44</sup> The legislative record of the PDA is clear that “[p]regnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.”<sup>45</sup>

Thus, when Congress mandated that employers treat pregnant women the same as “other persons similar in their ability or inability to work” the intended result was, and continues to be, that such treatment would lead to women’s equality in the workplace. While the comparative standard has led to positive results for some pregnant workers, for far too many, equality in the workplace remains elusive.

As outlined below, not only have courts failed to correctly understand and apply the “similar in ability or inability to work” standard and its application to pregnancy accommodations, but even as workers with disabilities gained the right to explicit accommodations with the passage of the Americans with Disabilities Act in 1990 and the Americans with Disabilities Amendments Act

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<sup>38</sup> 123 Cong. Rec. S14989 (daily ed. Sept. 15, 1977) [hereinafter *September 1977 PDA Hearing*] (statement of Sen. Williams).

<sup>39</sup> See *March 1977 PDA Hearing*, *supra* note 35 (statement of Sen. Williams).

<sup>40</sup> See *September 1977 PDA Hearing*, *supra* note 38 (statement of Sen. Williams).

<sup>41</sup> See *Young Amicus Brief*, *supra* note 31, at 14 (citing 123 Cong. Rec. E1487 (daily ed. Mar. 15, 1977) (remarks of Sen. Williams)).

<sup>42</sup> *Id.*

<sup>43</sup> See 42 U.S.C. § 2000e(k) (2012).

<sup>44</sup> *Id.*

<sup>45</sup> 123 Cong. Rec. S15057 (daily ed. Sept. 16, 1977) (statement of Judy Hefner, staffer of Sen. Leahy).

in 2008, pregnancy discrimination law has remained unchanged and stagnant since 1978, leaving pregnant women behind.

The PDA's comparator standard has proven incapable of achieving full equality for pregnant workers. As legal scholar Johanna Grossman has explained, "Equal citizenship requires not only legal protection from unjustified exclusion from the workforce, but also protection for a pregnant woman's right to continue working despite the potential temporary physical limitations of pregnancy."<sup>46</sup>

Failing to update the law to provide explicit accommodations to pregnant workers with medical needs even though workers with disabilities now have those rights runs directly afoul of Congress's intended purpose of "accord[ing] the same rights" to pregnant women as provided to "other workers who are disabled from working."<sup>47</sup> By putting in place an explicit right to accommodations for pregnancy, childbirth, and related medical conditions, the Pregnant Workers Fairness Act provides the long overdue update the law needs.<sup>48</sup>

#### **A. The PDA Prior to *Young v. UPS*: Pregnant Workers in Need of Accommodation Face a Losing Battle in the Courts Because of the Comparator Framework**

While the second clause of the PDA requiring equal treatment may have seemed fairly straightforward, decades of interpretation by courts eroded the law's promise of equality.<sup>49</sup> Courts said employers could lawfully deny workplace adjustments to pregnant workers, even while granting the same to co-workers, as long as any difference in treatment was "pregnancy-blind."<sup>50</sup> For example, light duty for on-the-job injuries, but not for injuries incurred off the job, was deemed perfectly permissible under the PDA in case after case,<sup>51</sup> despite the fact that such policies imposed the "very same harmful economic and health consequences for women as the ones Congress sought to prevent in 1978."<sup>52</sup> As a result, instead of standing on equal footing with their peers, pregnant women often found themselves at the bottom of the heap.

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<sup>46</sup> Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L. J. 567, 570 (2010).

<sup>47</sup> S. Rep. No. 95-331, at 4 (1977).

<sup>48</sup> Related medical conditions can include, but are not limited to, lactation and the need to express breast milk. *See, e.g., Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1261 (11th Cir. 2017) (affirming judgment on PDA claim in favor of a patrol officer who was denied a breastfeeding accommodation); *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425, 427 (5th Cir. 2013) (holding that firing a woman because she is expressing milk at work violates Title VII).

<sup>49</sup> Of course, many pregnant women have found recourse over the years utilizing the PDA's second clause and many will in the future. We do not wish to convey that employers may fail to accommodate all pregnant workers with impunity, but rather to expose the fact that this standard is failing most women and presents practical challenges even for those who would be successful in court.

<sup>50</sup> *See, e.g., Reeves v. Swift Transp. Co., Inc.*, 446 F.3d 637, 641 (6th Cir. 2006).

<sup>51</sup> *See, e.g., Sagliano v. Ulta Salon, Cosmetics & Fragrance, Inc.*, No. 3:12-CV-01503 JAM, 2015 WL 150276, at \*4 (D. Conn. Jan. 11, 2015); *Abbott v. Elwood Staffing Servs., Inc.*, 44 F.Supp.3d 1125, 1158–59 (N.D. Ala. 2014); *Urbano v. Cont'l Airlines*, 138 F.3d 204, 206 (5th Cir. 1998) ("As long as pregnant employees are treated the same as other employees injured off duty, the PDA does not entitle pregnant employees with non-work related infirmities to be treated the same under Continental's light-duty policy as employees with occupational injuries.").

<sup>52</sup> *See* PREGNANT AND JOBLESS, *supra* note 16, at 5.

Using similar methodology to that used in the “Long Overdue” report,<sup>53</sup> we reviewed 200 Pregnancy Discrimination Act cases in the two years leading up to the *Young* decision and found that of those cases that dealt with an issue of pregnancy accommodation, in nearly two-thirds of cases, courts rejected the plaintiff’s PDA claim largely because the pregnant worker could not provide adequate comparators.<sup>54</sup> Unfortunately, even after *Young v. UPS*, the comparator standard remains the dominant hurdle for workers in proving their PDA claims and the main reason pregnant workers are still losing their cases two-thirds of the time, just as they were before *Young*.

For example, pre-*Young* courts frequently interpreted the PDA to permit employers to categorically provide light duty for on-the-job injuries, but not for limitations incurred off the job.<sup>55</sup> Post-*Young* courts are still incorrectly permitting employers to push pregnant women off the job even if they categorically accommodate on-the-job injuries.<sup>56</sup> As the next section elucidates, this all points to the fact that *Young* did little to assist pregnant workers in need of accommodation and pregnant women remain as unequal as ever in the workplace.

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<sup>53</sup> As part of our methodology we included cases where an accommodation (including on-the-job accommodations and leave or time off) was sought, but not where the only PDA claim is a traditional disparate treatment claims (e.g., where a pregnant employee was fired simply for being pregnant). We included leave cases only if they involved leave for a pregnancy-related complication or time off to recover from childbirth but not leave for bonding purposes. We did not include cases with state law claims only, unless the court is explicit that it is using federal law/interpreting the state law consistent with the PDA. We also excluded cases that were dismissed for procedural reasons (e.g., timeliness) and included published and unpublished opinions. Similar to *Long Overdue*, if a pregnant worker prevailed on a defendant’s dispositive motion (a motion to dismiss or motion for summary judgment) on the PDA claim, then we categorized that as a “positive” case. Likewise, if a pregnant worker’s PDA claim did not survive a defendant’s dispositive motion, then we categorized that as a “negative” case. Appeals were also analyzed similarly. In motion to dismiss cases, we viewed the facts in the light most favorable to the plaintiff and in motion for summary judgment cases, we viewed the facts and reasonable inferences in the light most favorable to the nonmoving party, in accordance with the legal standards for dispositive motions. In a very small number of cases, the court assessed the validity of a jury verdict or rendered a judgment following a bench trial. We recognize other methodology may have yielded slightly different outcomes.

<sup>54</sup> See, e.g., *Shay v. RWC Consulting Grp.*, No. CIV 13-0140 JB/ACT, 2014 WL 3421068 (D.N.M. June 30, 2014) (granting employer’s motion to dismiss plaintiff’s PDA claim because she could not produce evidence that similarly-situated employees were treated better); *Reynolds v. Shady Brook Animal Hosp., Inc.*, No. 4:12-CV-2258, 2013 WL 5964564 (S.D. Tex. Nov. 7, 2013) (granting employer’s motion to dismiss plaintiff’s PDA claim because there was no evidence that the employer allowed “non-pregnant employees to change jobs due to other health concerns”); *Metzler v. Kentuckiana Med. Ctr.*, No. 4:11-CV-00101-TWP, 2013 WL 1619592 (S.D. Ind. Apr. 15, 2013) (granting summary judgment for employer and finding the comparator plaintiff produced insufficient to support her claim).

<sup>55</sup> See, e.g., *Sagliano*, 2015 WL 150276, at \*4, *Abbott*, 44 F.Supp.3d at 1158–59.

<sup>56</sup> See *Durham v. Rural/Metro Corp.*, No. 4:16-CV-01604-ACA, 2018 WL 4896346, at \*1 (N.D. Ala. Oct. 9, 2018) (), *appeal docketed*, No. 18-14687 (11th Cir. Nov. 7, 2018). See also Brief of the Equal Employment Opportunity Comm’n as Amici Curiae Supporting Plaintiff-Appellant, *Durham v. Rural/Metro Corp.*, No. 18-14687, at 7–8 (11th Cir. Feb. 22, 2019), <https://www.eeoc.gov/eeoc/litigation/briefs/durham.html> (highlighting that not only did the company maintain a light duty policy for workers with on-the-job injuries but “the record also shows that Rural/Metro accommodated employees who were disabled under the ADA, as reflected in its employee handbook and the testimony of its senior human resources manager.”).

## **B. The PDA Post-*Young v. UPS*: Groundbreaking A Better Balance Report, “Long Overdue” Reveals Pregnant Workers Are Still Losing Over Two-Thirds of Their Pregnancy Accommodation Cases Because of the Comparator Framework and Other Barriers**

In May, 2019, A Better Balance released a report, “Long Overdue,” detailing the numerous ways pregnant workers are still routinely jeopardizing their health—and economic security—when denied medically necessary reasonable accommodations. The report highlights that, in spite of *Young v. UPS*,<sup>57</sup> the 2015 U.S. Supreme Court decision that set new standards for pregnant workers’ federal protections, today’s pregnant workers are still forced to choose between a paycheck and a healthy pregnancy. This comprehensive and first-of-its-kind review of relevant cases found that more than two-thirds of women needing accommodations while pregnant lost their court cases under the Pregnancy Discrimination Act, leaving the pregnancy accommodation landscape much the same as it was before the *Young* case.

### **a. Revisiting the PDA in *Young v. UPS***

In 2015, the Supreme Court took up the question as to when and how employers must provide accommodations to pregnant workers under the Pregnancy Discrimination Act. While the Court’s decision proved to be a victory for Peggy Young, the opinion created uncertainty for employers and employees alike.

The most salient aspect of Justice Breyer’s opinion for the majority 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.<sup>58</sup>

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.”<sup>59</sup> 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 court clarified that expense and inconvenience do not independently qualify as legitimate justifications.<sup>60</sup> Finally, the plaintiff can respond to the employer’s justification by offering evidence that said reasoning was simply pretext for intentional discrimination.<sup>61</sup> 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.<sup>62</sup>

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<sup>57</sup> *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

The new test laid out in *Young* has done little to create more clarity in the law or to benefit pregnant workers in need of immediate accommodation to stay healthy and working. Post-*Young*, pregnant women are facing three main problems in these cases:

1. the “**comparator**” problem, in which pregnant workers must show other employees are being accommodated by their employer in order to obtain their own accommodations;
2. the “**significant burden**” problem, in which pregnant workers are forced to discredit their employer’s justification for failing to accommodate them under a confusing legal standard; and
3. the “**costly and time-consuming litigation**” problem, whereby most pregnant workers simply cannot afford to wait for medically necessary accommodations they need immediately.

The result is not just that a high percentage of pregnant workers are losing these cases due to a uniquely stringent standard imposed on them, but that women and families across the country are losing because pregnant workers are continually forced to risk their health on the job or lose out on a paycheck because the framework set out by the Supreme Court is insufficient. The following section details how the outdated PDA framework, even after *Young*, is leading to an unsafe and unequal workplace for pregnant women.

#### **b. The “Comparator” Problem: Women Should Not Have to Compare Themselves to Others to Stay Healthy and Working**

The first step of the *Young* test includes reinforcement of the second clause of the PDA requiring workers to show that others in the workplace were accommodated in order to receive accommodations. Our research for “Long Overdue” revealed that meeting this first step of the *Young* test—a step that Justice Breyer said should not be “onerous”<sup>63</sup>—is still the primary impediment to workers in need of accommodations because courts are still stringently applying the comparator standard. This standard—which places a unique burden on pregnant workers that is not placed on workers with disabilities—is also tone deaf to the realities of the American workplace, where workers lack clout, bargaining power, and access to their co-workers’ accommodations requests or personnel files.

Our analysis in “Long Overdue” revealed that over two-thirds of workers lost their pregnancy accommodation cases. Nearly seventy percent of those losses can be traced to courts’ rejection of women’s comparators or inability to find comparators.<sup>64</sup> First, even after *Young*, courts are still incorrectly imposing categorical bans on certain types of comparators. For instance, in 2018, a federal court in Alabama rejected EMT **KIMBERLIE MICHELLE DURHAM’S** PDA claim that her employer failed to accommodate her lifting restriction even though she presented evidence that the employer accommodated three other people in her workplace with lifting restrictions. In *Durham*, the court reasoned that since those three co-workers were

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<sup>63</sup> *Id.*

<sup>64</sup> See LONG OVERDUE, *supra* note 7, at 14–16 (laying out all the cases post-*Young* in which courts held employers were permitted to deny pregnant workers accommodations under the PDA and finding nearly seventy percent of these cases failed because of the comparator standard).

accommodated for on-the-job injuries Durham was not “similarly situated” and the employer was not legally required to accommodate her.<sup>65</sup>

Like Durham, **CASSANDRA ADDUCI**, who worked part-time at a warehouse in Tennessee, also requested a temporary re-assignment after her doctor told her she should lift no more than 25 pounds. Though the employer had a “Temporary Return to Work” program and Adduci provided the court with a spreadsheet of 261 employees that the company provided with temporary work or light duty assignments, the court, post-*Young*, rejected those employees as valid comparators even though some of those accommodated were part-time, like Adduci, and occupied *the same exact position* as Adduci. In another case out of Florida, a court rejected a firefighter’s claim that the city failed to provide her light duty because she could not produce a “nearly identical” comparator. This also presents women with a catch-22; since courts often insist that comparators be non-pregnant persons, it is virtually impossible to find a “nearly identical” comparator.<sup>66</sup>

In case after case we reviewed, women in jobs ranging from nursing<sup>67</sup> to law enforcement<sup>68</sup> and in both the public<sup>69</sup> and private sector<sup>70</sup> 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<sup>71</sup> to Pennsylvania<sup>72</sup> to Oklahoma.<sup>73</sup>

Even in the months since we published “Long Overdue,” courts are continuing to hand down opinions against pregnant workers because the standard remains so oppressive. For instance, in August 2019, the Fifth Circuit rejected **MICHELLE SANTOS’S** PDA claim in *Santos v. Wincor-Nixdorf*. Santos requested a modified work schedule and was terminated a few days before giving birth, but the court sided with the employer because she could not provide “nearly identical” comparators, proving yet again how much of a blockade the comparator framework presents.<sup>74</sup>

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<sup>65</sup> See *Durham v. Rural/Metro Corp.*, No. 4:16-CV-01604-ACA, 2018 WL 4896346, at \*4 (N.D. Ala. Oct. 9, 2018), appeal docketed, No. 18-14687 (11th Cir. Nov. 7, 2018); see also Brief of A Better Balance & Ctr. for WorkLife Law et al. as Amici Curiae Supporting Plaintiff-Appellant, *Durham v. Rural/Metro Corp.*, No. 18-14687 (11th Cir. Feb. 8, 2019), <https://www.abetterbalance.org/resources/brief-of-amici-curiae-a-betterbalance-center-for-worklife-law-et-al-in-support-of-plaintiff-appellant-urging-reversal/>.

<sup>66</sup> *Lawson v. City of Pleasant Grove*, No. 2:14-CV-0536-JEO, 2016 WL 2338560, at \*10–11 (N.D. Ala. Feb. 16, 2016), rep. and recommendation adopted, No. 2:14-CV-536-KOB, 2016 WL 1719667 (N.D. Ala. Apr. 29, 2016).

<sup>67</sup> See *Luke v. CPlace Forest Park SNF*, 747 Fed. 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).

<sup>68</sup> See *Legg v. Ulster Cty.*, No. 1:09-CV-550 (FJS/RFT), 2017 WL 3207754, at \*5 (N.D.N.Y. July 27, 2017), appeal docketed, No. 17-2861 (2d Cir. Sept. 14, 2017).

<sup>69</sup> See e.g., *Vidovic v. City of Tampa*, No. 8:16-cv-T-17AAS, 2017 WL 10294807, at \*9 (M.D. Fla. Oct. 12, 2017); *Diaz v. Florida*, 219 F. Supp. 3d 1207, 1218 (S.D. Fla. 2016).

<sup>70</sup> See, e.g., *Swanger-Metcalf v. Bowhead Integrated Support Servs., LLC*, No. 1:17-cv-2000, 2019 WL 1493342, at \*8 (M.D. Pa. Mar. 31, 2019); *LaCount v. South Lewis SH OPCO*, No. 16-CV-0545-CVE-TLW, 2017 WL 2821814, at \*2 (N.D. Okla. June 29, 2017); *Anfeldt v. United Parcel Serv., Inc.*, No. 15 Civ. 10401, 2017 WL 839486, at \*3 (N.D. Ill. Mar. 3, 2017).

<sup>71</sup> *Huffman v. Speedway LLC*, 621 Fed. App’x 792, 799 (6th Cir. 2015).

<sup>72</sup> *Wadley v. Kiddie Acad. Int’l, Inc.*, No. CV 17-05745, 2018 WL 3035785, at \*1 (E.D. Pa. June 19, 2018).

<sup>73</sup> *LaCount v. South Lewis SH OPCO*, No. 16-CV-0545-CVE-TLW, 2017 WL 2821814, at \*2 (N.D. Okla. June 29, 2017).

<sup>74</sup> *Santos v. Wincor Nixdorf, Inc.*, No. 16 Civ. 440-RP, 2018 WL 1463710, at \*8 (W.D. Tex. Mar. 23, 2018).

Workers with disabilities have an explicit right to engage in a discussion with their employer to seek reasonable accommodations absent undue hardship. Pregnant women should be afforded the same right. As I have emphasized before, “many pregnant workers who need temporary adjustments to their work duties are new to their jobs, lack bargaining power, are unfamiliar with company policies (if there are any) and simply do not have the luxury of time to sort out these questions,”<sup>75</sup> and need immediate relief to stay healthy and working. Forcing women to go through evidentiary hoops to try to find a co-worker to whom they can compare themselves is not only Sisyphean but is also unequal to their counterparts with disabilities who need not jump through the same hoops to remain equal in the workplace.

### **c. The “Significant Burden” Problem**

While the comparator standard has proven to be the main roadblock to pregnant women receiving workplace accommodations, the “significant burden” standard the Court laid out in *Young* as part of the pretext analysis in the third step of the test, has also proven harmful to women. If workers are even able to make it to this step in the analysis, the “significant burden” analysis remains an additional hurdle.

For instance, when corrections officer **ANNE MARIE LEGG** requested light duty to avoid having to work with violent offenders during her pregnancy, the jail refused to accommodate her because it accommodated only on-the-job injuries. At trial, the judge instructed the jury that her PDA claim could succeed only if “the light-duty policy places a significant burden on pregnant women as opposed to all other employees who are similar in their ability or inability to work and were not granted a light-duty accommodation.”<sup>76</sup> The judge misapplied the *Young* standard by conflating the first and third steps of the *Young* test. While the first step of the test requires a worker to show she “was similar in her ability or inability to work” to other employees who were accommodated, by the time the worker reached the significant burden test, she should no longer need to provide a comparator. Effectively, the court added an additional hurdle for Legg to surmount, one she did not meet. Legg lost at trial.

### **d. The “Costly and Time-Consuming Litigation” Problem**

*Young* also presents a practical problem. Litigation is often the only way to parse pregnancy accommodation issues through the existing PDA standard. In order to state a claim under the three-part *Young* test, one has to show that the employer did not accommodate the worker. That effectively means *Young* is designed to be a litigation standard, not a standard in which an employer and employee could resolve an accommodation request informally before a denial has been made. As we hear through our free legal hotline, many pregnant workers do not want to litigate pregnancy accommodation claims. They want to follow their doctor’s orders, have a healthy pregnancy, and continue working so that they can put food on the table for their growing family. They want to be able to have a conversation with their employer to resolve accommodation requests informally.

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<sup>75</sup> Dina Bakst, Opinion, *Peggy Young’s Victory Is Not Enough*, U.S. NEWS & WORLD REPORT (Mar. 26, 2015), <https://www.usnews.com/opinion/economic-intelligence/2015/03/26/peggy-young-supreme-court-victory-is-not-enough-for-pregnant-workers>.

<sup>76</sup> See Jury Instructions, *Legg v. Ulster Cty., No. 1:09-CV-550* (FJS/RFT) (N.D.N.Y. Aug. 30, 2016), ECF No. 185.

Furthermore, not only are pregnant workers expected to produce enough evidence to prove their employer's intention was discriminatory, they must do so, in many cases, under challenging circumstances where they're often unfamiliar with company policies and simply do not have the luxury of time to sort out these questions. Pregnant women need an immediate remedy to stay employed—they simply cannot rely on a protracted, stressful, and highly uncertain legal process to get the relief they need. The *Young* standard is only designed to address problems long after they have occurred, rather than facilitating timely resolutions. This is demonstrated by the fact that many of the workers who call us needing an immediate accommodation have spoken with other attorneys who simply tell them to call back once they have been terminated.

With a clearer pregnancy accommodation framework in place employers and employees can resolve accommodation requests informally and expediently. The current standard simply does not allow for quick resolution and, as such, everyone loses. As the next section reveals, the Americans with Disabilities Act Amendments Act has also done little to protect pregnant workers with medical needs arising from pregnancy.

### **III. The ADAAA Still Fails to Adequately Protect Workers in Need of Accommodations for Their Health or to Prevent Pregnancy-Related Complications**

In 2008, the Americans with Disabilities Act—which, since its passage in 1990 provides the explicit right to reasonable accommodations—was amended to expand its reach, becoming the Americans with Disabilities Act Amendments Act (“ADAAA”). Still, pregnant workers in need of accommodation are facing two main issues with the ADAAA.

First, courts consistently make clear that pregnancy itself is not a disability and does not merit reasonable accommodations under the ADAAA.<sup>77</sup> That means that if a physician recommends an accommodation in order for a pregnant worker to maintain a healthy pregnancy or avoid serious pregnancy-related complications (e.g., preterm labor), the worker may not be covered under the ADAAA.<sup>78</sup> Second, while the ADAAA intended to expand the types of pregnancy-related

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<sup>77</sup> See, e.g., *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 553 (7th Cir. 2011) (citing EEOC guidance, that remains in place to this day in holding “[c]ourts that consider these regulations consistently find that pregnancy, absent unusual circumstances, is not a physical impairment”); *Brown v. Aria Health*, No. CV 17-1827, 2019 WL 1745653, at \*4 (E.D. Pa. Apr. 17, 2019) (“A routine pregnancy is not considered a disability within the meaning of the ADA.”); *Hannis-Miskar v. N. Schuylkill Sch. Dist.*, No. 3:16CV142, 2016 WL 3965209, at \*3 (M.D. Pa. July 22, 2016) (“Because plaintiff fails to assert complications with her pregnancy, she has failed to plead a disability under the ADA.”); *Selkow v. 7-Eleven, Inc.*, No. 11-456, 2012 WL 2054872, at \*14 (M.D. Fla. June 7, 2012) (“Absent unusual circumstances, pregnancy is not considered a disability . . . .”); see also 29 C.F.R. pt. 1630 app. (“Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments.”).

<sup>78</sup> Furthermore, courts are still relying on pre-ADAAA case law in concluding that pregnancy-related impairments do not qualify as pregnancy-related disabilities. See, e.g., *Serednyj*, 656 F.3d at 554 (relying on pre-ADAAA case law in holding that plaintiff's ADA claim failed because her “lifting restriction was of limited duration, and not an abnormal condition of her pregnancy. Indeed, the inability to do heavy lifting is not a substantial limitation as compared to the average person”); see also *Wonasue v. University of Maryland Alumni Association*, 984 F. Supp. 2d 480, 490 (D. Md. 2013) (relying on pre-ADAAA case law in finding that even though the plaintiff had “hyperemesis

impairments that may qualify as a disability,<sup>79</sup> and indeed some courts have heeded that directive,<sup>80</sup> other courts have been unwilling to extend ADA coverage for pregnancy-related disabilities, even in cases where workers have presented serious pregnancy complications.

#### **a. Pregnancy Itself is Not Considered A Disability Under the ADA**

In *Brown v. Aria Health*, decided in April 2019, the Eastern District of Pennsylvania held an employer did not violate the ADA when an operating room nurse was forced out onto unpaid leave after her doctor wrote a note stating that she should avoid exposure to fluoroscopy, a type of x-ray, and bone cement during her pregnancy “because it is unsafe for her” to be in those rooms.<sup>81</sup> The court found that because Brown did not have pregnancy-related complications, and because a “routine pregnancy is not considered a disability within the meaning of the ADA,” she had no right to accommodations under the ADA.<sup>82</sup>

In yet another example, when **WHITNEY LACOUNT**, a certified nursing assistant, asked to refrain from lifting only one particular patient during her pregnancy, had five other employees willing to help her, and brought in a doctor’s note with a 25-pound lifting restriction, her employer pushed her out onto unpaid leave, finding her to be a “liability.”<sup>83</sup> The court dismissed her ADA claim because “Plaintiff has not alleged that she was pregnant and that she had a related mental or physical impairment. Instead, she alleges that she was pregnant and her doctor imposed a lifting restriction, but she does not claim that she had an abnormal or high-risk pregnancy. This does not constitute a disability.”<sup>84</sup>

In *Swanger-Metcalf v. Bowhead Integrated Support Services*, decided in March 2019, **ELIZABETH SWANGER-METCALFE** was an automotive worker whose job entailed working in a poorly ventilated sand room part of the time.<sup>85</sup> When she became pregnant, her doctor gave her a note recommending that she work only in well-ventilated areas, which she gave to her supervisors.<sup>86</sup> Her employers said they were not required to accommodate her because pregnancy is not a disability, and said she could either work in the sand room or take unpaid leave. When she became distressed at this impossible choice, her supervisors mocked her,

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of pregnancy, a severe form of morning sickness, where the vomiting is excessive and may cause dehydration in the body,” she did not have a disability for the purposes of the ADA).

<sup>79</sup> See 29 C.F.R. pt. 1630 app.; see also Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (2015).

<sup>80</sup> See, e.g., *Mayorga v. Alorica, Inc.*, No. 12-21578-CIV, 2012 WL 3043021, at \*5 (S.D. Fla. July 25, 2012) (finding that “premature uterine contractions, irritation of the uterus, increased heart rate, severe morning sickness, severe pelvic bone pains, severe back pain, severe lower abdominal pain, extreme headaches, and other pregnancy-related conditions” qualified as a disability under the ADA).

<sup>81</sup> *Brown*, 2019 WL 1745653, at \*2.

<sup>82</sup> *Id.* at \*4–5.

<sup>83</sup> *LaCount v. S. Lewis SH OPCO, LLC*, No. 16-CV-0545-CVE-TLW, 2017 WL 1826696, at \*1 (N.D. Okla. May 5, 2017).

<sup>84</sup> *Id.* at \*3 (emphasis in original).

<sup>85</sup> *Swanger-Metcalf v. Bowhead Integrated Support Servs., LLC*, No. 1:17-CV-2000, 2019 WL 1493342, at \*2 (M.D. Pa. Mar. 31, 2019).

<sup>86</sup> *Id.*

saying, “they want women’s equal rights, they got ‘em!”<sup>87</sup> She was ultimately pushed out onto unpaid leave.

The court rejected Swanger-Metcalf’s ADA claim. She argued that “because breathing constitutes a major life function...breathing of ‘debris filled air’ while working in the sand room could have caused her to sustain serious pregnancy complications.”<sup>88</sup> The court was unpersuaded by that argument finding that because she was trying to avoid a pregnancy-related complication but did not currently have a complication, she was not entitled to ADA accommodations.<sup>89</sup>

### **b. Courts Are Still Narrowly Interpreting the Scope of Pregnancy-Related Impairments That Qualify as a Disability Under the ADAAA**

In *Colon v. Sabic Innovative Plastics*, the Northern District of New York found that “even after the ADAAA, courts in the Second Circuit have held that short-term impairments do not render a person disabled within the meaning of the statute.”<sup>90</sup> In *Colon*, the court found that even though the plaintiff had documented evidence of a “high-risk pregnancy” from her medical provider that was not enough to meet the definition of a disability under the ADAAA. The court stated: “The only evidence that Plaintiff presented in support of her position that her high-risk pregnancy was a disability is the fact that her doctor diagnosed her with a high risk [sic] pregnancy.”<sup>91</sup> Thus, despite presenting a written diagnosis from her doctor, Colon did not qualify as disabled under the ADAAA.<sup>92</sup>

Similarly, in *Oliver v. Scranton Materials*, the court found that “medical complications associated with [] high risk pregnancy with triplets and the medical impairments caused by both the complications and ... need for surgery at the time of birth” did not meet the definition of “disability” under the ADA because “complications” and “surgery” were not specific enough.<sup>93</sup> Three years later, in the 2018 case *Arozarena v. Carpenter Co*, when a machine operator “began to have complications with her pregnancy and in the last two months of her pregnancy found herself having to see her doctor twice a week to be monitored” the court cited *Oliver* in holding that even though she submitted doctor’s notes, she did not provide enough specificity in her complaint to prove that she had an ADA-qualifying disability.<sup>94</sup>

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<sup>87</sup> See Complaint, *Swanger-Metcalf v. Bowhead Integrated Support Servs., LLC*, No. 1:17-CV-2000, 2019 WL 1493342 (M.D. Pa. Mar. 31, 2019), ECF No. 1.

<sup>88</sup> *Swanger-Metcalf*, 2019 WL 1493342, at \*11.

<sup>89</sup> *Id.*

<sup>90</sup> *Colon v. Sabic Innovative Plastics US, LLC*, No. 115CV651MADDJS, 2017 WL 3503681, at \*7 (N.D.N.Y. Aug. 15, 2017).

<sup>91</sup> *Id.* (quoting *Wanamaker v. Westport Bd. of Educ.*, 899 F. Supp. 2d 193, 211 (D. Conn. 2012) (“[T]emporary, non-chronic impairments of short-duration, with little or no long term or permanent impact, are usually not disabilities.”)).

<sup>92</sup> Note that while this case may have presented certain complicated factual issues, the court’s analysis regarding qualifying disabilities, especially vis a vis high-risk pregnancy, is instructive and stands to impact future courts’ interpretations as to what qualifies as an ADAAA-qualifying pregnancy-related impairment.

<sup>93</sup> *Oliver v. Scranton Materials, Inc.*, No. 3:14-CV-00549, 2015 WL 1003981, at \*8 (M.D. Pa. Mar. 5, 2015).

<sup>94</sup> *Arozarena v. Carpenter Co.*, No. 5:17-CV-05457, 2018 WL 2359143, at \*1 (E.D. Pa. May 24, 2018); see also *Alger v. Prime Rest. Mgmt., LLC*, No. 1:15-CV-567-WSD, 2016 WL 3741984, at \*8 (N.D. Ga. July 13, 2016) (although the court acknowledged the plaintiff experienced “severe complications” and bleeding, the court found

Outside of the pregnancy context, too many times, the ADAAA has fallen short in expanding protections to workers with temporary impairments, which bodes poorly for pregnant workers who are often in need of only short-term accommodations.<sup>95</sup>

Congress should be concerned with preventing health problems before they start, rather than forcing a pregnant worker to injure herself or risk injuring herself in order to obtain ADAAA coverage for a new complication. Prevention is not only worth a pound of cure, but in too many instances where the health and economic harms are virtually irreparable, prevention is the *only* tool we have.

The PWFA would help to protect healthy pregnancies even in scenarios where a woman does not yet have any medical complications and simply requires some modest accommodations, like being able to use the restroom frequently, to stop health problems before they start.

#### **IV. The FMLA is Also Inadequate in Providing Protections for Pregnant Workers in Need of Accommodations**

Although a very important protection, the Family and Medical Leave Act (“FMLA”)<sup>96</sup> is not the statutory scheme pregnant workers need when they require reasonable accommodations, like a stool to sit on, a water bottle, or light duty, to continue working. The FMLA provides workers with up to twelve weeks of unpaid leave for pregnancy-related illness, recovery from childbirth, and other pregnancy-related incapacity. More than forty percent of workers are ineligible for

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that Alger failed to show her pregnancy-related complications constituted a disability under the ADA); *Llano v. New York City Health & Hosps. Corp.*, No. 13 CIV. 5820 RJS, 2014 WL 1302654, at \*2 (S.D.N.Y. Mar. 31, 2014) (pregnancy-related nausea did not qualify as a disability under the ADA).

<sup>95</sup> Given the short-term nature of pregnancy, courts’ broader rejection of temporary disabilities as ADA-qualifying disabilities means that many pregnancy-related impairments, even those that may significantly compromise a pregnant employee’s health, will likely not constitute ADAAA qualifying disabilities. *See, e.g., Leone v. All. Foods, Inc.*, No. 8:14-CV-800-T-27TBM, 2015 WL 4879406, at \*7 (M.D. Fla. Aug. 14, 2015) (holding that the plaintiff’s eye injury, which required two weeks’ treatment, was not a disability since the impairment was short in duration); *Willis v. Noble Envt’l Power, LLC* 143 F. Supp. 3d 475, 483 (N.D. Tex. 2015) (holding that the plaintiff’s dehydration and heat stroke, which required him to go to the emergency room and prevented him from walking, communicating, and concentrating, was not a disability because the impairment “spanned no more than a few days”); *Mastrio v. Eures Services* No. 3:13-CV-00564 VLB, 2014 WL 840229, at \*6 (D. Conn. Mar. 4, 2014) (holding the plaintiff’s kidney stones, which required him to miss work for a month, where he was restricted to his bedroom and suffered excruciating pain, was not a disability because it was only temporary); *Butler v. BTC Foods Inc.*, No. CIV.A. 12-492, 2012 WL 5315034, at \*3 (E.D. Pa. Oct. 19, 2012) (holding a double hernia did not constitute a disability because it was only a “one-time occurrence”); *see also Feldman v. Law Enft Assocs. Corp.*, 955 F. Supp. 2d 528, 539 (E.D.N.C. 2013) (“[Plaintiff] has not offered any evidence beyond his overnight visit to the hospital to show that the [mini-stroke] substantially impaired the major life activity of working or any other major life activity.”); *Lewis v. Fla. Default Law Grp., P.L.*, No. 8:10-CV-1182-T-27EAJ, 2011 WL 4527456, at \*5 (M.D. Fla. Sept. 16, 2011) (holding that “the fact that Lewis could not perform those functions for a period of one to two weeks does not mean her symptoms ‘substantially limited’ those activities” and quoting from the EEOC’s ADA guidance that “[i]mpairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe” 29 C.F.R. pt. 1630 app. (citing Joint Hoyer–Sensenbrenner Statement, p. 5)).

<sup>96</sup> 29 U.S.C. §§ 2601–2654 (2012).

FMLA protections and many more cannot afford to take time off unpaid.<sup>97</sup> Workers who are forced to use up their FMLA leave entitlement when forced off the job during pregnancy are then often unable to use its protections to care for their new baby, one of the intended uses of the FMLA.

## **V. Pregnant Workers Need the Pregnant Workers Fairness Act to Guarantee an Explicit Right to Reasonable Accommodations**

As discussed above, under the framework established by the court’s majority in *Young*, a pregnant worker who wants to prove unlawful treatment based on her employer’s failure to accommodate her pregnancy must go through a multi-step process that can only be fleshed out through lengthy litigation. Yet most workers we hear from simply want an accommodation to continue working and comply with their doctor’s orders. They cannot afford to wait weeks, months, or years for a court decision. Once their baby has started elementary school, it is obviously too late to ensure the pregnancy is healthy at the outset and to prevent a downward spiral of financial woes. Workers need an explicit right to accommodations, not a standard that forces them into a years-long spiral of chasing down co-workers to meet a uniquely burdensome standard.

As A Better Balance has said before, “when employees and employers sit down together, they have the opportunity to come up with solutions that meet everyone’s needs. No lawyers need be involved. The reasonable accommodations standard also encourages precisely the kind of dialogue that can lead to greater understanding of workers as complete human beings, and acceptance of difference in the workplace.”<sup>98</sup>

### **A. An Explicit Right to Accommodations for Pregnancy Fulfills the Intent of the Pregnancy Discrimination Act**

The PWFA fulfills the intent of the PDA—to provide equal treatment to pregnant women—by making it unmistakably clear that employers have to make reasonable accommodations for pregnant workers, just like they do for workers who need accommodation because of disability.

As described in our joint amicus brief with the American Civil Liberties Union in the *Young v. UPS* Supreme Court case:

“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. See, e.g., 123 Cong. Rec. 7,539 (1977) (statement of Sen. Williams) (PDA intended to address “the outdated notion that women are only supplemental or temporary workers-earning ‘pin money’ or waiting to return home to

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<sup>97</sup> See HELEN JORGENSON & EILEEN APPELBAUM, CTR. FOR ECON. & POLICY RESEARCH, EXPANDING FEDERAL FAMILY AND MEDICAL LEAVE COVERAGE: WHO BENEFITS FROM CHANGES IN ELIGIBILITY REQUIREMENTS? 3 (Feb. 2014), <http://cepr.net/documents/fmlaeligibility-2014-01.pdf>.

<sup>98</sup> PREGNANT AND JOBLESS, *supra* note 16, at 7.

raise children full-time”). These stereotypes implicated all women and emanated from the belief that women are, “and should remain, ‘the center of home and family life.’” *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (quoting *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)).”<sup>99</sup>

The Pregnancy Discrimination Act sought to challenge these pernicious sex role stereotypes.<sup>100</sup> In line with this original intent driving the PDA, the PWFA will remedy the various forms of gender bias discussed above, and that persist for pregnant women today. This is because the PWFA provides the explicit right to accommodation, so all of the reasons why employers deny those accommodations would no longer be permitted. Additionally, for those dealing with conscious bias, such as paternalistic assumptions, the PWFA explicitly prohibits forcing a pregnant worker in need of accommodations onto leave if another reasonable accommodation can be provided. Any intentional bias unleashed against a worker who requests accommodations would be protected by the statute’s retaliation protections. Finally, even structural bias would be corrected by the PWFA because workplaces would no longer be permitted to get away with so-called “pregnancy blind” policies or practices—they would simply have to provide reasonable accommodations breaking down structural barriers in the workplace and paving the way for equal opportunities.

### **B. What Does the Pregnant Workers Fairness Act Do?**

The Pregnant Workers Fairness Act’s express purpose is to eliminate discrimination and promote women’s health and economic security. The law applies to employers with fifteen or more employees and would ensure that pregnant workers can stay safe and healthy at work. The law would require employers to provide reasonable accommodations to employees who have known limitations stemming from pregnancy, childbirth, and related conditions unless such accommodation would cause an undue hardship for the employer. Examples of reasonable accommodations might include more frequent or longer breaks, access to a stool to sit on, or the ability to carry a water bottle. An employer cannot unilaterally force a pregnant worker to take leave when another reasonable accommodation could help keep her on the job. The PWFA uses an existing reasonable accommodations framework, closely modeled after the Americans with Disabilities Act, that is familiar to employers.

Specifically, as written in the text of the federal Pregnant Workers Fairness Act, “the terms ‘reasonable accommodation’ and ‘undue hardship’ have the meanings given such terms in section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111).”<sup>101</sup> The text also specifies that the terms “shall be construed as such terms have been construed under such Act and as set forth in the regulations required by this Act, including with regard to the interactive process that will typically be used to determine an appropriate reasonable accommodation.”<sup>102</sup>

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<sup>99</sup> See Young Amicus Brief, *supra* note 31, at 8.

<sup>100</sup> See Reva B. Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 WM. & MARY L. REV. 971, 995–999 (2018).

<sup>101</sup> See H.R. 2694, *supra* note 2.

<sup>102</sup> See 42 U.S.C. § 12111(9)–(10). According to the ADA, “The term “reasonable accommodation” may include— (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or

Most pregnancy accommodations are fairly inexpensive and time-limited.<sup>103</sup> For instance, a pregnant cashier may require a stool to sit on so as to prevent swelling and circulatory problems. A pregnant retail worker may require additional bathroom breaks so that she does not develop a urinary tract infection. A pregnant police officer may request a light duty re-assignment so that she does not have to wear a constricting uniform that could imperil her pregnancy. A warehouse worker who received a doctor's note indicating she should not lift over 50 pounds may seek temporary re-assignment.

The undue hardship standard is designed to ensure that employers are not required to stretch their business operations too thin in order to provide an accommodation.

These standards are time-tested, familiar to employers, and based in ensuring every worker receives an individualized inquiry rather than a blanket, one-size-fits-all policy. As indicated, the bill's language states that regulations and case law from courts interpreting these definitions will be pulled in for the Pregnant Workers Fairness Act as well. Additionally, language was added to ensure that the interactive process is very clearly stated in the law, in response to a request from business groups. Businesses and employees alike appreciate the interactive process precisely because it encourages a conversation, rather than contentious litigation.

In determining appropriate accommodations, the PWFA contemplates an individualized inquiry into the pregnant worker's needs. In doing so, it ensures pregnant workers receive only the accommodations they actually need, which deters employers from resting on traditional stereotypes of pregnant workers. Many women will never need accommodations for their pregnancy, even at later stages and even for those in physically strenuous work. Accommodation needs and requests not only vary from woman to woman, but even from pregnancy to pregnancy. The beauty of the flexible reasonable accommodation standard within the PWFA is that it makes no assumptions about what pregnant workers may need or not need, and therefore it ensures that the law does not perpetuate gender inequality by providing women with overly broad and unnecessary protections. Instead, in recognition that every pregnancy and workplace is different, the PWFA requires only an interactive process between employer and employee to determine whether a reasonable accommodation will allow the worker to continue working without jeopardizing her health.

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policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." The term "undue hardship" means "(A)In general The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B). (B)Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include— (i)the nature and cost of the accommodation needed under this chapter; (ii)the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii)the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv)the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

<sup>103</sup> JOB ACCOMMODATION NETWORK, ACCOMMODATION AND COMPLIANCE SERIES, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 4 (2015), <https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628>.

Finally, because reasonable accommodations for pregnant workers are time limited, they are not very costly and are unlikely to constitute an undue hardship on the employer. The bill also explicitly states that employers cannot deny employment opportunities for workers who request reasonable accommodations. Employers would also not be permitted to force an employee to accept an unnecessary reasonable accommodation that they do not want or need, in order to combat paternalism. The PWFA explicitly mentions that employers may not force an employee out onto leave unless no other reasonable accommodation would work, since that is a very common scenario under the status quo. Finally, employers cannot take other adverse action, against employees who request a reasonable accommodation, such as cutting their hours or demoting them.

The PWFA pulls in the exact same remedies as are already provided under Title VII, so as to ensure consistency with the current Pregnancy Discrimination Act. This, too, is familiar to employers.

### **C. Why Is the Pregnancy Discrimination Amendment Act an Inadequate Solution?**

In June 2015, some members of Congress introduced the Pregnancy Discrimination Amendment Act as an alternative to the PWFA.<sup>104</sup> While we applaud them for recognizing the shortcomings of the PDA, this alternative proposal leaves pregnant workers and their health behind, and is likely worse than the status quo. The PWFA uses a familiar framework from the Americans with Disabilities Act, but the PDAA inserts new language and confusing legal standards into an already problematic statutory framework.

The PDAA says that pregnant women should be treated the same as other non-pregnant employees who are working under “similar working conditions” and with “temporary” limitations. However, these terms are confusing and undefined. Under the PDAA, a pregnant woman who needs a water bottle not only still has to struggle to find another coworker who also receives a water bottle under the current problematic comparative framework. She also has to find a coworker in “similar working conditions” to her who is only temporarily impaired. “Similar working conditions” is a phrase borrowed from the federal Equal Pay Act.<sup>105</sup> Unfortunately, this term has been defined very narrowly by courts and has been used repeatedly to deny women their equal rights.<sup>106</sup> For example, “similar working conditions” takes into

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<sup>104</sup> H.R. 2800, 114th Cong. (2015).

<sup>105</sup> 29 U.S.C. § 206(d)(1) (2012).

<sup>106</sup> See, e.g., *See Timmon v. Servicemaster Co.*, No. 96-1655, 1997 WL 306778, at \*1 (6th Cir. Jun. 5, 1997) (finding working conditions of female telephone sales representative were not similar to those of male residential sales representative); *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1323-24 (9th Cir. 1993) (holding that higher pay for male coach of men's basketball team compared to female coach of women's basketball team was justified by “substantial differences between their responsibilities and working conditions” because the men’s basketball team earned more revenue for the school, and therefore the male coach “was under greater pressure . . . to promote his team and to win”); *Gerbush v. Hunt Real Estate Corp.*, 79 F.Supp.2d 260, 263-64 (W.D.N.Y. 1999) *aff’d*, 234 F.3d 1261 (2d Cir. 2000) (holding that working conditions of female real estate branch manager were not similar to those of male managers of other branches because female manager’s branch was less profitable); *Berry v. Bd. of Sup’rs of Louisiana State Univ. & Agr. & Mech. Coll.*, No. CIV.A. 81-0178 L, 1985 WL 6149, at \*1-2 (W.D. La. Feb. 27, 1985) *aff’d sub nom. Berry v. Bd. of Sup’rs of Louisiana State Univ.*, 783 F.2d 1270 (5th Cir. 1986) (finding that a female university professor’s working conditions were dissimilar to those of male professors in her department

consideration the surroundings in a work environment, such as the temperature.<sup>107</sup> Under the PDAA, a pregnant indoor cashier at a garden shop would not get a stool when an outdoor cashier with a broken foot is provided with one.

The term “temporary” is also undefined. It is unclear if it means less than a month, six months, a year, or two years. A pregnant woman could be denied an accommodation because her counterpart is permanently, not temporarily disabled. Even worse, she may end up waiting months to see whether her coworker recovers or whether his or her condition is more prolonged.

The PDAA also lacks many important provisions that the PWFA contains. As will be discussed in further detail below, the PWFA explicitly states that employers cannot push employees onto unpaid leave when another accommodation would allow them to keep working and stay healthy. The PWFA also makes sure that an employee will not have to accept an employer’s suggested accommodation that is unnecessary.<sup>108</sup>

## **VI. State Pregnant Workers Fairness Act Laws Demonstrate That This Standard Is a Workable Solution to Keep Pregnant Women Healthy and On the Job**

This has been an overwhelmingly bipartisan issue at the state level—over half of all states, twenty-seven in total, now provide stronger legal protections for pregnant workers who require some reasonable accommodations to stay healthy and employed.<sup>109</sup> A Better Balance is proud to have worked on almost all of the recently enacted state-level laws as well as many campaigns that have supported the introduction of similar legislation.

Every one of the state-level accommodation laws enacted since 2013 passed with bipartisan, and in many cases, unanimous support. The new wave of laws tracks the ADA reasonable accommodation framework – indeed, all post-2013 state laws use this familiar reasonable accommodation/undue hardship framework. Across the country, state legislators have taken action on this issue to strengthen their state economies, improve health outcomes, and reduce the burden on Medicaid and other social programs.

### **A. Legislators Recognize Opportunity to Increase Women’s Labor Force Participation And Strengthen Economic Security for Families**

State legislators understand the importance of reasonable accommodations in order to ensure women remain in the workforce and promote economic security for families.

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because the majority of her time was spent on instruction, whereas none of her male comparators spent more than 50% of their time on instructional duties); *Grier v. Rumsfeld*, 466 F.Supp. 422, 425 (S.D. Tex. 1979) (holding that the working conditions of a female supply clerk were not similar to those of male members of the National Guard performing “functionally the same task” because male Guard members were subject to potential mobilization).

<sup>107</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974).

<sup>108</sup> See H.R. 2694, *supra* note 2.

<sup>109</sup> See ABB FACT SHEET: STATE AND LOCAL PWFAS *supra* note 9.

In Illinois, Democratic sponsor Toi Hutchinson put it succinctly: “We don’t want to be in a situation where women have to choose between having a healthy pregnancy and going to work. This is to keep women working, so they can support their families.”<sup>110</sup>

In Kentucky, Republican State Senator Alice Forgy Kerr, who championed the Kentucky Pregnant Workers Act, was inspired to act after hearing the stories of police officers Lyndi Trischler and Sam Riley, mentioned above. Sen. Kerr took their stories to heart and recognized Kentucky’s low rank in labor force participation for women. She understood that providing reasonable accommodations would encourage women’s participation in not only non-traditional occupations like policing, but other realms as well, benefitting the state’s economy.<sup>111</sup>

Speaking in support of the New York Pregnant Workers Fairness Act, Republican State Senator Kemp Hannon stated, “In the absence of this legislation what we’re doing is saying to somebody who is pregnant: No, you can’t continue to work. No, you can’t continue to have your usual routine. And that just puts an economic burden on the rest of society.”<sup>112</sup>

Keeping pregnant workers attached to the workforce has also been a key reason for business support of state pregnant worker fairness legislation. For example, the Associated Industries of Massachusetts (“AIM”), which represents 3,500 member employers, took a strong statement in support of the Massachusetts Pregnant Workers Fairness Act. In a letter to Governor Baker urging his signature of the bill, AIM stated that “[it] allows employees to make arrangements that permit them to remain on the job through a pregnancy while creating a pathway for employers to create reasonable accommodations.”<sup>113</sup>

## **B. Legislators Recognize the Health Benefits of Accommodating Pregnant Workers**

In a letter to legislators advocating for the New York City Pregnant Workers Fairness Act, Dr. Lucy Willis, an Emergency Department physician in New York City, testified in support of the city’s Pregnant Workers Fairness Act. She explained that she had treated a 16-week pregnant patient who arrived by ambulance after collapsing at work.<sup>114</sup> The patient was so severely dehydrated that she had to be treated with intravenous fluids. Dehydration is dangerous early in pregnancy because of the risk of miscarriage from fainting. Although the worker had asked her supervisor if she could carry a water bottle during the early and risky stages of her pregnancy (based on her doctor’s orders), her supervisor denied the request because of a store-wide policy: no water bottles were allowed on the retail floor. In another example of a worker forced to risk her health, one fast food worker was even denied breaks to use the bathroom more frequently, as

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<sup>110</sup> See *Ill. S. Floor Deb.*, 98th Gen. Assemb. (May 20, 2014) (statement of Sen. Toi Hutchinson).

<sup>111</sup> 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/?archive&nola=WGAOS+020057&part=2>.

<sup>112</sup> *N.Y. S. Floor Deb.*, 2013–2014 Leg. Sess. (June 12, 2014) (statement of Sen. Kemp Hannon).

<sup>113</sup> Letter from Richard C. Lord, President and CEO of Associated Industries of Massachusetts, to Massachusetts Governor Charlie Baker (July 24, 2017) (on file with author).

<sup>114</sup> Letter from Wendy Chavkin, MD, MPH, Professor of Population and Family Health and Obstetrics-Gynecology, Columbia University, to James Vacca, New York City Council Member (Nov. 29, 2012) [hereinafter Chavkin Letter], <https://www.abetterbalance.org/resources/chavkin-letter/>.

is often necessary during pregnancy.<sup>115</sup> Not being able to use the bathroom can result in serious infections in pregnancy.<sup>116</sup>

No pregnant woman should have to endure a trip to the emergency room when such a scare could easily be prevented. Furthermore, many pregnant women are too fearful to ask for an accommodation for fear of retaliation, presenting yet another scenario where workers are forced to risk their health because they do not have an explicit right to pregnancy accommodations and anti-retaliation protections for such requests.<sup>117</sup>

Legislators were also moved by Dr. Wendy Chavkin’s testimony on preterm birth: “Physically demanding work—including prolonged standing, long work hours, irregular work schedules, heavy lifting, and high physical activity—has consistently been shown to be associated with a statistically significantly increased risk of preterm delivery and low birth weight. High levels of physical activity at work and work-related stress have also been found to be associated with increased risk for pregnancy-induced hypertension.”<sup>118</sup> These consequences are not only devastating for workers, but also quite costly for society. On average, each premature/low birth weight baby costs employers and employees an additional \$58,917 in newborn and maternal health care costs, according to the March of Dimes.<sup>119</sup> Today, one in ten live births is preterm and prematurity is the leading cause of infant mortality nationwide.<sup>120</sup> While premature delivery does not always cause problems for the child, it does increase the likelihood of serious medical complications.

In a Health Impact Assessment of the Kentucky Pregnant Workers Act, the Louisville Department of Public Health and Wellness wrote, “Accommodating pregnant workers, upon their request, is critical for reducing poor health outcomes . . . . Improving birth outcomes makes a sustainable impact for a lifetime of better health.”<sup>121</sup> Those poor outcomes, the report highlighted, can include miscarriage, preterm birth, low birth weight, preeclampsia, and birth defects, among other issues.<sup>122</sup> Thus, ensuring healthy pregnancies and babies can result in long-term savings for the healthcare system. Providing reasonable accommodations also allows

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<sup>115</sup> A BETTER BALANCE & NAT’L WOMEN’S LAW CTR., *IT SHOULDN’T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS* 4 (2013), <https://www.abetterbalance.org/resources/it-shouldnt-be-a-heavy-lift/>.

<sup>116</sup> LOUISVILLE DEP’T OF PUBLIC HEALTH AND WELLNESS, *PREGNANT WORKERS HEALTH IMPACT ASSESSMENT* 2019, at 6–7 (2019 [hereinafter *PREGNANT WORKERS HEALTH IMPACT ASSESSMENT*]), [https://louisvilleky.gov/sites/default/files/health\\_and\\_wellness/che/pregnant\\_workers\\_hia\\_final\\_02182019.pdf](https://louisvilleky.gov/sites/default/files/health_and_wellness/che/pregnant_workers_hia_final_02182019.pdf).

<sup>117</sup> *ACOG Committee Opinion No. 733*, *supra* note 12, at e117.

<sup>118</sup> *See* Chavkin Letter, *supra* note 114.

<sup>119</sup> MARCH OF DIMES, *PREMATURE BIRTH: THE FINANCIAL IMPACT ON BUSINESS* (2013), <https://www.marchofdimes.org/materials/premature-birth-the-financial-impact-on-business.pdf>.

<sup>120</sup> *Preterm Birth*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pretermbirth.htm> (last visited Oct. 14, 2019).

<sup>121</sup> *PREGNANT WORKERS HEALTH IMPACT ASSESSMENT*, *supra* note 116, at 7.

<sup>122</sup> *Id.* We have seen these devastating health impacts firsthand. *See* Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES, Oct. 21, 2018, <https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html> (highlighting A Better Balance client Tasha Murrell who miscarried while working at a warehouse in Tennessee after her manager denied her medically-advised lifting restriction).

women to work later into their pregnancies and save any leave time until after childbirth, allowing them more time to recover and establish breastfeeding.<sup>123</sup>

### C. Legislators Acknowledge the Related Savings for Other Government Assistance Programs

As Armanda Legros’s story highlighted, many pregnant workers who are pushed onto unpaid leave or fired from their jobs often have no choice but to resort to public assistance in order to stay afloat. Women we have spoken to in these circumstances must rely on food stamps, Medicaid, unemployment insurance benefits, disability benefits, Temporary Assistance for Needy Families, rental assistance, and other government programs to make ends meet. These vitally important safety nets should not have their resources stretched by recipients who would prefer to continue working in a safe environment with minor accommodations from their employers.

State lawmakers have repeatedly acknowledged that when employers can cheaply provide accommodations and keep a valued worker out of poverty, it only makes sense to avoid added financial stress on individuals and taxpayers.

Speaking in support of Delaware’s pregnancy accommodation legislation that passed unanimously in 2014, Republican State Senator Colin Bonini said, “From a fiscal-conservative standpoint, we don’t want people to lose their jobs and get on public assistance. We want women to work and to have successful pregnancies and successful families.”<sup>124</sup>

In Utah, Republican State Senator Todd Weiler explained, “We had a woman who lost her job testify in committee and is now on state assistance because of that with a small baby. And so there is a need here.”<sup>125</sup> Weiler’s colleague, Republican State Representative Rebecca Edwards, agreed, stating, “Our economy benefits when women are able to keep working, continue supporting their families, and avoid getting on public assistance programs.”<sup>126</sup>

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<sup>123</sup> A medical condition related to pregnancy can also include, but is not limited to, limited time off to recover from childbirth. It is well-established that time off or a period of leave can constitute a reasonable accommodation under the ADA. *See, e.g., Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000) (“This court and others have held that a medical leave of absence—[plaintiff’s] proposed accommodation—is a reasonable accommodation under the Act in some circumstances.”); *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591, 601 (7th Cir. 1998) (“[T]here was sufficient evidence from which a reasonable juror could conclude that [plaintiff’s] medical leave, as requested, would have been a reasonable accommodation.”); *Rascon v. US West Communications, Inc.*, 143 F.3d 1324, 1333–34 (10th Cir. 1998) (“An allowance of time for medical care or treatment may constitute a reasonable accommodation.”). Many state pregnant workers fairness statutes explicitly require time off to recover from childbirth as a reasonable accommodation. *See, e.g.,* Ky. Rev. Stat. Ann. § 344.030(6)(b) (2019); Mass. Gen. Laws ch. 151B, § 4(1E) (2018); Conn. Gen. Stat. § 46a-60(a)(2) (2017); Neb. Rev. Stat. § 48-1102(11) (2015).

<sup>124</sup> *See* Marsha Mercer, *States Go Beyond Federal Law to Protect Pregnant Workers*, PEW CHARITABLE TRUSTS (Jan. 7, 2015), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/1/07/states-go-beyond-federal-law-to-protect-pregnant-workers>.

<sup>125</sup> *See Utah S. Floor Deb.*, 61st Leg., 2016 Gen. Sess. (Feb. 2, 2016), (statement of Sen. Todd Weiler), <https://le.utah.gov/av/floorArchive.jsp?markerID=94586>.

<sup>126</sup> *See Utah H. of Rep. Floor Deb.*, 61st Leg., 2016 Gen. Sess. (Feb. 25, 2016) (statement of Rep. Rebecca Edwards), <https://le.utah.gov/av/floorArchive.jsp?markerID=95717>.

#### D. State Officials Recognize That Reducing Litigation Saves State Agency Enforcement Dollars

After California passed similar legislation, litigation of pregnancy cases decreased, even as pregnancy discrimination cases around the country were increasing.<sup>127</sup> The same study further found that the number of published and unpublished court and administrative decisions involving California’s pregnancy accommodation law was very low.<sup>128</sup> The Hawaii Civil Rights Commission reported a similar reduction in pregnancy discrimination complaints and litigation after enactment.<sup>129</sup>

Savings from reduced litigation are passed on to the state, whose enforcing agencies have limited resources. For example, Colorado’s law estimated that any state expenditures to enforce the law, including increased workload from fielding inquiries, would be minimal and could be accomplished within existing appropriations.<sup>130</sup> Minnesota’s law was determined to have no fiscal impact, and enforcing agencies did not believe that the volume of new complaints would result in quantifiable additional costs.<sup>131</sup> A fiscal review of Nebraska’s 2015 law explained:

Ten other states with proposed or enacted legislation similar to this bill have all indicated little to no fiscal impact. Since other states have experienced only minor increases or no increases in case filings attributed to similar legislation and a small increase in caseloads can be absorbed with existing resources, there is no fiscal impact.<sup>132</sup>

New York’s bill was found to have no budget implications for the state.<sup>133</sup> Oregon found no significant fiscal impact, stating: “Costs related to the measure are anticipated to be minimal.”<sup>134</sup> Utah similarly found the bill to have no significant fiscal impact.<sup>135</sup>

In states where legislation has been introduced, but not yet passed, there is a similar theme. In Tennessee, for example, the 2019 bill was found to have no significant fiscal impact because “there will not be a sufficient number of civil cases for state or local government to experience

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<sup>127</sup> NOREEN FARRELL, JAMIE DOLKAS & MIA MUNRO, EQUAL RIGHTS ADVOCATES, EXPECTING A BABY, NOT A LAY-OFF: WHY FEDERAL LAW SHOULD REQUIRE REASONABLE ACCOMMODATION OF PREGNANT WORKERS 25 (2013), [http://www.ncdsv.org/images/ERA\\_ExpectingABabyNotALay-off\\_2012.pdf](http://www.ncdsv.org/images/ERA_ExpectingABabyNotALay-off_2012.pdf).

<sup>128</sup> *See id.* at 15.

<sup>129</sup> *See* Letter from Linda Hamilton Krieger & William D. Hoshijo, Hawai’i Civil Rights Commission, to A Better Balance (Feb. 1, 2013) (on file with author).

<sup>130</sup> COLO. GEN. ASSEM. LEGIS. COUNCIL STAFF, FISCAL NOTE, H.B. 16-1438, 69th Leg., Reg. Sess. (2016), [https://leg.colorado.gov/sites/default/files/documents/2016A/bills/fn/2016a\\_hb1438\\_f1.pdf](https://leg.colorado.gov/sites/default/files/documents/2016A/bills/fn/2016a_hb1438_f1.pdf).

<sup>131</sup> MINN. LEG., CONSOLIDATED FISCAL NOTE, H. 2371, 88th Leg. (2014).

<sup>132</sup> NEB. LEG., FISCAL NOTE, L.B. 627, 104th Leg., 1st Sess. (2015).

<sup>133</sup> N.Y. STATE ASSEMB., MEMORANDUM IN SUPPORT OF LEGISLATION, A. 4873, 2015–2016 Leg. Sess. (2015), [https://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=A04873&term=2015&Summary=Y&Memo=Y](https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A04873&term=2015&Summary=Y&Memo=Y).

<sup>134</sup> OR. LEGIS. ASSEMB. LEGIS. FISCAL OFFICE, FISCAL IMPACT OF PROPOSED LEGISLATION, H.B. 2341, 80th Leg., 2019 Reg. Sess. (2019), <https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureAnalysisDocument/48416>.

<sup>135</sup> UTAH LEG., FISCAL NOTE, S.B. 59, 61st Leg., 2016 Gen. Sess. (2016), <https://le.utah.gov/~2016/bills/static/SB0059.html>.

any significant increase in revenue or expenditures.”<sup>136</sup> Moreover, they found that “... this legislation is not expected to result in any significant impact to commerce or jobs in Tennessee.”

#### **E. Legislators Understand That Greater Clarity Benefits Businesses**

As mentioned earlier, the current patchwork of federal law and case law around this issue creates confusion for employers and leaves too many employees without the accommodations they desperately need. At the state level, lawmakers have recognized the urgent need to provide greater clarity for employers and employees, which allows issues to be resolved quickly and informally.

Speaking in favor of the proposed Illinois accommodation law that passed unanimously in 2015, Democratic State Representative Carol Sente said:

I was a small business employer, so I looked at this language very seriously. I employed 20 architects and various employees, over half of them were female employees. So, over the years, I would argue that this language in this bill is reasonable. To be able to allow reasonable accommodation so that my female employees could serve our clients is good for an employer. It allows me to keep on deadline, to keep serving our clients, and to allow women to be able to contribute to the workforce and work through their pregnancy.<sup>137</sup>

Describing the broad business support for Nebraska’s legislation, State Senator Heath Mello emphasized:

There’s a reason why the Nebraska Chamber of Commerce did not oppose this bill. There’s a reason the Nebraska Federation of Independent Businesses did not oppose this bill, and those are the voices for small business and big business in our state because right now, under current law, there is a lot of gray matter as it relates to pregnancy in regards to trying to provide accommodation to a pregnant worker.<sup>138</sup>

#### **F. Despite Progress at the State Level, the Need Remains for A Federal Fix**

The progress on pregnancy accommodations at the state level has been encouraging, and state legislative records provide strong arguments in favor of strengthening protections for pregnant workers. But even state legislators understand that the ultimate goal is a federal law. As former Republican State Senator Colin Bonini—who sponsored the Delaware pregnant workers fairness bill—said in a Congressional briefing on the federal PWA: “This policy is so obvious that it’s

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<sup>136</sup> TENN. GEN. ASSEMB. FISCAL REVIEW COMM., FISCAL NOTE, H.B. 986–S.B. 758, 111th Leg. (2019), <http://www.capitol.tn.gov/Bills/111/Fiscal/SB0758.pdf>.

<sup>137</sup> *Ill. H. of Rep. Floor Deb.*, 98th Gen. Assemb. (Apr. 10, 2014) (statement of Rep. Carol Sente).

<sup>138</sup> *Neb. Leg. Floor Deb.*, 104th Leg., 1st Sess. (Mar. 12, 2015) (statement of Sen. Heath Mello).

tremendously frustrating that it hasn't happened. This is a public policy slam dunk. Do we want women to keep their jobs? Of course we do."<sup>139</sup>

Providing one clear, uniform standard for businesses is absolutely critical, so as to allow for informal resolution of accommodation requests between employer and employee. The federal PWFA would help facilitate communication between the employer and employee so they are on the same page about a worker's health needs.

Propel HR, a business industry website based in Greenville, South Carolina, said in praising the state's new pregnancy accommodations law that it creates "clearer expectations" as to employer's obligations and "employers have learned that it makes good business sense to create a work environment where expectant and nursing mothers feel valued and respected."<sup>140</sup>

Federal law providing a clear right to reasonable accommodations is especially critical for the 23 states that have not enacted stronger protections, many of which are in the Southeast and the Midwest. These are often states with higher proportions of low-wage workers and weaker protections for working families.

### G. Pregnant Workers Thrive in States With PWFA Laws On the Books

We see the difference this law makes in the twenty-seven states that have Pregnant Workers Fairness Acts, or similar protections, on the books compared to states without those protections. In states with strong protections, women's experiences show a clear standard can make all the difference in a worker's life and the health of a pregnancy. The PWFA would ensure all pregnant workers—no matter where they live—are able to stay healthy and working when they need income the most.<sup>141</sup>

For example, thanks to New York City's law, **ANGELICA VALENCIA** was reinstated to her job after being pushed out because she asked to avoid overtime. Angelica, who worked at a packing facility in NYC, was three months pregnant when her doctor advised that she avoid heavy lifting, as she had suffered a miscarriage the year before. She requested to be placed on desk duty, which she knew was available. Instead, her manager assigned her grueling overtime hours. With the help of the NYC Pregnant Workers Fairness Act, she was able to work and get the accommodation she needed.<sup>142</sup>

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<sup>139</sup> *Sen. Bonini Testifies in Support of Pregnant Workers Fairness Act*, CAPE GAZETTE (Apr. 2, 2016), <https://www.capegazette.com/article/sen-boninestifiessupport-pregnant-workers-fairness-act/101508>.

<sup>140</sup> Jada Jacobs, *New South Carolina Law Protects Pregnant and Nursing Employees*, PROPELHR (June 20, 2018), <https://www.propelhr.com/blog/new-sc-law-protects-pregnant-employees-and-nursing-mothers>.

<sup>141</sup> A BETTER BALANCE, *THE CASE FOR THE PREGNANT WORKERS FAIRNESS ACT*, IN STORIES (Sept. 2019), <https://www.abetterbalance.org/resources/the-case-for-the-pregnant-workers-fairness-act-in-stories/>.

<sup>142</sup> *Id.*

Additionally, thanks to New Jersey's law, **TAKIRAH WOODS** was able to return to work with light duty and avoid complications. At 14 weeks pregnant, Takirah, a family services worker in New Jersey, was advised by her doctor not to lift over 15 pounds, something she only rarely did. When she requested the accommodation, her employer forced her to take unpaid leave. Desperate to keep her job, she asked her doctor to lift the restriction, even though it could compromise her health and pregnancy. But then, she learned about her rights under New Jersey's Pregnant Worker Fairness Act. After asserting her rights, she was reinstated with light duty for the rest of her pregnancy.<sup>143</sup>

Angelica and Takirah, along with many other women we speak with, have a vastly different experience from those who lose out in states without a Pregnant Workers Fairness Act, like Armanda, Lyndi, and Natasha mentioned above. The contrast is profound—one road leads to dialogues and a healthy worker, the other to protracted litigation.

As discussed above, the driving force behind the PWFA is to ensure clarity where there is currently a web of confusion, which would allow for informal resolutions when a pregnant worker needs them, not when it is too late. One major point of the law is to *prevent* problems before they occur, especially for low-wage workers with little resources or bargaining power. The PWFA would benefit employers and employees, not lawyers.

## **VII. Conclusion**

In 2019 it is simply outrageous that pregnancy discrimination is rampant and that workers are pushed off their jobs when a simple, reasonable accommodation would allow them to continue working without jeopardizing the health of their pregnancy. No one should have to make that impossible choice. The time is now. The Pregnant Workers Fairness Act is long overdue.

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<sup>143</sup> *Id.*