



**Statement of Emily Martin
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**House Committee on Education & Labor
Subcommittee on Civil Rights and Human Services
Subcommittee Hearing on the Pregnant Workers Fairness Act (H.R. 2694)
October 22, 2019**

Thank you for the opportunity to submit a statement to the Committee and the Subcommittee on Civil Rights and Human Services on the Pregnant Workers Fairness Act, H.R. 2694. The National Women's Law Center has worked for more than 45 years to advance and protect women's equality and opportunity, and has long worked to remove barriers women face in the workplace. Protecting against pregnancy discrimination is at the core of our work. We urge you to support H.R. 2694, which would ensure that pregnant workers are no longer asked to choose between the health of their pregnancy and their job.

I. The National Women's Law Center strongly supports H.R. 2694.

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

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

The Pregnant Workers Fairness Act, H.R. 2694, would ensure that pregnant workers can continue to do their jobs and support their families by setting out a simple, easy to apply legal standard that would provide clarity for employers and employees alike; it would require employers to make reasonable workplace adjustments for those workers who need them due to pregnancy, childbirth, and related medical conditions, like lactation, unless the accommodation

imposes an undue hardship on the employer. Because pregnancy itself is temporary, these accommodations are short-term and are frequently low-cost, such as providing a stool to sit on rather than requiring a worker to stand during a shift or allowing a pregnant worker to keep a bottle of water by her workstation. Providing accommodations ensures that women can work safely while pregnant instead of getting pushed out of work at the very moment when they and their families are preparing for the expenses associated with a new baby.²

Public support for the Pregnant Workers Fairness Act is high. In March 2019 the National Women’s Law Center commissioned a poll to assess voters’ views on core issues related to gender equity. In a national survey of 2,000 registered voters, we found extremely strong support across the political spectrum for the Pregnant Workers Fairness Act. Eighty-nine percent of voters, including 96% of Democrats, 84% of Republicans, and 85% of Independents, supported Congress taking action to “require employers to make reasonable accommodations for pregnant workers who have a medical need for temporary changes at work,” with more than half of all voters voicing “strong” support for this proposal.³

This overwhelming voter support has been a factor leading to a wave of bipartisan legislation in the states ensuring reasonable accommodations for pregnant workers. Twenty-seven states and the District of Columbia have passed bills or issued Executive Orders to explicitly grant pregnant employees, or certain categories of pregnant employees, the right to reasonable accommodations at work. Twenty-two of these bills have been passed in the last six years alone, all with bipartisan support, and in the majority of cases with unanimous or near-unanimous support.⁴ States including South Carolina, Kentucky, Nebraska, North Dakota, West Virginia, and Utah, as well as states such as Massachusetts, Oregon, Delaware, and New Jersey, have passed legislation to ensure that pregnant workers receive reasonable accommodations when they need them to continue working safely.⁵

But the right to reasonable accommodations should not depend on where you happen to live, and pregnant workers across the country cannot afford to continue to wait for Congress to act. The National Women’s Law Center urges the 116th Congress to seize the opportunity to make a real difference in the lives of women and their families and pass the Pregnant Workers Fairness Act without delay.

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

Many women can work through their pregnancies without any changes in their jobs. However, for some pregnant women, particular job activities – such as lifting, bending, or standing for long periods – can pose a challenge at some point during a pregnancy. For example, workers employed in four of the ten most common occupations for pregnant workers -- retail salesperson; waiter or waitress; nursing, psychiatric and home health aide; and cashier⁶ – report continuously standing on the job,⁷ and prolonged standing at work has been shown to more than triple the odds of pregnant women taking leave during pregnancy or becoming unemployed.⁸ These women may have a medical need for temporary adjustments of job duties or work rules so that they can continue to work safely and support their families. But too often when pregnant workers ask for modest accommodations recommended by their doctors, like a stool to sit on or the right to drink

water during a shift, they are instead forced onto unpaid leave or even fired.⁹ Indeed, one survey estimated that a quarter of a million pregnant workers are denied their requests for reasonable workplace accommodations nationally every year.¹⁰ When an employer refuses an accommodation request, requiring a pregnant worker to choose between following medical advice and following a boss's orders, it can have grave implications for her health and the health of her pregnancy, as well as serious financial repercussions.

Workers in low-wage occupations, where work rules and work culture are often particularly inflexible, appear to be especially likely to be denied accommodations for pregnancy.¹¹ For instance, over 40 percent of full-time workers in low-wage jobs report that their employers do not permit them to decide when to take breaks, and roughly half report having very little or no control over the scheduling of hours.¹² This culture of inflexibility can lead to reflexive denials when workers in low-wage jobs seek pregnancy-related accommodations, which is of particular concern given that more than one in five (20.9%) pregnant workers is employed in a low-wage job.¹³ Moreover, pregnant Black women and Latinas are disproportionately represented in low-wage jobs. Nearly one in three Black and Latina pregnant workers hold low-wage jobs (30.0 percent and 31.3 percent, respectively).¹⁴ This means a lack of clear legal rights to pregnancy accommodations likely hits Black women and Latinas particularly hard.

When women who have physical limitations stemming from pregnancy are forced off the job instead of being accommodated, their families can suffer a devastating loss of income at the very moment their financial needs are increasing. Mothers' earnings are crucial to most families' financial security and well-being – in 2017, 41% of mothers nationally were sole or primary breadwinners, and nearly another one-quarter of mothers were co-breadwinners, bringing home 25% to 49% of earnings for their families.¹⁵

For this reason, many pregnant workers denied the accommodations they need to continue working safely will have no choice other than to continue to work; these women are often put at risk of serious health consequences, such as miscarriage, pre-term birth, pregnancy-induced hypertension and preeclampsia, congenital anomalies, and low birth weight.¹⁶ Premature birth is the leading cause of death during the first month of a baby's life, and can cause developmental delays and intellectual disabilities.¹⁷ Low birth weight babies face increased health risks at birth such as breathing difficulties, bleeding in the brain, heart problems, intestinal issues, and potential vision problems.¹⁸

While the stakes are high for pregnant workers with a medical need for accommodation, only a small number of employees will need pregnancy accommodations in any given year, meaning that the employers' burden in providing such accommodations is slight. Only about 1.5% of workers give birth each year, and only a fraction of those pregnant workers would require accommodations.¹⁹ Even in the occupations where they are most likely to be employed, pregnant women represent a negligible share of total workers. For example, pregnant women are most likely to work as elementary and middle school teachers, but only 3.2% of all elementary and middle school teachers are pregnant in a given year.²⁰

Those workers who are pregnant, however, typically work late into their pregnancies, which may increase the need for an accommodation. The United States Census Bureau shows that, out of all

first-time mothers who worked while pregnant between 2006 and 2008, 88% worked into their last trimester, while 65% worked into their last month of pregnancy.²¹

III. Federal law too often leaves pregnant workers unprotected and without recourse.

The existing federal laws on the books are not sufficient to protect pregnant workers with medical needs for accommodation from discrimination.

Some pregnant workers experiencing significant pregnancy complications have been able to obtain accommodations under the Americans with Disabilities Act or state law equivalents.²² These laws implement the fundamental principle that physical limitations that can be reasonably accommodated without an undue hardship to the employer should not force people out of work. However, courts have been reluctant to treat the physical limitations and medical needs that can arise out of a normally-progressing pregnancy as disabilities.²³ Pregnancy is not considered a disability as a matter of law or logic, and thus courts have typically required plaintiffs seeking a pregnancy-related accommodation under the Americans with Disabilities Act to demonstrate that they have a significant pregnancy complication that constitutes a disability²⁴—but this leaves many pregnant workers with physical needs for accommodation unprotected. For instance, a woman may need a bigger uniform or a new bullet-proof vest to accommodate her growing pregnancy – this need is indicative of a normally progressing pregnancy, yet may require an accommodation. In other circumstances, pregnant workers may seek accommodations precisely because they wish to prevent pregnancy complications that are likely in the absence of accommodation, yet courts have held that the Americans with Disabilities Act provides no right to such preventive accommodations.²⁵

Pregnant workers who need to take time away from work because of pregnancy complications may be able to access unpaid leave under the Family and Medical Leave Act, if they work for an employer with at least 50 employees and otherwise meet the Family and Medical Leave Act's eligibility conditions.²⁶ While the Family and Medical Leave Act is very important and helpful to many individuals who need time off, what many pregnant workers want is to be able to continue to do their job – and many could do so and keep earning income for their families with reasonable accommodations to work rules or duties. The Family and Medical Leave Act does not provide a solution for these workers.

And while the Pregnancy Discrimination Act significantly changed the landscape for pregnant workers and provides critical protections against pregnancy discrimination, many courts have unfortunately interpreted the Pregnancy Discrimination Act and state law equivalents narrowly and allowed employers to refuse to accommodate workers with medical needs arising out of pregnancy, even when they routinely accommodated other physical limitations.

In 2015 in *Young v. UPS*,²⁷ the Supreme Court held that when an employer accommodates workers who are similar to pregnant workers in their ability to work, it cannot refuse to accommodate pregnant workers who need it simply because it “is more expensive or less convenient” to accommodate pregnant workers too.²⁸ The Court also held that an employer that fails to accommodate pregnant workers violates the Pregnancy Discrimination Act when its

accommodation policies impose a “significant burden” on pregnant workers that outweighs any justification the employer offers for those policies.²⁹

Peggy Young was working as a driver for UPS when she became pregnant and was advised by her health care provider that she should not lift more than 20 pounds during her pregnancy. Although UPS accommodated needs for alternative duties for several groups of workers—those injured on the job, those protected by the Americans with Disabilities Act, and those who lost their commercial drivers’ licenses because of medical or other reasons—the company refused to accommodate Peggy Young. Instead, UPS pushed Peggy Young onto unpaid leave for the last six months of her pregnancy despite her desire and ability to work; as a result, she lost her paycheck and her UPS-provided health insurance. She sued UPS for violating the Pregnancy Discrimination Act.

In *Young*, the Supreme Court altered the legal tests for pregnancy accommodation claims in several important ways. First, the Court made clear that a plaintiff successfully makes an initial showing in a pregnancy discrimination case challenging the denial of an accommodation when she shows (1) that she was pregnant; (2) that she sought accommodation; (3) that the employer did not accommodate her; (4) that the employer did accommodate others “similar in their ability or inability to work.”³⁰ The Court emphasized that this does not mean that a pregnant worker must identify a nearly identical coworker that the employer accommodated.

Second, the Court offered some clarification about how an employer may and may not defend an accommodation policy after the pregnant worker has made this showing. When the pregnant worker has made this showing, the employer may then come forward with a “legitimate, nondiscriminatory” reason for the difference in treatment, but evidence that it is more expensive or less convenient to accommodate pregnant workers too does not constitute a legitimate reason.³¹

Third, the Court set out a new way in which a pregnant employee may prove that the employer’s stated legitimate reason is actually a pretext and that the employer is actually motivated by discrimination against pregnant women. The Court explained that when a pregnant worker shows the accommodation policies impose a significant burden on pregnant workers that outweigh any justifications offered by an employer, this can demonstrate intentional discrimination.³²

Despite the Supreme Court’s affirmation that a refusal to accommodate pregnancy can run afoul of the Pregnancy Discrimination Act, in case after case in the courts since *Young*, workers denied pregnancy accommodations have had their cases thrown out because of a misinterpretation of the comparator standard, a botched interpretation of the significant burden determination, or in some cases ignoring the *Young* test altogether. The multi-step balancing test set out in *Young* appears to have left courts, employers, and employees confused about when exactly the Pregnancy Discrimination Act requires pregnancy accommodations.

Indeed, a recent survey of pregnancy accommodations caselaw since the 2015 *Young* decision found that in over two-thirds of post-*Young* pregnancy accommodations cases, courts held that employers were permitted to deny pregnant workers accommodations under current federal law.³³

For example, in *Santos v. Wincor Nixdorf, Inc.*³⁴ this past August, the Fifth Circuit Court of Appeals affirmed a grant of summary judgment against an employee, Michelle Santos, who requested an accommodation to allow her to work from home in compliance with her doctor's recommendations during her pregnancy. Instead of evaluating whether Ms. Santos was able to fulfill her workplace obligations under the accommodations she requested, the court focused on the need to identify other employees who were similarly situated. In reaching their conclusions, both the district court and the circuit court relied on a pre-*Young* decision by the Fifth Circuit that required the circumstances of the employee-comparator be "nearly identical."³⁵

*Adduci v. Fed. Express Corp.*³⁶ is another example of a particularly egregious case showcasing problems with comparator analysis under the Pregnancy Discrimination Act. After becoming pregnant, Cassandra Adduci, an employee of FedEx in Tennessee, requested a temporary reassignment to comply with her physician's lifting-restriction of 25lbs. Instead, her employer placed her on unpaid leave. Although Ms. Adduci was able to provide the court with a spreadsheet documenting over 261 other part-time employees who were given temporary work reassignments in the same calendar year, the district court granted summary judgment in favor of her employer. The court found that the comparators in the spreadsheet did not "address the relevant aspects of [her] employment situation" and was therefore not a sufficient example of similarly situated comparators.³⁷

In *Swanger-Metcalf v. Bowhead Integrated Support Servs. LLC*,³⁸ a district court in Pennsylvania granted the employer's motion to dismiss because Elizabeth Swanger-Metcalf, an employee at Bowhead who requested accommodations, was unable to identify "similarly situated" employees. The employer's schedule had some workers spending time both in the "prep floor" and the "sand room." While working in the sand room, employees were required to wear respirators or ventilation hoods to protect themselves from the hazardous chemicals. When Ms. Swanger-Metcalf found out she was pregnant, she was told by her doctor that she should request to work only in well-ventilated areas. When she requested the accommodation from her employer, she was told that she would be sent home if she refused to work in the sand room and that the employer couldn't show "favoritism" in work assignments.³⁹ Although the plaintiff believed that there were indeed other individuals who were accommodated in their requests to move between departments, the court dismissed the case because she did not provide "factual details as to how other employees" were accommodated in her complaint, prior to any discovery on these issues.⁴⁰

*Jackson v. J.R. Simplot Co.*⁴¹ provides yet another example of the comparator analysis leaving pregnant workers unprotected. Stacey Jackson worked at a fertilizer plant when her doctor recommended lifting restrictions and limited exposure to harmful chemicals in conjunction with her fertility treatment and pregnancy. When she requested the accommodation, her employer stated that they were not able to find her a job that would minimize her exposure to chemicals. The employee sued, but both the district court and the circuit court granted summary judgment in favor of the employer. Although she was able to present evidence of five other employees who were granted light duty when they requested the accommodation, the courts rejected the argument that the failure to accommodate her was discriminatory because the other employees did not also request limiting exposure to chemicals.⁴²

All of these women fought for their rights to an accommodation under the post-*Young* Pregnancy Discrimination Act framework in court and lost, and sadly, their cases are not unique.⁴³ These cases demonstrate the difficult burdens of proof that are still imposed on pregnant workers post-*Young*. More fundamentally, they make clear that the comparator-focused analysis demanded by the Pregnancy Discrimination Act fails to grapple with the question that matters most when a pregnant worker's health is threatened by a workplace condition or task: can that medical need be reasonably accommodated, in a manner that does not impose undue hardship on an employer, but allows a pregnant worker to do her job safely?

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

The Pregnant Workers Fairness Act has been narrowly drafted to specifically address employer requirements to provide reasonable accommodations for employees with limitations arising out of pregnancy, childbirth, or a related medical condition. For example:

- An employer might be required to modify a no-food-or drink policy for a pregnant employee who experiences painful or potentially dangerous uterine contractions when she does not regularly drink water.
- An employer might be required to provide a stool to a pregnant cashier who was experiencing leg pain and swelling from standing for long periods of time.
- An employer might be required to reassign heavy lifting duties to other employees for some portion of an employee's pregnancy.
- An employer might be required to provide an available light duty position to a pregnant police officer who was temporarily unable to go on patrol because no bulletproof vest would fit her.

The bill would prohibit employers from discriminating against employees because they need this sort of reasonable accommodation.⁴⁴ In other words, an employer would not be allowed to fire a pregnant employee to avoid making any job modifications, or to retaliate against an employee who had asked for an accommodation.

The Pregnant Workers Fairness Act would also prohibit employers from forcing a pregnant employee onto leave when another reasonable accommodation would allow the employee to continue to work. While the employee would remain free to choose to use any leave available to her, she would not be forced off the job and onto leave against her will. Neither would she be forced to accept an unnecessary accommodation, if she did not, in fact, have a limitation arising out of pregnancy, childbirth, or a related medical condition.

The Pregnant Workers Fairness Act relies on a reasonable accommodation framework already familiar to employers accustomed to the Americans with Disabilities Act's requirements, and the text of the bill defines "reasonable accommodation" and "undue hardship" by reference to section 101 of the Americans with Disabilities Act of 1990 and its implementing regulations.⁴⁵ This definition includes incorporation of the Americans with Disabilities Act's interactive

process between employer and employee that will typically be used to come to agreement as to an appropriate reasonable accommodation.

The remedies and enforcement section of the bill extends enforcement powers, procedures and remedies to those employees covered by the following statutes; Title VII of the Civil Rights Act of 1964, the Congressional Accountability Act of 1995, Chapter 5 of Title 3, United States Code, employees covered by the Government Employee Rights Act of 1991, and employees covered by Section 717 Of the Civil Rights Act Of 1964. Through this broad coverage, both private and public employees would be protected under the Pregnant Workers Fairness Act.

The Pregnant Workers Fairness Act further sets out that no later than two years from the date of enactment, the Equal Employment Opportunity Commission shall issue implementation regulations, providing specific examples of accommodations addressing known limitations related to pregnancy, childbirth or related medical conditions that would be provided to job applicants or employees that would be presumed to be reasonable unless the employer could demonstrate that providing such an accommodation would create an undue hardship.⁴⁶

The bill includes an explicit waiver of state immunity.⁴⁷ The remedies provided by the Pregnant Workers Fairness Act are a “congruent and proportional”⁴⁸ response addressing a pattern of sex discrimination in violation of the Equal Protection Clause by public employers against pregnant employees,⁴⁹ and thus state sovereign immunity is appropriately waived pursuant to Congress’s powers under Section Five of the Fourteenth Amendment.

As recognized by the Supreme Court, gender stereotypes about “mothers or mothers to be”⁵⁰ have led to pervasive sex discrimination in violation of the Equal Protection Clause: “denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second.”⁵¹

As Justice Kennedy stated in his dissent in *Young*:

There must be little doubt that women who are in the work force—by choice, by financial necessity, or both—confront a serious disadvantage after becoming pregnant “Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second.” *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (quoting The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor–Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 100 (1986)). Such “attitudes about pregnancy and childbirth . . . have sustained pervasive, often law-sanctioned, restrictions on a woman's place among paid workers.” *AT & T Corp. v. Hulteen*, 556 U.S. 701, 724, 129 S.Ct. 1962, 173 L.Ed.2d 898 (2009) (Ginsburg, J., dissenting). Although much progress has been made in recent decades and many employers have voluntarily adopted policies designed to recruit, accommodate, and retain employees who are pregnant or have young children, see Brief for U.S. Women’s Chamber of Commerce et al. as *Amici Curiae* 10-14, pregnant

employees continue to be disadvantaged—and often discriminated against—in the workplace, see Brief of Law Professors et al. as Amici Curiae 37–38.⁵²

“Legislation enacted under § 5 must be targeted at ‘conduct transgressing the Fourteenth Amendment’s substantive provisions,’”⁵³ but Congress is not limited to narrowly prohibiting acts forbidden by the Fourteenth Amendment itself.⁵⁴ Instead, “Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”⁵⁵ In particular, use of Section Five power is appropriate to remedy or deter constitutional violations involving “subtle discrimination that may be difficult to detect on a case-by-case basis.” The Pregnant Workers Fairness Act does just this:⁵⁶ its reasonable accommodation framework relieves individual employees of the burden of proving that an employer’s inflexible imposition of workplace standards reflects sex stereotyping that flows from the invidious assumption that pregnant workers are not competent or committed workers;⁵⁷ it would remedy and deter unconstitutional sex stereotyping in the hiring and promotion of young potentially pregnant women.⁵⁸

V. Accommodating workers is good for business.

In July of 2019, ten major companies from across states and industries sent an open letter to Congress in support of the Pregnant Workers Fairness Act.⁵⁹ The letter, signed by Adobe, Amalgamated Bank, Chobani, Cigna Corp., Facebook, ICM Partners, L’Oreal USA, Levi Strauss & Co., Microsoft Corporation, and Spotify, as well as the US Women’s Chamber of Commerce, underscored that women’s labor force participation is critical to the strength of companies and the growth of the national economy. These employers recognize that the passage of the Pregnant Workers Fairness Act would be an important step to ensuring the health, safety, and productivity of the modern workforce, because accommodating pregnant workers is not only good for working women and families, it is good for business.

Experience implementing the Americans with Disabilities Act demonstrates the business benefits of reasonable accommodation. A survey by the Job Accommodation Network (JAN), a technical assistance provider to the Department of Labor, found that the majority of employers that provided accommodations to employees with disabilities reported that the accommodations did not impose any new costs on the employer.⁶⁰ Of those employers that reported a cost for accommodations, the majority reported a one-time cost of \$500 or less.⁶¹ Because accommodations provided to pregnant workers are temporary, the costs associated with these accommodations, if any, are likely to be substantially less than the already low costs associated with providing accommodations to workers with permanent disabilities.

Employers also report significant benefits from providing accommodations including:

- Improved recruitment and retention of employees: In the JAN survey, 89% of employers reported that providing an accommodation for disabilities allowed them to retain valued employees,⁶² and 59% said that it “eliminated costs associated with training a new employee.”⁶³ Workplace flexibility has also been shown to increase employee retention in industries with typically high turnover such as sales and customer service.⁶⁴ When

employers provide temporary accommodations that allow pregnant workers who need accommodations to continue working, they make it possible for these workers to transition smoothly to being a working parent and create incentives for them to stay with their employers when they return to work after having a baby.

- **Increased employee commitment:** Sixty-one percent of employers reported in the JAN survey that providing accommodations to workers with disabilities “increase[s] overall company morale.”⁶⁵ Similarly, a 2014 report on work-life balance and workplace flexibility policies by the President’s Council of Economic Advisors noted that “[w]orkers with more flexible arrangements report higher levels of job satisfaction” and “more loyalty and commitment to their employers.”⁶⁶ The same results can be expected for pregnant workers, who are more likely to be committed to employers who meet workers’ needs for workplace accommodations during pregnancy
- **Increased productivity:** Accommodating employees with disabilities increases productivity not only for the employee who needs an accommodation, but also for the business overall. Seventy-two percent of employers reported to JAN that accommodating employees “increased the employee’s productivity,”⁶⁷ and 55% reported that providing accommodations “increased overall company productivity.”⁶⁸ These studies suggest that when pregnant workers’ needs for accommodations are met, employers can anticipate improved productivity.
- **Reduced absenteeism:** JAN’s survey found that 55% of employers reported better attendance from an employee after providing an accommodation for a disability, partly because accommodations improve employee health by decreasing work-related stress.⁶⁹ Workplace flexibility studies also show that businesses experience less absenteeism when they offer flexible work arrangements.⁷⁰ All too often, pregnant workers are being forced to miss work simply because their employers are denying minor temporary adjustments they need to do their jobs safely. Providing these accommodations to pregnant workers is likely to reduce absences, resulting in a bottom-line benefit for employers.
- **Improvements in workplace safety:** When employers provide accommodations, they create a safer workplace. Forty-six percent of employers reported increases in workplace safety as a result of providing accommodations to employees with disabilities,⁷¹ and 36% reported reduced workers’ compensation and other insurance costs.⁷² Providing flexible workplaces can also reduce employee stress and improve overall health⁷³ which lead to reduced risk of workplace injury and fewer workers’ compensation claims.⁷⁴ Providing accommodations to those pregnant workers who need them to work safely during pregnancy will undoubtedly reduce stress on these workers, and thus lower their risk of injury.
- **Increased diversity:** Many employers value workplace diversity, not only for its intrinsic benefits but also because diversity is highly valued in the marketplace. Forty-one percent of employers surveyed noted that a benefit of providing accommodations to employees with disabilities was that they “increase diversity of the company.”⁷⁵ Similarly, workplace flexibility has been shown to increase the presence of women in the

workplace: a survey conducted by Deloitte showed that flexibility was the factor “most likely to improve the retention of women.” After Deloitte implemented flexible work options, turnover rates between men and women equalized and the number of women in leadership positions rose from 14 to 168 over ten years.⁷⁶ Likewise, providing temporary accommodations to pregnant workers, particularly those in nontraditional and physically demanding jobs, is likely to make women who might become pregnant much more willing to choose these fields.

VI. The Pregnant Workers Fairness Act is a commonsense and common ground bill.

The National Women’s Law Center strongly supports H.R. 2694. Working families cannot afford to wait for the Pregnant Workers Fairness Act any longer. More than 40 years after the passage of the Pregnancy Discrimination Act, it is unconscionable that pregnant workers across the country continue to face discrimination when seeking reasonable accommodations that would allow them to continue to work safely. No one who is pregnant should be forced to choose between ignoring her doctor’s advice and losing her job at a time when both her health and the economic security of her family are absolutely crucial. We urge swift passage of this commonsense and common ground bill.

¹ See 42 U.S.C. § 2000e(k); 29 C.F.R. §1604, App. Q&A 5.

² While this statement makes mention of pregnant women, the Pregnant Workers Fairness Act applies to all employees for pregnancy, childbirth and related medical conditions, including transgender men and nonbinary individuals.

³ NAT’L WOMEN’S LAW CTR. (NWLC), NWLC SURVEY FINDS OVERWHELMING SUPPORT FOR GENDER JUSTICE POLICIES (MAY 2019), <https://nwlc.org/resources/nwlc-survey-finds-overwhelming-support-for-gender-justice-policies>.

⁴ See NWLC, PREGNANCY ACCOMMODATIONS IN THE STATES (Sept. 2019), <https://nwlc.org/resources/pregnancy-accommodations-states/>.

⁵ *Id.*

⁶ Occupational data are from O*NET OnLine, National Center for O*NET Development, *available at* www.onetonline.org/ (last visited April 17, 2019). In some cases, researchers selected similar but not exact occupation(s) to serve as a proxy for ACS and/or O*NET occupation(s) due to inconsistencies between data sources. Occupations were considered physically demanding or hazardous if 40% of workers or more responded performing activities continuously or almost continuously while at work. Researchers combined O*NET data from nursing assistants, home health aides, and psychiatric aides to serve as a proxy for the ACS occupation nursing, psychiatric and home health aides. O*NET Occupational data for nursing assistants were used in the table: “Common jobs for pregnant workers: Standing” (i.e. 50% of nursing assistants responded standing continuously or almost continuously at work). In addition, 41% of home health aides and 51% of psychiatric aides stood more than half the time.

⁷ Workers in other common occupations among pregnant women reported standing a significant amount at work. For instance, 40% of elementary school teachers, except special education; 48% of middle school teachers, except special education; and 35% of first-line supervisors of retail sales workers reported standing more than half the time.

⁸ See Sylvia Guendelman et al., *Biomechanical and Organisational Stressors and Associations with Employment Withdrawal Among Pregnant Workers: Evidence and Implications*, 59 *ERGONOMICS* 1613 (2016).

⁹ For stories of women pushed out of work because they were denied the temporary accommodations that they sought during pregnancy, see generally NWLC & A BETTER BALANCE (ABB), *IT SHOULDN’T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS* (2013), http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf. See also Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination is Rampant Inside America’s Biggest Companies*, *N.Y. TIMES* (Feb. 8, 2019),

<https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html>; Bryce Covert, *The American Workplace Still Won't Accommodate Pregnant Workers*, THE NATION (Aug. 12, 2019), <https://www.thenation.com/article/pregnant-workers-discrimination-workplace-low-wage/>.

¹⁰ See NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, LISTENING TO MOTHERS: THE EXPERIENCE OF EXPECTING AND NEW MOTHERS IN THE WORKPLACE 3 (Jan. 2014), <http://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf>.

¹¹ See Covert, *supra* note 9.

¹² See LIZ WATSON & JENNIFER SWANBERG, WORKPLACE FLEXIBILITY 2010: GEORGETOWN LAW, FLEXIBLE WORKPLACE SOLUTIONS FOR LOW-WAGE HOURLY WORKERS: A FRAMEWORK FOR A NATIONAL CONVERSATION 19 (May 2011), https://www.researchgate.net/publication/283088549_Flexible_workplace_solutions_for_low-wage_hourly_workers.

¹³ NWLC defines low-wage occupations as jobs that pay \$11.50 per hour or less (the annual equivalent of about \$23,920 per year (\$11.50 x 2080 hours), which assumes a 40-hour workweek for 52 weeks).

¹⁴ Occupational data are from O*NET OnLine, available at <http://www.onetonline.org/>. Percentages are how often workers reported standing continuously or almost continuously at work, except for registered nurses (47% of registered nurses responded standing about half the time). Median hourly incomes are from Bureau of Labor and Statistics (BLS), Occupational Employment Statistics, available at https://www.bls.gov/oes/2017/may/oes_nat.htm.

¹⁵ See SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, BREADWINNING MOTHERS CONTINUE TO BE THE U.S. NORM (May 2019), <https://cdn.americanprogress.org/content/uploads/2019/05/12070012/Breadwinners2019-report1.pdf>.

¹⁶ NWLC & ABB, *supra* note 9, at 12.

¹⁷ MARCH OF DIMES, PREMATURE BABIES, <https://www.marchofdimes.org/complications/premature-babies.aspx> (last visited Oct. 17, 2019).

¹⁸ *Id.*

¹⁹ NWLC calculations based on 2017 American Community Survey (ACS) one-year averages using Steven Ruggles, Sarah Flood, Ronald Goeken, Josiah Grover, Erin Meyer, Jose Pacas, and Matthew Sobek. IPUMS-USA: Version 9.0 [dataset]. Minneapolis, MN: IPUMS, 2019. <https://doi.org/10.18128/D010.V9.0>.

²⁰ See MORGAN HARWOOD & SARAH DAVID HEYDEMANN, NWLC, BY THE NUMBERS: WHERE DO PREGNANT WOMEN WORK? 2 (Aug. 2019), <https://nwlc.org/wp-content/uploads/2019/08/Pregnant-Workers-by-the-Numbers-v3-1.pdf>. NWLC calculations based on American Community Survey (ACS) 2017 1-year estimates using IPUMS-USA, available at <http://usa.ipums.org/usa>. The percentage of pregnant workers in the occupation is calculated by reference to the share of women in the occupation who have given birth in the last year.

²¹ LINDA LAUGHLIN, US CENSUS BUREAU, CURRENT POPULATION REPORTS, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961-2008 at Table 2, <https://www.census.gov/prod/2011pubs/p70-128.pdf>.

²² 42 U.S.C. § 12111 et seq.; 21 V.S.A. § 495 et seq.

²³ NWLC & ABB, *supra* note 9, at 14.

²⁴ See, e.g., *Spees v. James Marine, Inc.*, 617 F.3d 380, 397 (6th Cir. 2010) (“Pregnancy-related conditions have typically been found to be impairments where they are not part of a ‘normal’ pregnancy.”); *Lang v. Wal-Mart Stores E., L.P.*, 2015 WL 1523094, at *2 (D.N.H. Apr. 3, 2015) (“[P]regnancy is not an actionable disability, unless it is accompanied by a pregnancy-related complication.”); *Annobil v. Worcester Skilled Care Ctr., Inc.*, 2014 WL 4657295, at *11 (D. Mass. Sept. 10, 2014) (granting summary judgment for defendant where plaintiff “provides no legal argument as to whether such symptoms [including headaches, nausea and vomiting] differ from normal symptoms of pregnancy and how these complications are disabling”); *Mayorga v. Alorica, Inc.*, 2012 WL 3043021, at *5 (S.D. Fla. July 25, 2012) (Post-ADAAA, “[p]regnancy, absent unusual circumstances, is not considered a disability under the ADA.” (collecting cases)).

²⁵ E.g., *Swanger-Metcalf v. Bowhead Integrated Support Services, LLC*, No. 1:17-cv-2000, 2019 WL 149334, *11 (M.D. Pa. March 31, 2019) (“While Plaintiff argues that working in the sand room could have caused her to sustain pregnancy complications at some point in the future, Plaintiff does not allege that she suffered from any pregnancy-related complications at the time she sought an accommodation. As a result, Plaintiff’s claim of discrimination under the ADA fails because she has not alleged facts sufficient to support a reasonable inference that she is disabled under the ADA.”).

²⁶ 29 U.S.C. § 2601 et seq.

²⁷ *Young v. UPS*, 135 S. Ct. 1338 (2015).

²⁸ *Id.* at 1354.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1354-55.

³³ See DINA BAKST, ELIZABETH GEDMARK, & SARAH BRAFMAN, ABB, LONG OVERDUE: IT IS TIME FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT 9 (May 2019), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.

³⁴ *Santos v. Wincor Nixdorf, Inc.*, No. 19-50046, 2019 WL 3720441 (5th Cir. Aug. 7, 2019).

³⁵ *Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 260 (5th Cir. 2009) (quoting *Little v. Republic Ref. Co., Ltd.*, 924 F.2d 93, 97 (5th Cir.1991)).

³⁶ 298 F. Supp. 3d 1153 (W.D. Tenn. 2018).

³⁷ *Id.* at 1160.

³⁸ No. 1:17-CV-2000, 2019 WL 1493342 (M.D. Pa. Mar. 31, 2019).

³⁹ *Id.* at *2.

⁴⁰ *Id.* at *8.

⁴¹ 666 F. App'x 739 (10th Cir. 2016).

⁴² *Id.* at 740.

⁴³ For additional stories of pregnancy discrimination after the Supreme Court's decision in *Young v. UPS*, see BAKST, GEDMARK, & BRAFMAN, *supra* note 33, at 14-16.

⁴⁴ Small businesses with fewer than 15 employees would be exempt from the federal Pregnant Workers Fairness Act requirements. However, the Pregnant Workers Fairness Act as written does not supersede or invalidate city or state Pregnant Workers Fairness Acts, some of which cover employers with less than 15 employees, or otherwise preempt or invalidate any other law providing greater or equal protections.

⁴⁵ 42 U.S.C. § 12111.

⁴⁶ Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (2019).

⁴⁷ *Id.*

⁴⁸ *E.g., City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

⁴⁹ *Waite v. Bd. of Trustees of Univ. of Alabama*, No. 2:16-CV-01244-JEO, 2018 WL 5776265, at *16 (N.D. Ala. Nov. 2, 2018) (alleging pregnancy discrimination by a public research university); *Vidovic v. City of Tampa*, No. 8:16-cv-T-17AAS, 2017 WL 10294807, at *9 (M.D. Fla. Oct. 12, 2017) (alleging pregnancy discrimination by a Tampa city fire department); *Webster v. U.S. Dep't of Energy*, 267 F. Supp. 3d 246, 264 (D.D.C. 2017) (alleging pregnancy discrimination claims against the federal Department of Energy); *Diaz v. Florida*, 219 F. Supp. 3d 1207, 1218 (S.D. Fla. 2016) (state employee alleging pregnancy discrimination against the state of Florida); *Lawson v. City of Pleasant Grove*, No. 2:14-CV-0536-JEO, 2016 WL 2338560, at *10-11 (N.D. Ala. Feb. 16, 2016), *rep. and recommendation adopted*, No. 2:14-CV-536-KOB, 2016 WL 1719667 (N.D. Ala. Apr. 29, 2016) (alleging pregnancy discrimination against a city police department).

⁵⁰ *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

⁵¹ *Id.*; see generally *United States v. Virginia*, 518 U.S. 533-34 (["Sex] classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.") (citing *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948)).

⁵² See *Young v. United Parcel Serv.*, 135 S. Ct. 1338, 1367 (Kennedy, J., dissenting).

⁵³ *Coleman v. Maryland Court of Appeals*, 132 S.Ct. 1327, 1334 (2012).

⁵⁴ "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)

⁵⁵ *Hibbs* at 727.

⁵⁶ I am deeply indebted to Professor Reva Siegel of Yale Law School for her analysis of these matters, to be published in a forthcoming piece.

⁵⁷ See Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. ON POVERTY L. & POL'Y 1, 21 (2012) ("A third way in which employers of low-wage workers demonstrate hostility to pregnancy is by refusing to allow even the smallest of workplace adjustments for pregnant workers—adjustments that employers would often make for other, non-pregnant employees who needed them."); *Id.* at 26 ("The inflexibility of many low-

wage jobs is often compounded by rigid attendance policies that penalize workers for justifiable absences, for being minutes late, or even for assumption of future absences—for example, the stereotype that a single mother will be ‘unreliable.’”).

⁵⁸ In this way, the protections offered by the Pregnant Workers Fairness Act would be analogous to Title VII’s disparate impact provision, justified under Section 5, as a remedy for intentional discrimination that is difficult to prove. *In re Empt. Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1321-23 (11th Cir. 1999); *see also Okrahlik v. Univ. of Ark.*, 255 F.3d 615, 626 (8th Cir. 2001) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987, 990 (1988)); Claude Platton, *Title VII Disparate Impact Suits Against State Governments After Hibbs and Lane*, 55 DUKE L.J. 641 (2005).

⁵⁹ AN OPEN LETTER IN SUPPORT OF THE PREGNANT WORKERS FAIRNESS ACT FROM LEADING PRIVATE-SECTOR EMPLOYERS (Jul. 2019), *available at* <http://www.nationalpartnership.org/our-work/resources/economic-justice/coalition/an-open-letter-in-support-of-PWFA-from-private-sector-employers.pdf>.

⁶⁰ JOB ACCOMMODATION NETWORK (JAN), WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 4 (Sept. 2019), <https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See* WATSON & SWANBERG, *supra* note 12, at 24.

⁶⁵ JAN, *supra* note 60, at 5.

⁶⁶ COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, WORK-LIFE BALANCE AND THE ECONOMICS OF WORKPLACE FLEXIBILITY 15-16 (June 2014), *available at* https://obamawhitehouse.archives.gov/sites/default/files/docs/updated_workplace_flex_report_final_0.pdf [hereinafter EXECUTIVE OFFICE REPORT].

⁶⁷ JAN, *supra* note 60, at 5.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ EXECUTIVE OFFICE REPORT, *supra* note 66, at 19.

⁷¹ JAN, *supra* note 60, at 5.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ CORPORATES VOICES FOR WORKING FAMILIES, BUSINESS IMPACT OF FLEXIBILITY: AN IMPERATIVE FOR EXPANSION 19 (Feb. 2011), *available at* https://www.wfd.com/PDFS/BusinessImpactsofFlexibility_March2011.pdf; *see also* DAVID LEE, MANAGING EMPLOYEE STRESS AND SAFETY: A GUIDE TO MINIMIZING STRESS-RELATED COST WHILE MAXIMIZING EMPLOYEE PRODUCTIVITY 1 (2000), *available at* <http://docplayer.net/18897220-Managing-employee-stress-and-safety-a-guide-to-minimizing-stress-related-cost-while-maximizing-employee-productivity.html>.

⁷⁵ JAN, *supra* note 60, at 5.

⁷⁶ CORPORATES VOICES FOR WORKING FAMILIES *supra* note 74.