# FIGHTING FOR FAIRNESS: EXAMINING LEGISLATION TO CONFRONT WORKPLACE DISCRIMINATION

## JOINT HEARING

BEFORE THE

## SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES

AND THE

## SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

## COMMITTEE ON EDUCATION AND LABOR U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

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# FIGHTING FOR FAIRNESS: EXAMINING LEGISLATION TO CONFRONT WORKPLACE DISCRIMINATION

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**Thursday, March 18, 2021**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS,
COMMITTEE ON EDUCATION AND LABOR,
*Washington, DC.*

The subcommittees met, pursuant to notice, at 10:15 a.m. via Zoom, Hon. Suzanne Bonamici (Chairwoman of the Subcommittee on Civil Rights and Human Services) presiding.

Present: Representatives Bonamici, Adams, Scott, Norcross, Hayes, Stevens, Leger Fernández, Jones, Mrvan, Bowman, Yarmuth, Mfume, Fulcher, Keller, Thompson, Stefanik, Miller-Meeks, Good, McClain, Fitzgerald, Cawthorn, and Foxx.

Staff present: Tylease Alli, Chief Clerk; Phoebe Ball, Disability Counsel; Ilana Brunner, General Counsel; David Dailey, Counsel to the Chairman; Ijeoma Egekeze, Professional Staff; Alison Hard, Professional Staff; Sheila Havenner, Director of Information Technology; Eli Hovland, Policy Associate; Carrie Hughes, Director of Health and Human Services; Eunice Ikene, Labor Policy Advisor; Ariel Jona, Policy Associate; Andre Lindsay, Policy Associate; Richard Miller, Director of Labor Policy; Max Moore, Staff Assistant; Mariah Mowbray, Clerk/Special Assistant to the Staff Director; Udochi Onwubiko, Labor Policy Counsel; Kayla Pennebecker, Staff Assistant; Veronique Pluviose, Staff Director; Carolyn Ronis, Civil Rights Counsel; Theresa Thompson, Professional Staff; Banyon Vassar, Deputy Director of Information Technology; Cyrus Artz, Minority Staff Director; Courtney Butcher, Minority Director of Member Services and Coalitions; Rob Green, Minority Director of Workforce Policy; Georgie Littlefair, Minority Legislative Assistant; John Martin, Minority Workforce Policy Counsel; Hannah Matesic, Minority Director of Operations; Carlton Norwood, Minority Press Secretary; and John Witherspoon, Minority Professional Staff Member.

Chairwoman BONAMICI. The Joint Hearing of the Subcommittee on Civil Rights and Human Services and the Subcommittee on Workforce Protections will come to order. Welcome everyone. I note that a quorum is present. The subcommittees are meeting today to hear testimony on Fighting for Fairness, Examining Legislation to Confront Workplace Discrimination.

This is an entirely remote hearing. All microphones will be kept muted as a general rule to avoid unnecessary background noise. Members and witnesses will be responsible for unmuting themselves when they are recognized to speak, or when they wish to seek recognition.

I also ask that Members please identify themselves before the speak. Members should keep their cameras on while in the proceeding. Members shall be considered present in the proceeding when they are visible on camera, and they shall be considered not present when they are not visible on camera. The only exception to this is if they are experiencing technical difficulty, and inform the committee staff of such difficulty.

If any Member experiences technical difficulties during the hearing you should stay connected on the platform, make sure you are muted, and use your phone to immediately call the committee's IT Director whose number was provided in advance. Should the Chair experience technical difficulty, or need to step away to vote on the floor, Dr. Adams is Chair of the Subcommittee on Workforce Protections, or another majority Member of one of the subcommittees if she's not available is hereby authorized to assume the gavel in the Chair's absence.

This is again, an entirely remote meeting. And as such the committee's hearing room is officially closed. Members who choose to sit with their individual devices in the hearing room must wear headphones to avoid feedback, echoes and distortion resulting from more than one person on the software platform sitting in the same room.

Members are also expected to adhere to social distancing, and safe healthcare guidelines including the use of masks, hand sanitizer and wiping down their areas, before and after their presence in the hearing room. In order to ensure that the committee's five-minute rule is adhered to, staff will be keeping track of time using the committee's field timer.

The field timer will appear in its own thumbnail picture and will be named 001__timer. There will not be a one-minute remaining warning. The field timer will sound its audio alarm when time is up. Members and witnesses are asked to wrap up promptly when their time has expired.

A roll call is not necessary to establish a quorum in official proceedings conducted remotely or with remote participation, but the committee has made it a practice whenever there is an official proceeding with remote participation for the clerk to call the roll to help make clear who is present at the start of the proceeding.

Members should say their name before announcing they are present. This helps the Clerk, and also helps those watching the platform and the livestream who may experience a few seconds delay.

At this time, I ask the Clerk to call the roll.

The CLERK. Chairwoman Bonamici?

Chairwoman BONAMICI. Present.

The CLERK. Chairwoman Adams?

Chairwoman ADAMS. Present.

The CLERK. Mr. Scott?

Mr. SCOTT. Present.

The CLERK. Mr. Takano?
[No response.]
The CLERK. Mr. Norcross?
[No response.]
The CLERK. Ms. Jayapal?
[No response.]
The CLERK. Mrs. Hayes?
Mrs. HAYES. Present.
The CLERK. Ms. Omar?
[No response.]
The CLERK. Ms. Stevens?
[No response.]
The CLERK. Ms. Leger Fernández?
[No response.]
The CLERK. Mr. Jones?
Mr. JONES. Present.
The CLERK. Mr. Mrvan?
Mr. MRVAN. Present.
The CLERK. Mr. Bowman?
Mr. BOWMAN. Present.
The CLERK. Mr. Yarmuth?
Mr. YARMUTH. Present.
The CLERK. Mr. Mfume?
[No response.]
The CLERK. Ranking Member Fulcher?
Mr. FULCHER. Fulcher here.
The CLERK. Ranking Member Keller?
Mr. KELLER. Keller is here.
The CLERK. Mr. Thompson?
Mr. THOMPSON. Mr. Thompson is here.
The CLERK. Ms. Stefanik?
Ms. STEFANIK. Present.
The CLERK. Mrs. Miller-Meeks?
[No response.]
The CLERK. Mr. Owens?
[No response.]
The CLERK. Mr. Good?
Mr. GOOD. Good is here.
The CLERK. Mrs. McClain?
[No response.]
The CLERK. Mrs. Spartz?
[No response.]
The CLERK. Mr. Fitzgerald?
Mr. FITZGERALD. I'm here.
The CLERK. Mr. Cawthorn?
Mr. CAWTHORN. I am present thank you.
The CLERK. Mrs. Steel?
[No response.]
The CLERK. Chairwoman Bonamici that concludes the roll call.
Chairwoman BONAMICI. Thank you very much.
Mr. NORCROSS. Don Norcross is here Madam Chairwoman.
Chairwoman BONAMICI. Did somebody seek to be recognized?
Mr. NORCROSS. Donald Norcross. I am present.

Chairwoman BONAMICI. Thank you, Mr. Norcross. Pursuant to Committee Rule 8(c), opening statements are limited to the subcommittee Chairs and Ranking Members. This allows us to hear from our witnesses sooner and provides all Members with adequate time to ask questions.

I recognize myself now for the purpose of making an opening Statement.

Every worker should be able to earn a living free from discrimination. But unfortunately, many women, people of color, older workers, workers with disabilities, and LGBTQ workers still experience persisted discrimination in the workplace, including pay disparities, limited opportunities, and harassment.

Today's hearing will examine four legislative solutions to protect workers from various forms of workplace discrimination. The Pregnant Workers Fairness Act, the Protecting Older Workers Against Discrimination Act, the Paycheck Fairness Act, and the Providing Urgent Maternal Protections for Nursing Mothers Act.

Women are on the front lines of the Coronavirus pandemic as essential workers, risking their lives every day to provide for our communities. At the same time, women are being forced out of the labor market.

In September 2020, four times more women left the labor force than men. The experiences of women of color are even harsher. As a mom and a policymaker, I know how important it is to protect the economic security of pregnant workers and working families.

It is unacceptable that in 2021 pregnant workers can still be forced to choose between a healthy pregnancy, or a paycheck. One simple accommodation, such as providing seating, water, and bathroom breaks, would allow them to stay safe on the job during their pregnancy.

The Pregnant Workers Fairness Act clearly establishes nationwide a pregnant worker's right to reasonable accommodations and guarantees that pregnant workers can seek those accommodations without facing discrimination or retaliation in the workplace.

It is a long overdue fix to the inadequate patchwork of protections under existing law. This bipartisan bill passed the House with overwhelming support in the 116th Congress, and I welcome the opportunity to work with my Republican colleagues to move this bill forward in a bipartisan manner again this year.

Pregnant workers are not the only workers facing discrimination on the job. Older workers are also vulnerable to workplace discrimination and have become increasingly vulnerable to discrimination during the COVID–19 pandemic.

Congress recognized the need to protect older workers from discrimination when in 1967 it enacted the Age Discrimination and Employment Act. But the Supreme Court severely eroded those protections in 2009 through its 5–4 decision in *Gross* v. *FBL Financial Services*.

In that case the court imposed a higher burden of proof than courts have previously required for age discrimination cases, and because of the court's opinion in Gross, workers must now prove that age discrimination was the sole motivating cause for their employer's adverse action, rather than just a motivating factor in their employer's adverse action.

The Protecting Older Workers Against Discrimination Act is a bipartisan legislative fix that would restore the pre-2009 standard in age discrimination claims, thereby aligning the burden of proof with the same standards for proving discrimination based on sex, race, religion, and national origin.

Congress passed this bill with bipartisan support last Congress, and just this morning I joined Chairman Scott and Congressman Davis in reintroducing it.

Finally, I'd like to voice my strong support for the two other bipartisan bills under discussion today. The Paycheck Fairness Act, which this subcommittee and the Workforce Protection Subcommittee, also enthusiastically advanced last Congress, and the PUMP Act, which I know Chairwoman Adams will cover in detail.

The four bills we are discussing today take important steps toward workplace gender equity, healthy pregnancies, and improving the economic security of all workers. I thank the witnesses for their time today and I yield to the Ranking Member Mr. Fulcher for his opening Statement.

[The statement of Chairwoman Bonamici follows:]

STATEMENT OF HON. SUZANNE BONAMICI, CHAIRWOMAN, SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES

Every worker should be able to earn a living free from discrimination, but unfortunately, many women, people of color, older workers, workers with disabilities, and LGBTQ workers still experience persistent discrimination in the workplace including, pay disparities, limited opportunities, and harassment. Today's hearing will examine four legislative solutions to protect workers from various forms of workplace discrimination, including: the *Pregnant Workers Fairness Act*, the *Protecting Older Workers Against Discrimination Act*, the *Paycheck Fairness Act*, and the *Providing Urgent Maternal Protections for Nursing Mothers Act*.

Women are on the frontlines of the coronavirus pandemic as essential workers, risking their lives every day to provide for our communities. At the same time, women are being forced out of the labor market. In September 2020, four times more women left the labor force than men. The experiences of women of color are even harsher.

As a mom and a policymaker, I know how important it is to protect the economic security of pregnant workers and working families. It is unacceptable that in 2021, pregnant workers can still be forced to choose a healthy pregnancy or a paycheck when simple accommodations—such as providing seating, water, and bathroom breaks—would allow them stay safe on the job during their pregnancy.

The *Pregnant Workers Fairness Act* clearly establishes nationwide a pregnant worker's right to reasonable accommodations and guarantees that pregnant workers can seek those accommodations without facing discrimination or retaliation in the workplace. It is a long overdue fix to the inadequate patchwork of protections under existing law. This bipartisan bill passed the House with overwhelming support in the 116th Congress, and I welcome the opportunity to work with my Republican colleagues to move this bill forward in a bipartisan manner again this year.

Pregnant workers are not the only workers facing discrimination on the job. Older workers are also vulnerable to workplace discrimination and have become increasingly vulnerable to discrimination during the COVID–19 pandemic.

Congress recognized the need to protect older workers from discrimination when in 1967 it enacted the *Age Discrimination in Employment Act*. The Supreme Court severely eroded those protections in 2009, however, through its 5–4 decision in *Gross* v. *FBL Financial Services, Inc*. In that case the court imposed a higher burden of proof than courts had previously required for age discrimination cases. Because of the Court's opinion in *Gross*, workers must now prove that age discrimination was the sole motivating cause for their employer's adverse action, rather than just a motivating factor in their employer's adverse action.

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I want to thank all the witnesses for their time today, and I yield to the Ranking Member, Mr. Fulcher for his opening Statement.

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Mr. Fulcher your sound is not clear, so we'll give you just a moment to see if we can hear you clearly. Mr. Fulcher would you like to try again? OK I recognize Mr. Fulcher. You have five minutes for your opening Statement. Mr. Fulcher it's still not clear. In the interest of time I'm going to go to Chairwoman Adams and then come right back to you and that will give you five minutes to work on your sound.

I recognize Chairwoman Adams for five minutes for your opening Statement.

Chairwoman ADAMS. Thank you, Madam Chair. In addition to the Pregnant Worker's Fairness Act, and Protecting Older Workers Against Discrimination Act, today's hearing will also examine the Paycheck Fairness Act, and the PUMP for Nursing Mothers Act, both of which are partially, or fully under the jurisdiction of the Subcommittee on Workforce Protections.

These bills address issues of basic fairness for women in the workplace. Today women earn on an average 82 cents on the dollar compared to white men. The wage gap is even worse for women of color. For example, black women earn an average of 63 cents on the dollar, Native women earn average of 60 cents on the dollar, and Latino women earn an average of 55 cents on the dollar compared to white men.

The wage gap persists in nearly every line of work, regardless of education, experience, occupation, industry, or job title, and that's unacceptable. From the North Carolina House to the U.S. House for three decades, I've been fighting to close the gender wage gap.

Fifty-eight years have passed since the Equal Pay Act was enacted, and it's been 10 years since President Obama signed into law the Lilly Ledbetter Fair Pay Act, yet the promise of equal pay for equal work remains unfulfilled, or unfilled—unfulfilled excuse me.

The Paycheck Fairness Act is an opportunity for Congress to strengthen the Equal Pay Act, bolster the rights of working women, and put an end to the gender-based wage disparity once and for all. The Paycheck Fairness Act would require employers to prove that a pay disparity exists for legitimate reasons, ban retaliation against workers who discuss their wages, allow more workers to participate in class action lawsuits against systemic pay discrimination, prohibit employers from seeking the salary history of perspective employees, and develop a wage data collection system.

And provide a system to businesses to improve equal pay practices. The House passed this legislation with support of seven House Republicans in the 116th Congress, and we look forward to passing it again this year.

Nursing workers are in need of protections in the workplace, to be able to maintain breast feeding when they return to work. More than 10 years ago the Break Time for Nursing Mothers Act was enacted, requiring employers to provide eligible nursing workers with unpaid break time, and a clean private space to pump.

Unfortunately, gaps in the law limit the number of workers entitled to these protections, and our workers can hold their employers accountable when they violate these requirements. The PUMP for Nursing Mothers Act is a bipartisan bill that closes gaps that excluded nearly nine million employees who are exempted from overtime protections.

The bill also ensures nursing workers have access to appropriate remedies when their employees fail to provide break time and appropriate pumping space. It also clarifies that if an employee is not completely relieved of duty during a break, that time is considered hours worked for the purposes of minimum wage and overtime requirements.

Every worker who chooses to nurse understands the importance of being able to express breast milk, and the severe health consequences of failing to do so. This legislation is a simple improvement to existing law that will have a meaningful impact on nursing workers across the country.

I strongly support all four bills under discussion today, and I will now yield back to you Madam Chair.

[The statement of Chairwoman Adams follows:]

STATEMENT OF HON. ALMA S. ADAMS, CHAIRWOMAN, SUBCOMMITTEE ON WORKFORCE PROTECTIONS

In addition to the *Pregnant Workers Fairness Act* and the *Protecting Older Workers Against Discrimination Act*, today's hearing will also examine the *Paycheck Fairness Act* and the *PUMP for Nursing Mothers Act*, both of which are partially or fully under the jurisdiction of the subcommittee on Workforce Protections.

These bills address issues of basic fairness for women in the workplace.

Today, women earn, on average, 82 cents on the dollar compared to all men. The wage gap is even worse for women of color. For example, Black women earn an average of 63 cents on the dollar, Native women earn an average of 60 cents on the dollar, and Latina women earn an average of 55 cents on the dollar compared to white men. The wage gap persists in nearly every line of work, regardless of education, experience, occupation, industry, or job title.

That is unacceptable. From the North Carolina House to the U.S. House, for three decades, I have been fighting to close the gender wage gap.

Fifty-eight years have passed since the *Equal Pay Act* was enacted, and it's been ten years since President Obama signed into law the *Lilly Ledbetter Fair Pay Act*, yet the promise of equal pay for equal work remains unfulfilled.

The *Paycheck Fairness Act* is an opportunity for Congress to strengthen the *Equal Pay Act*, bolster the rights of working women, and put an end to the gender-based wage disparity once and for all.

The *Paycheck Fairness Act* would:

- Require employers to prove that a pay disparity exists for legitimate reasons;
- Ban retaliation against workers who discuss their wages;
- Allow more workers to participate in class action lawsuits against systemic pay discrimination;
- Prohibit employers from relying on the salary history of prospective employees; and
- Develop wage data collection systems and provide assistance to businesses to improve equal pay practices.

The House passed this legislation with support of 7 House Republicans in the 116th Congress, and we look forward to passing it again his year.

Nursing workers also need protections in the workplace to be able to maintain breastfeeding when they return to work.

More than ten years ago, the *Break Time for Nursing Mothers Act* was enacted, requiring employers to provide eligible nursing workers with unpaid break time and a clean, private space to pump. Unfortunately, gaps in the law limit the number of workers entitled to these protections and how workers can hold their employers accountable when they violate these requirements.

The *PUMP for Nursing Mothers Act* is a bipartisan bill that closes gaps that excluded nearly 9 million employees who are exempted from overtime protections. The bill also ensures nursing workers have access to appropriate remedies when their employers fail to provide break time and appropriate pumping space. It also clarifies that, if an employee is not completely relieved of duty during a break, that time is considered hours worked for the purposes of minimum wage and overtime requirements.

Every worker who chooses to nurse understands the importance of being able to express breast milk and the severe health consequences of failing to do so. This legislation is a simple improvement to existing law that will have a meaningful impact on nursing workers across the country.

I strongly support all four bills under discussion today and I will now yield to the Ranking Member, Mr. Keller.

---

Chairwoman BONAMICI. Thank you, Chair Adams, and I now recognize Ranking Member Fulcher for five minutes for your opening Statement.

Mr. FULCHER. Thank you, Madam Chair. I think I understand now how some of our remote students feel with their struggles in learning remotely. Thank you to all of our witnesses for joining us here today. Thank you again Madam Chair.

We all agree that discrimination in America's workplace is wrong and should not be tolerated. That's why there are laws prohibiting such egregious behavior. And while the reported intent behind this legislation is admiral, good intentions don't always bring good policy.

Good policy comes from thorough examination and bipartisan collaboration. This hearing is far from thorough as we are considering all at once four separate and distinct bills that make significant changes to very important laws.

It's also not bipartisan. If my colleagues across the aisle were truly interested in bipartisan collaboration on these bills, they would have allowed more than one Republican witness to testify. This will not result in a fair or adequate examination of the underlying issues, and it certainly misses the mark regarding today's hearing title "Fighting for Fairness."

Although today's hearing will cover a number of bills, I'll comment on one bill that is particularly troubling. The so-called Protecting Older Workers from Discrimination Act is just another empty promise wrapped in a convenient title. There's no evidence of data that suggests this bill is needed.

It's already against the law to discriminate in the workplace because of an individual's age. Congress has enacted significant laws prohibiting the employment discrimination, including the Age Discrimination Employment Act, the Americas with Disabilities Act, and Rehabilitation Act, and the Civil Rights Act.

Additionally, employment trends for older workers are positive in recent decades. In 2019 older workers earn 7 percent more than the median income for all workers compared to 20 years ago when older workers earned 23 percent less than the median for all workers.

In Idaho today, workers 45 to 64 are earning 19.6 percent more than all workers in the State. This trend is expected to continue as we recover economically from COVID–19. The only parties likely to win if the bill is enacted into law are the trial lawyers. The bill will increase frivolous legal claims against business owners, thereby taking away valuable resources from efforts to prevent harassment and discrimination.

The bill disregards current law. Real world workplace solutions, and Supreme Court precedent ultimately rewarding trial lawyers at the expense of older Americans. I thank the witnesses for being here today. I hope as Members of this Committee we'll be able to work together in the future on real solutions to real problems. Madam Chair I yield back.

[The statement of Ranking Member Fulcher follows:]

STATEMENT OF HON. RUSS FULCHER, RANKING MEMBER, SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES

Republicans and Democrats agree that discrimination in any form is wrong. It should not be tolerated in America's workplaces. That's why there are laws prohibiting such egregious behavior. And while the purported intent behind the legislation before us is admirable, good intentions don't always bring good policy.

Good policy comes from thorough examination and bipartisan collaboration. This hearing is far from thorough, as we are considering all at once, four separate and distinct bills that make significant changes to very important laws.

It's also not bipartisan. If Democrats were truly interested in bipartisan collaboration on these bills, they would have allowed more than ONE Republican witness to testify. This will not result in a fair or adequate examination of the underlying issues and certainly misses the mark regarding today's hearing title 'fighting for fairness.'

Although today's hearing will cover a number of bills, I'll comment on one bill that is particularly troubling. The so-called *Protecting Older Workers Against Discrimination Act* is just another empty promise from Democrats wrapped in a convenient title.

There is no evidence or data that suggests this bill is needed. It is already against the law to discriminate in the workplace because of an individual's age. Congress has enacted significant laws prohibiting employment discrimination, including the *Age Discrimination in Employment Act*, the *Americans with Disabilities Act*, the *Rehabilitation Act*, and the *Civil Rights Act*.

Additionally, employment trends for older workers are positive in recent decades. In 2018, older workers earned 7 percent more than the median income for all workers, compared to 20 years ago when older workers earned 23 percent less than the median for all workers. In Idaho today, workers 45 to 64 years old are earning 19.6 percent more than all workers in the State. This trend is expected to continue as we recover economically from COVID–19.

The only parties who will 'win,' in nearly all cases if the bill is enacted into law, are trial lawyers. The bill will also increase frivolous legal claims against business owners. These undeserving claims will take valuable resources away from efforts to prevent harassment and discrimination.

This bill being pushed by Democrats disregards current law, real-world workplace situations, and Supreme Court precedent; ultimately rewarding trial lawyers at the expense of older Americans.

I thank the witnesses for being here today. I hope as Members of this Committee, we will be able to work together in the future on real solutions to real problems instead of gifting trial lawyers a payout under the guise of 'protecting' older workers. I yield back.

---

Chairwoman ADAMS. Thank you very much Ranking Member Fulcher and I now recognize the Ranking Member of the Subcommittee on Workforce Protections, Mr. Keller, for the purposes of making an opening Statement.

Mr. KELLER. Thank you to both of our Chairwomen, Ranking Member Fulcher and to all our witnesses for joining us today. I'd first like to associate myself with the remarks made by Ranking Member Fulcher about the structure of the hearing unfolding here today.

Only allowing the minority to invite one witness for a legislative hearing covering four different bills, is far from unifying, and will not result in a thorough bipartisan examination of the important topics before us. I'd like to comment specifically on one of the bills being discussed today, H.R. 7. Equal work deserves equal pay, regardless of the sex of the employee.

In America this is the law. Paying women less than men for equal work is wrong and illegal. If employers are doing so, they are wrong, and they are breaking the law. No one here disagrees with that fact. That's why Congress enacted the Equal Pay Act of 1963, which made it illegal to pay different wages to women for equal work.

The following year Congress enacted even broader, non-discrimination laws making it illegal for employers to discriminate because of race, color, national origin, religion and sex, in Title VII of the Civil Rights Act. These landmark laws are important affirmation of who we are and what we believe as a country, that workplace discrimination is repugnant and illegal, and quite frankly, discrimination of any kind in our country is unacceptable.

H.R. 7, the so-called Paycheck Fairness Act is a false promise that creates opportunities and advantages for trial lawyers, not for working women. Instead of treating sex discrimination charges with the seriousness they deserve, the Paycheck Fairness Act is designed to make it easier for trial lawyers to bring more suits of questionable validity for the purpose of siphoning off unlimited pay days from settlements and jury awards, lining their own pockets and dragging women through tedious, never-ending legal turmoil.

The Paycheck Fairness Act offers no new or meaningful protections against pay discrimination, rather it dramatically limits the ability of employers to defend themselves against claims of discrimination based on pay disparities that result from legitimate factors.

Just 2 months ago the women's labor force participation rate hit a 33 year low, the lowest it's been since 1988. At a time when women are leaving the work force in droves, largely due to COVID–19, and lengthy school closures, the last thing we should be doing is dragging working women through never-ending legal turmoil while making it easier for trial lawyers to score unlimited pay days.

All employees should be valued for their recognizable contributions to the American work force and economy. Instead of working on redundant laws to line the trial lawyer's pockets, this committee should be focused on policies that foster individual freedom, innovation, and progressive economic policies so all workers and jobseekers have opportunities to achieve life-long success. Thank you and I yield back.

[The statement of Ranking Member Keller follows:]

STATEMENT OF HON. FRED KELLER, RANKING MEMBER, SUBCOMMITTEE ON WORKFORCE PROTECTIONS

Thank you, to both of our Chairwomen, Ranking Member Fulcher, and to all our witnesses for joining us today.

I'd first like to associate myself with the remarks made by Ranking Member Fulcher about the structure of the hearing unfolding here today. Only allowing the minority to invite one witness for a 'legislative' hearing covering four different bills is far from 'unifying' and will not result in a thorough, bipartisan examination of the important topics before us.

I'd like to comment specifically on one of the bills being discussed today, H.R. 7. Equal work deserves equal pay, regardless of the sex of the employee. In America, this is the law. Paying women less than men for equal work is wrong and illegal. Employers who continue to do so are wrong and they are breaking the law. No one here disagrees with that fact.

That's why Congress enacted the *Equal Pay Act* of 1963, which made it illegal to pay different wages to women for equal work. The following year, Congress enacted even broader nondiscrimination laws, making it illegal for employers to discriminate because of race, color, national origin, religion, and sex in Title VII of the *Civil Rights Act*.

These landmark laws are an important affirmation of who we are and what we believe as a country: that workplace discrimination is repugnant and illegal.

H.R. 7, the so-called *Paycheck Fairness Act*, is a false promise that creates opportunities and advantages for trial lawyers-not for working women. Instead of treating sex discrimination charges with the seriousness they deserve, the 'Paycheck Fairness' Act is designed to make it easier for trial lawyers to bring more suits of questionable validity for the purpose of siphoning off unlimited paydays from settlements and jury awards, lining their own pockets and dragging women through tedious, never-ending legal turmoil.

The 'Paycheck Fairness' Act offers no new or meaningful protections against pay discrimination. Rather, it dramatically limits the ability of employers to defend against claims of discrimination based on pay disparities that result from legitimate factors.

Just two months ago, the women's labor force participation rate hit a 33-year low, the lowest it's been since 1988. At a time when women are leaving the work force in droves, largely due to COVID–19 and lengthy school closures, the last thing we should be doing is dragging working women through never-ending legal turmoil while making it easier for trial lawyers to score unlimited paydays.

All employees should be valued for their recognizable contributions to the American work force and economy. Instead of working to line trial lawyers' pockets, this Committee should be focused on polices that foster individual freedom, innovation, and pro-growth economic policies so all workers and job seekers have opportunities to achieve life-long success.

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Chairwoman BONAMICI. Thank you Ranking Member Keller. Without objection all other Members who wish to insert written Statements into the record may do so by submitting them to the Committee Clerk electronically in Microsoft Word format by 5 p.m. on April 1, 2021.

I will now introduce the witnesses. Ms. Laurie McCann is a Senior Attorney with AARP Foundation Litigation. Her principle responsibilities include litigation and amicus curiae participation for AARP on a broad range of age discrimination and other employment issues. McCann is a noted speaker on the Aging Workforce.

Ms. Dina Bakst is Co-Founder and Co-President of A Better Balance, a leading national legal advocacy organization headquartered in New York City. A Better Balance is dedicated to advancing the rights of working families, promoting fairness in the workplace, and helping workers across the economic spectrum care for themselves and their families without risking their economic security.

Ms. Camille Olson is a partner in the law firm Seyfarth Shaw LLP. Since 2013 Ms. Olson has served as Chairperson of the United States Chamber of Commerce's Equal Employment Oppor-

tunity EEO Subcommittee. She has represented companies nationwide in all areas of litigation.

Ms. Fatima Goss Graves is the President and CEO of the National Women's Law Center. Ms. Goss Graves has served in numerous roles at the National Women's Law Center for more than a decade, and has a distinguished track record working across a broad set of issues central to women's lives, including income security, health and reproductive rights, education access, and workplace justice.

We appreciate the witnesses for participating today, and we look forward to your testimony. Let me remind the witnesses that we have read your witness Statements and they will appear in full in the hearing record. Pursuant to Committee Rule 8(d) and committee practice, you are each asked to limit your oral presentation to a five-minute summary of your written Statement. I also wanted to remind the witnesses that pursuant to Title 18 of the U.S. Code, Section 1001, it is illegal to knowingly and willfully falsify any Statement, representation, writing, document, or material fact presented to Congress or otherwise conceal or cover up a material fact. During your testimony, staff will be keeping track of the time and will use a chime to signal when one minute is left and when time is up entirely. They will sound a short chime when there is one minute left and a longer chime when time is up. Please be attentive to the time and wrap up when your time is over and then remute your system. If you experience any technical difficulties during your testimony or later in the hearing, please stay connected on the platform, make sure you are muted and use your phone to immediately call the committee's IT director, whose number been provided in advance. We will let all the witnesses make their presentations before we move to Member questions, and when answering a question, please remember to unmute your microphone. I will first recognize Ms. McCann.

**STATEMENT OF LAURIE MCCANN, SENIOR ATTORNEY WITH AARP FOUNDATION, WASHINGTON DC**

Ms. MCCANN. Chairs Adam and Bonamici, Ranking Members Fulcher and Keller and Members of the committee. On behalf of our nearly 38 million members, and all older Americans, AARP thanks you for inviting us to testify concerning the need to confront workplace discrimination, and the role The Protecting Older Workers Against Discrimination Act would play in doing so.

For older individuals, age discrimination is the most significant barrier to both getting and staying employed. The COVID–19 pandemic has only amplified age discrimination. High and persistent unemployment, compounded by the health risks of COVID–19 threatens the retirement security of older workers, especially women over the age of 55.

A key reason age discrimination remains stubbornly persistent is because ageism in our culture remains stubbornly entrenched, quite possibly ageism is one of the last acceptable forms of prejudice in our society.

Too often courts fail to interpret the Age Discrimination Employment Act as a remedial civil rights statute which then results in its protections being weakened. Perhaps the worst example of the

increasingly cramped reading of the ADEA by the courts is Gross versus FBL Financial Services, a more than 10 year-old Supreme Court decision and the impetus of the POWADA legislation.

Not long after the decision I accompanied Jack Gross as he visited Members of this body to encourage passage of the very same legislation we are discussing today.

Mr. Gross's employer underwent a merger after he had had a successful 30 year career. Older workers who did not accept a buyout were demoted and replaced by younger workers.

Jack went to court and a jury awarded him about $47,000.00 in lost compensation. So when his case was appealed to the Supreme Court, the court rules that the ADEA requires a much stricter showing of causation than other forms of discrimination.

It was no longer enough to prove that age was one of the motivating factors behind an employer's conduct, the court rules that older workers must prove that age was a decision but for cause for the employer's actions.

The Gross decision has made it far more difficult for older workers to get their day in court, and even more difficult to prevail. I just explained how in Jack's own case, he won under the motivating factor framework, but after the Supreme Court changed the rules and required him to retry his case under the new higher standards, he lost, despite having proven the same facts with the same parties in the same court as before.

In another case from Jack's home State of Iowa, an older employer brought an age discrimination case both under the ADEA and the Iowa Civil Rights Act. Under the ADEA Gross's but for standard governed, but under the Iowa State law workers need only show that discrimination was a motivating factor in the adverse treatment.

A single court applying the different standards to the very same set of facts reached opposite conclusions. The worker lost her ADEA case due to Gross, but her State law claim survived.

The Gross decision has sent a terrible message to employers and the court, that age discrimination isn't as wrong as other forms of discrimination, that some age discrimination is OK, as long as the employer can point to other lawful motives that may have also played a role, employers will escape liability altogether.

In this manner the Gross decision undermined Congress's mandate for how they expected the ADEA to be enforced, that age discrimination would play no role in employment decision. POWADA does not expand civil rights, it has long been a bipartisan straightforward restoration of the standard that was in effect before 2009.

Discrimination is discrimination, and POWADA clarified Congress's intent that no amount of unlawful discrimination in the workplace is acceptable. Congress should pass POWADA as soon as possible. Thank you again for inviting AARP to testify.

[The prepared Statement of Ms. McCann follows:]

PREPARED STATEMENT OF LAURIE MCCANN

**TESTIMONY OF**
**LAURIE MCCANN**
**ON BEHALF OF**
**AARP**

**SUBMITTED TO THE**
**EDUCATION AND LABOR COMMITTEE**
**U.S. HOUSE OF REPRESENTATIVES**
**SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES AND**
**SUBCOMMITTEE ON WORKFORCE PROTECTIONS**
**ON**

**FIGHTING FOR FAIRNESS: EXAMINING LEGISLATION TO CONFRONT WORKPLACE DISCRIMINATION**

**March 18, 2021**
**Washington, DC**

**For further information, contact:**
**Michele Varnhagen**
**AARP Government Affairs**
**(202) 434-3723**

***Introduction***

Chairs Adams and Bonamici, Ranking Members Fulcher and Keller, and Members of the Committee, on behalf of our nearly 38 million members and all older Americans nationwide, AARP thanks you for inviting us to testify at today's hearing to discuss the need to confront workplace discrimination, including that faced by older workers. I am Laurie McCann, a Senior Attorney with AARP Foundation, the charitable affiliate of AARP, which, among other things, works to help low-income older adults earn a living. For almost 35 years, I have been working to ensure equal employment opportunities for older workers so that they can continue to put their experience to work.

It is simply good business to recruit and to retain talent regardless of age**.** The age 50+ segment of the workforce is the most engaged cohort across all generations, which translates into higher productivity, increased revenues, and improved business outcomes.[1] Research study after research study finds that a diverse workforce is a more productive, better performing, more innovative workforce, and this holds for *age* diversity too.[2] Yet, older workers continue to face numerous obstacles to employment, barriers that cannot be fully addressed in one hearing. As discussed below, the pandemic and accompanying recession has dealt a devastating blow to the job prospects and future retirement security of older workers.

***Age Discrimination Is the Most Significant Barrier to Employment for Older Workers***

For older jobseekers and workers, age discrimination is the biggest barrier to both getting employed and staying employed. Stereotypes of older workers as more expensive, less productive, and unable to master new skills and technologies, limit the employment opportunities of older individuals. Whether due to the high rate of involuntary separations older workers face,[3] or the various ways employers reject or discourage their job applications,[4] age discrimination impedes older workers' ability to get and stay employed.

Certainly, the Age Discrimination in Employment Act (ADEA) — which has been in effect for over 50 years—significantly improved the employment landscape for older workers. Congress has amended the law several times to gradually strengthen its coverage and protections. Upper age limits on coverage were eliminated — banning mandatory retirement for almost all workers

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[1] *See generally, AARP, A Business Case for Workers Age 50+: A Look at the Value of Experience* (2015), available at https://www.aarp.org/content/dam/aarp/research/surveys_statistics/general/2015/business-case-workers-age-50plus.doi.10.26419%252Fres.00100.001.pdf

[2] *See generally,* Lori Trawinski, *Disrupting Aging in the Workplace: Profiles in Intergenerational Diversity Leadership* (AARP Pub. Policy Inst., Oct. 2016), *available at* https://www.aarp.org/content/dam/aarp/ppi/2017/08/disrupt-aging-in-the-workforce.pdf

[3] Johnson, R.W., Gosselin, P. (December 2018). *How secure is employmenti at older ages*? Urban Institute. https://urban.org/sites/default/files/publication/99570/how_secure_is_employment_at_older_ages_2.pdf

[3] Neumark, D. (January 2020). *Age discrimination in hiring: Evidence from age-blind vs. non-age-blind hiring procedures*. NBER. https://www.nber.org/papers/w26623.pdf

[4] Neumark, D. (January 2020). *Age discrimination in hiring: Evidence from age-blind vs. non-age-blind hiring procedures*. NBER. https://www.nber.org/papers/w26623.pdf

— discrimination in employee benefits has diminished, and significant protections for older workers who are laid off were added.

Unfortunately, age discrimination in the workplace is still disturbingly pervasive. According to an AARP survey released in 2018, 3 in 5 older workers report they have seen or experienced age discrimination on the job.[5] Nearly two-thirds of women and more than three-fourths of African American workers age 45 and older say they've seen or experienced age discrimination in the workplace.[6] Distressingly, the Covid-19 pandemic has only amplified age discrimination. High and persistent unemployment, compounded by the health risks of Covid-19, threatens the retirement security of older workers.[7] In January, almost half (49.7 percent) of jobseekers ages 55 and older were long-term unemployed compared with 34.7 percent of jobseekers ages 16 to 54.[8] Moreover, there is an alarming trend toward increasing early retirements as many displaced older workers lose hope of finding work any time soon.[9] During the pandemic, older workers have exited the labor force at twice the rate they did during the Great Recession of 2007 to 2009.[10] According to AARP employment data, women over the age of 55 face a particularly serious threat to their careers and earning power amid the financial and labor market turmoil due to Covid-19. The January and February 2021 labor force participation rates for women 55+ (33.1% both months) are the lowest since the pandemic began, suggesting an even more long-term impact on older women.[11]

- Termination – A 2018 Urban Institute/ProPublica study found that 56 percent of all older workers age 50+ are "pushed out of longtime jobs before they choose to retire" and "only one in 10 of these workers ever again earns as much as they did before" their involuntary separation.[12] Among the age discrimination charges filed with the

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[5] Rebecca Perron, *The Value of Experience: Age Discrimination Against Older Workers Persists* 3 (AARP, 2018), *at* https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2018/value-of-experience-age-discrimination-highlights.doi.10.26419-2Fres.00177.002.pdf [hereinafter *AARP Survey]*.

[6] *Id.*

[7] Research by the New School forecasts that the poverty rate in retirement among workers who are now age 50 to 60 will jump to 54 percent from 28 percent because impact of the pandemic. Mark Miller, "A Pandemic Problem for Older Workers: Will They Have to Retire Sooner," The New York Times, June 26, 2020, https://www.nytimes.com/2020/06/26/business/retirement-coronavirus.html.

[8] https://www.aarp.org/ppi/info-2020/employment-data-digest.html

[9] Jennifer Schramm, "Devastating Job Losses May Be Pushing Older Workers into Retirements," June 8, 2020, https://blog.aarp.org/thinking-policy/job-losses-may-be-pushing-older-workers-into-retirement.

[10] Paula Span, "When Retirement Comes Too Early," New York Times, August 28, 2020 (citing research by the New School's Retirement Equity Lab), https://www.nytimes.com/2020/08/28/health/coronavirus-retirement-recession.html

[11] Jennifer Schramm, "The Covid Pandemic Has Upended Labor Force Projections," March 9, 2021, available at https://blog.aarp.org/thinking-policy/the-covid-pandemic-has-upended-labor-force-projections.

[12] Peter Gosselin, "If You're Over 50, Chances Are the Decision to Leave a Job Won't be Yours," ProPublica (Dec. 28, 2018), available at https://www.propublica.org/article/older-workers-united-states-pushed-out-of-work-forced-retirement.

EEOC, complaints about discriminatory discharge constitute, by far, the largest number of charges filed under the ADEA.[13]

- Hiring - Discrimination in hiring is quite common but less visible and much harder to prove. Experimental studies have documented significant discrimination against older applicants in the hiring process, including one study that found employers were less likely to call back older applicants, and "women face worse age discrimination than men."[14] AARP's 2018 survey found that three-fourths of age 45+ workers blame age discrimination for their lack of confidence in finding a *new job*.[15] It doesn't help that 44% of older jobseekers who had recently applied for a job were asked for age-related information such as their date of birth or date of graduation.[16] A more recent AARP survey of job insecure workers age 40-65 revealed that nearly half of the respondents feared that their older age will hamper their job search. This percentage is significantly higher for workers in their 50s (59%) and for those age 60 to 65 (72%). Women are also more concerned about ageism in a job search than men (47% vs. 41%).[17]

- Everything In Between — After discharge, the next most frequent complaint by older workers involves the "terms and conditions" of employment,[18] such as being moved to a night shift, or given an unfair performance evaluation. Age-based harassment on the job is also, unfortunately, quite common. It is the next most frequent complaint to the EEOC, and nearly one-fourth of age 45+ workers in the AARP survey said they had experienced negative comments about their age from supervisors and coworkers.[19]

A key reason age discrimination in the workplace remains stubbornly persistent is because ageism in our culture remains stubbornly entrenched. Quite possibly, ageism is one of the last acceptable forms of prejudice in our society. Certainly, not enough companies have taken age bias seriously. Despite the fact that the workforce is aging and – at least pre-COVID – workers age 65+ were the fastest growing age group in the labor force,[20] only about 8 percent of CEOs

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[13] EEOC, *Age Discrimination in Employment Act (Charges filed with EEOC): FY 1997 - FY 2020* (Receipts), *at* https://www.eeoc.govieeoc/statistics/enforcement/adea.cfm (accessed March 8, 2021) [hereinafter *EEOC Charge Statistics]*.

[14] David. Neumark, Ian Burn, and Patrick Button, *Age Discrimination and Hiring of Older Workers,* Federal Reserve Bank of San Francisco (2017), *at* https://www.frbstorq/economic-research/publications/economic-letter/2017/february/aqe-discrimination-and-hiring-older-workers/.

[15] *AARP Survey, supra* n. 3, at 8.

[16] *Id.* at 7.

[17] Rebecca Perron, "*Ageism Could Hurt Job Prospects, Say Job-Insecure Older Workers*," AARP Research (January 2021). https://www.aarp.org/research/topics/economics/info-2021/ageism-job-security-older-workers.html Job insecure was defined as including at least one of the following: currently unemployed, need upskilling to keep their current job or get a new job, OR concerned that they could lose a job, be temporarily laid off, have hours reduced, or be furloughed.

[18] *EEOC Charge Statistics, supra* n. 13.

[19] *AARP Survey, supra* n. 5, at 6.

report that they include "age" as a dimension of their diversity and inclusion policies and strategies.[21]

There are many best practices employers can adopt, and are adopting, to eschew age discrimination and benefit from building a multigenerational workforce. Such efforts can help prevent discrimination from ever occurring. However, it is important to remember that these efforts are not a substitute for strong legal protections against age discrimination in the workplace, and vigorous enforcement of those protections.

***The Gross Decision and Its Impact***

Unfortunately, over the years, the courts have failed to interpret the ADEA as a remedial civil rights statute, instead, narrowly interpreting its protections and broadly construing its exceptions — compounding the barriers older workers face around age discrimination. One of the most egregious examples of the increasingly cramped reading of the ADEA by the courts is the *Gross v. FBL Financial Services, Inc*.,[22] decision issued by the Supreme Court over 10 years ago. To appreciate the departure that the *Gross* case represents, it is important to understand the historical background.[23] The ADEA is firmly grounded in this nation's civil rights era.

Originally, age discrimination was proposed as a protected category to be part of the Civil Rights Act of 1964.[24] Though not ultimately included, that law directed the Secretary of Labor to conduct a study of age discrimination and report back to Congress.[25] The enactment of the ADEA in 1967 — amidst the enactment of the Equal Pay Act of 1963, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act in 1968 — was an important and integral part of Congressional actions to define and protect civil rights in the 1960s. President Johnson viewed the passage of the ADEA as a fundamental part of his civil rights legacy as well as his efforts to address the significant problems facing older Americans.

Besides sharing an ancestry with Title VII, the ADEA's language was borrowed directly from Title VII, prohibiting discrimination "because of" age. Thus, for decades, the ADEA was interpreted in concert and consistently with Title VII. The tradition and precedent of parallel construction was so strong that, when the Supreme Court recognized a "mixed motive" framework for proving discrimination under Title VII in the *Price Waterhouse v. Hopkins* case in

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[20] Jennifer Schramm, "The Covid Pandemic Has Upended Labor Force Projections," March 9, 2021, available at https://blog.aarp.org/thinking-policy/the-covid-pandemic-has-upended-labor-force-projections.

[21] *Intergenerational Diversity, supra* n. 2, at 2.

[22] 557 U.S. 167 (2009).

[23] *The Protecting Older Workers Against Discrimination Act, Hearing on H.R. 3721 before the U.S. House of Representatives Subcomm. on Health, Empl., Labor, & Pensions, Comm. on Educ. & Labor,* 111th Cong. 2d Sess. 8 (May 5, 2010) (testimony of Jack Gross, Plaintiff in Gross v. FBL Financial Services), at https://www.govinfo.govicontent/pkq/CHRG-111hhrq56131/pdf/CHRG-111hhrq56131.pdf.

[24] D. O'Meara, *Protecting the Growing Number of Older Workers: The Age Discrimination in Employment Act* 11-12, n. 24 (Univ. of Penn., The Wharton School, Industrial Research Unit, 1989) (citing 110 Cong. Rec. 9911 (1964))

[25]Section 715 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 265 (1964)

1989,[26] and after Congress codified that framework in the Civil Rights Act of 1991,[27] courts "uniformly" interpreted the ADEA to permit a mixed motive cause of action.[28] Under the mixed motive framework, once a worker proves that discrimination was a motivating factor, that it played any role in the employer's actions, liability for unlawful discrimination is established, even if the employer puts forward additional, lawful motives. The burden of persuasion then shifts to the employer to prove that it would have made the same decision even absent the unlawful discriminatory factor. If the employer demonstrates this "same decision" defense, the worker still wins, but her/his remedies are limited to injunctive relief, declaratory relief, and attorney's fees; no damages are recoverable.[29]

In the *Gross* case, Jack Gross, then 54, brought suit for age discrimination. After working for more than 30 years and steadily rising within the company, Jack's employer reorganized and underwent a merger. As part of these changes, many older workers were offered a buy-out, and those who didn't take the buy-out were demoted, with their prior duties and titles assigned to younger workers. Jack took his case to a jury, which agreed that age discrimination had been one of the motives behind his demotion. Jack was awarded $46,945 in lost compensation. But, the employer won on appeal, arguing that mixed motive discrimination must be proven by direct evidence, not circumstantial evidence. The Supreme Court agreed to hear the case on that evidentiary question. However, the Court surprised both parties when it issued a decision on a question that was never presented to the Court or briefed by the parties: whether mixed motive discrimination cases could be brought *at all* under the ADEA.

In *Gross,* the Court ruled that older workers may not bring mixed motive claims under the ADEA, meaning it was no longer legally sufficient to prove that age discrimination tainted the employer's conduct. The Court instead held that older workers must prove that age discrimination was a decisive, determinative, "but-for" cause for the employer's conduct. The Court discarded decades of precedent embracing parallel construction of the ADEA with Title VII. Instead, the Court noted that when Congress amended Title VII to codify the mixed motive framework, it could have similarly and simultaneously amended the ADEA, but it chose not to do so. The Court drew a negative inference from Congress' omission: if the ADEA was not amended to include motivating factor discrimination, then Congress must have intended to *exclude* motivating factor discrimination under the ADEA.

The *Gross* decision has resulted in significant harm to older workers challenging age discrimination. Requiring a worker not only to prove that age discrimination was one motivating factor in their treatment on the job — already a very difficult showing to make — but to prove that age was a critical, but-for motive in their adverse treatment, is a much higher and tougher

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[26] 490 U.S. 228 (1989).

[27] 42 U.S.C. § 2000e-2(m).

[28] *Protecting Older Workers Against Discrimination Act, Hearing on H.R. 3721 before the U.S. House of Representatives Comm. on the Judiciary, 111th* Cong. 2d Sess. 4 (June 10, 2010) (testimony of Assoc. Prof. Helen Norton, Univ. of Colo. School of Law).

[29] 42 U.S.C. §2000e-5(g)(2)(B).

standard of proof.[30] Moreover, by changing the standard from "motivating factor" to "but-for cause," the Court held there is never any shift in the burden of proof to the employer. Contrary to the balanced approach represented by Congress' codification of the mixed motive framework, older workers now always bear the burden of persuasion in ADEA cases. The combination of heightening the standard of proof and ruling that the burden of persuasion never shifts to the employer has made it much more difficult to *prove a case of* age discrimination under the ADEA/. In its place, the Court erected a new and substantial legal barrier in the path of equal opportunity for older workers.

For several reasons, it is difficult to quantify the impact that the *Gross* decision has had on the number of older workers who bring cases, and the number of those who win them. First, it is difficult to separate out the impact of the *Gross* decision from larger economic forces. The *Gross* decision was issued in 2009 at the same time as massive, recession-spawned lay-offs that resulted in record unemployment levels among older workers, which led to a jump in the number of ADEA charges filed with the EEOC.[31] Second, it is difficult to measure cases that are never brought. As it became much more difficult to prevail in court, workers are unable to find attorneys willing to take the economic risk to bring their cases. In discussions with plaintiffs' attorneys at employment law conferences, we have been told that in states with strong and effective state age discrimination laws, attorneys are more likely to bring age cases under their state laws than in federal court under the ADEA in light of the *Gross* decision.

Many cases do, however, illustrate the deleterious impact that the *Gross* decision has had on the ability of older workers to get their day in court and prevail. The most obvious example is Jack Gross' own case. As noted above, Jack won his case under the motivating factor framework, but after the Supreme Court changed the rules and required him to retry his case under the new higher standard, he lost, despite having proven the same facts, with the same parties, in the same courts as before. In another example,[32] a long-time employee who was let go challenged her termination as age discrimination under both the ADEA and the Iowa Civil Rights Act. Under the ADEA, *Gross'* but-for standard governs; under the state law, workers need only show that discrimination play a part — that it was a motivating factor in adverse treatment. A single court applying pre- and post-Gross standards to the very same set of facts and body of evidence reached opposite conclusions: the worker lost her ADEA case due to *Gross,* but her state law/motivating factor claim survived the employer's motion for summary judgment. Most recently, a panel of the U.S. Court of Appeals for the Sixth Circuit announced a "sole cause"

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[30] Despite the *Gross* Court's denial that its decision imposed any "heightened evidentiary standard" to prove age discrimination, *Gross,* at 178, n. 4, it did not take long for the courts in subsequent decisions to interpret *Gross'* but-for standard as requiring a higher, more stringent causation standard. *See e.g., Fuller v. Seagate Technology,* LLC, 651 F. Supp. 2d 1233, 1248 (D. Colo. 2009) ("this Court interprets *Gross* as elevating the quantum of causation required under the ADEA.").

[31] Over FY 2007 and 2008, the number of age discrimination charges filed with the EEOC jumped 50% over FY 2006. *See EEOC Charge Statistics, supra* n. 6. *See also, e.g.,* S. Rix, *The Employment Situation, August 2011: Older Worker Unemployment Remains Stubbornly High* (average duration of unemployment for older workers was higher than one year, compared to 37 weeks for the younger unemployed) (AARP Pub. Pol'y Inst., Sept. 2011), *available at* https://assets.aarp.orgirgcenterippilecon-sec/fs237.pdf

[32] *Burger v. Kmart,* 2012 U.S. Dist. LEXIS 89826, 2012 WL 2521114 (N.D. Iowa, June 28, 2012).

requirement in an ADEA termination case, relying on *Gross* to conclude that such a standard applies generally in claims under the statute.[33]

In addition to hurting individual older workers who have been treated unfairly, the *Gross* decision sent a terrible message to employers and to the courts generally — that age discrimination isn't as wrong, or as unlawful, as other forms of discrimination. As long as the employer can point to other lawful motives that also may have played a role, employers will not be held liable or accountable, even for manifest, proven age discrimination. In this manner, the *Gross* decision undermined Congress' entire purpose, mandate, and expected enforcement of the ADEA — that discrimination play NO role in employment decisions.[34]

Moreover, courts have begun using the approach of *Gross* interpreting *any* difference in the ADEA's statutory structure or history (from Title VII) to weaken elements of the law, even if that interpretation is irreconcilable with the ADEA's language, purpose, and jurisprudence. For instance, in the recent case of *Kleber v. CareFusion* Corp.,[35] the Seventh Circuit Court of Appeals ruled that one must *already be an employee* to challenge certain types of position qualifications that have a disparate impact against older applicants. In Mr. Kleber's case, he challenged a requirement that job applicants have a *maximum* of 10 years of experience, a specification that would clearly and foreseeably have a disparate impact on older applicants. Yet, the Court ruled that because Congress had amended Title VII back in 1972 to clarify its intent that applicants could bring disparate impact claims, but never had similarly amended the ADEA, then job applicants could not challenge practices in the hiring process with an age-discriminatory impact. In other words, the ADEA prohibits hiring discrimination, but not for job applicants!

Furthermore, the damage inflicted by *Gross* has not stopped with the ADEA. The Supreme Court and lower courts have extended the "negative inference" reasoning of *Gross* to other civil rights laws. Four years after *Gross,* in *University of Texas Southwestern Medical Center v. Nassar.*[36] the Supreme Court imposed the same unreasonably difficult burden of proof in Title VII cases in which an employer *retaliates* against workers who challenge workplace discrimination based on race, sex, or other grounds. That is, even though Congress had codified mixed motive discrimination in the "Unlawful Employment Practices" section of Title VII, it did not repeat the amendment in the "Other Unlawful Employment Practices" section of Title VII, which includes the anti-retaliation provision. Following *Gross,* the Court held that Congress must not have intended for the mixed motive analysis to apply to charges of retaliation. Thus, a woman who has been discriminated against on the basis of sex need only prove that sex discrimination was one motivating factor in her adverse treatment, but then if she is fired in retaliation for filing a complaint, she must demonstrate that retaliation was the decisive, but-for reason that she was fired. As one commentator put it, if a worker can be more easily fired for

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[33] *Pelcha v. MW Bancorp., Inc.* 984 F.3d 1199, 1205 (6th Cir. 2021) (ADEA plaintiffs "must show that age was *the* reason why they were terminated, not that age was one of multiple reasons.").

[34] As bad as the *Gross* decision was, some courts managed to make it worse, especially early on. For instance, some courts interpreted the "but for" standard to mean that the plaintiff must prove that age was the *sole* cause for their adverse action. This misinterpretation has largely been corrected. *See e.g., Lewis v. Humboldt Acquisition Corp. Inc.,* 681 F.3d 312 (6th Cir. 2012).

[35] 888 F.3d 868 (7th Cir. 2018), *rev'd en banc,* 914 F.3d 480 (7th Cir. 2019).

[36] 570 U.S. 338 (2013).

challenging discrimination, this "strips away"[37] the underlying protections of Title VII. The *Nassar* holding created two different causation standards for the same course of conduct within the same statute, just like *Gross* created two different causation standards for workers who allege intersectional discrimination, such as an older woman who challenges age+sex discrimination under the ADEA and Title VII.[38]

The Supreme Court has not yet ruled on the availability of the mixed motive framework under the Americans with Disabilities Act (ADA) or the Rehabilitation Act of 1973. However, several lower courts have, and they have extended *Gross* and *Nassar* to these two statutes. Most recently, the Second Circuit[39] joined the Fourth, Sixth, and Seventh Circuits in ruling that disability discrimination must be established under a "but-for" standard.[40]

***Why the Protecting Older Workers Against Discrimination Act (POWADA) Is Needed***

The bill under consideration today — the Protecting Older Workers Against Discrimination Act (POWADA) — is bipartisan legislation that would fix the enormous problem created by the *Gross* decision and its progeny: an unreasonably high standard of proof that is stacked against workers and backtracks on the promise of the ADEA and other civil rights laws: equal opportunity in employment. POWADA does not expand civil rights. It is a limited, straight-forward restoration of the standard in effect for decades before 2009. The bill was originally proposed by Senators Harkin and Grassley after extensive negotiation with both civil rights[41]and business groups.[42] POWADA would amend four core civil rights laws to clarify Congress' intent that no amount of unlawful discrimination in the workplace is acceptable. Under the bill:

- **"Mixed motive" claims are again recognized.** In accordance with the prior standards, a worker establishes an unlawful employment practice when a protected characteristic such as age or disability is proven to have been a motivating factor for an employer's action, even though nondiscriminatory motives may have also been involved. (There is no requirement

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[37] C. Donnelly, The Power to Retaliate: How *Nassar* Strips Away the Protections of Title VII, 22 WASH. & LEE J. CIVIL RTS. & Soc. JUST. 411 (2016).

[38] Some courts have ruled that the but-for standard precludes cases of intersectional discrimination under both the ADEA and Title VII, "because the [very] existence of the Title VII claim suggests that age was not the "but for" cause of the decision." Brief of Employment Law Professors as *Amid Curiae* in Support of Respondent, at 14-5, n.3, *University of Texas Southwestern Medical Center v. Nassar* (quoting *Culver v. Birmingham Board of Education,* 646 F. Supp. 2d 1270, 1271-72 (N.D. Ala. 2009)). *See also e.g., Frappied v. Affinity Gaming Black Hawk, LLC,* No. 17-cv-01294-RM-NYW (D.C. Colo. June 22, 2018) (plaintiffs may not proceed with their gender plus age claim; "the scope of liability under the ADEA is narrower than that under Title VII. *See Gross....")* (summary judgment on ADEA claim granted Jan. 17, 2019).

[39] *Natofsky v. City of N.Y.,* 921 F.3d 337(2d Cir. Apr. 18, 2019).

[40] This is despite the fact that the ADA expressly incorporates by reference Title VII's enforcement provisions, including the provision containing the "same decision" defense. *See* 42 U.S.C. 12117(a).

[41] The civil rights groups most involved were AARP, the Leadership Conference on Civil and Human Rights, and the National Employment Lawyers Association.

[42] The business groups most involved were the US Chamber of Commerce, HR Policy Association, and the Society for Human Resource Management (SHRM).

that a worker be required to prove that discrimination was the "sole cause" for their treatment on the job.) Then, the burden of proof shifts to the employer to show it would have made the same decision even absent discrimination. If the employer proves this, the employee's remedies are limited, as they have always been in such cases, to injunctive relief and attorneys' fees.

- **Workers may prove their cases using any type of admissible evidence.** The bill would clarify the question that originally led to the Supreme Court's acceptance of the *Gross* case. Workers can prove their cases, including "mixed motive" cases, using any type of admissible evidence, including circumstantial and direct evidence.

Discrimination is discrimination, and older workers who can prove they have been discriminated against should be treated no less favorably by the courts than other workers challenging workplace discrimination. It has been over 10 years since the *Gross* decision weakened protections against age discrimination and other rights. It is time to re-level the playing field and restore fairness under the law. This approach has broad support across party and ideological lines -- roughly 8 in 10 voters age 50+ say it is important for Congress to take action and restore workplace protections against age discrimination.[43] Congress should pass POWADA as soon as possible.

Unfortunately, POWADA won't fix all the problems with how protections against age discrimination have been eroded over the years. Much more needs to be done. For instance, Rep, Grothman introduced a bill that would protect more older workers from age discrimination by setting the employer size threshold (now 20 employees) under the ADEA at the same level as for Title VII and the ADA (15 employees). And, given the ad targeting practices of platforms like Facebook that have recently come to light, we also need to ensure that *job applicants* are protected from age discrimination. Alarmingly, in AARP's *Value of Experience* survey, among the 29 percent of older workers who had applied for a job or gone on a job interview in the previous two years, 44 percent had been asked to provide a birthdate, graduation date or some other age-related information.[44] Such requests explicitly bring age into workplace decision-making and deter older individuals from applying. Policymakers should strengthen the ADEA to prohibit inquiries about age and date of graduation in job applications unless the employer can demonstrate job-relatedness.

So, while POWADA would restore one aspect of inequality between the ADEA and other federal EEO laws, more steps will need to be taken to ensure that the ADEA provides safeguards parallel to those enjoyed by other protected classes and to afford the ADEA parity with Title VII of the Civil Rights Act.

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[43] AARP, *Protecting Older Workers Against Discrimination Act: National Public Opinion Report* 9, Fig. 9 Fig. 9 (June 2012), *available at* https://www.aarp.org/content/dam/aarp/research/surveys statistics/work and retirement/powada-national.pdf.

[44] AARP Survey, supra n.5 at 7.

***Conclusion***

As was the case with the Americans with Disabilities Act (ADA) — where Congress took bipartisan action to restore the statute's protections by enacting the Americans with Disabilities Act Amendments Act of 2008 — AARP believes that it is well past time to restore basic fairness for older workers and to enact POWADA immediately. AARP again thanks this Committee for inviting us to testify and we look forward to continuing to work with the Committee to enact this legislation.

Chairwoman BONAMICI. Thank you for your testimony, and we will now hear from Ms. Bakst. Ms. Bakst you are recognized for five minutes for your testimony.

**STATEMENT OF DINA BAKST, CO-FOUNDER AND CO-PRESIDENT OF A BETTER BALANCE**

Ms. BAKST. Thank you to the chairs, Ranking Members, and distinguished Members of the subcommittee for the opportunity to testify today in support of the Pregnant Workers Fairness Act, and the PUMP for Nursing Mothers Act.

A Better Balance is a national legal advocacy organization dedicated to advancing justice so workers can care for themselves and their loved ones without risking their economic security. We founded A Better Balance 15 years ago because we recognized that a lack of fair and supportive workplace laws and policies, the care crisis, was disproportionately harming women, especially black and Latino mothers in low-wage jobs.

This bias and inflexibility often kicks in when women become pregnant, and then snowballs until lasting economic disadvantage. We call this the pregnancy penalty, and since day one A Better Balance has recognized it as a key barrier to gender equality in America.

We've heard from thousands of women in both the public and private sector on our free legal help line who have experienced the harsh blow of the pregnancy penalty. Armanda Legros, a mother on Long Island who was forced out of her job at an armored truck company because her employer would not accommodate her lifting restriction.

Without an income she struggled to feed her newborn and her young child. As she told the Senate Help Committee in 2014 "Once my baby arrived, just putting food on the table for him and my 4 year old was a challenge. I was forced to use water in his cereal at times because I could not afford milk."

Years later we're still hearing the same stories of pregnant women who are fired, or forced out instead of being granted temporary, reasonable accommodations. This time it's with a global pandemic in the backdrop that has forced millions of women to risk their health, or leave the workplace, with a lack of paid leave and childcare exacerbating these challenges.

At the height of the pandemic we heard from Tasia, a pregnant retail worker in Missouri who called us because a store's water fountain was shut down due to COVID–19 safety concerns. To avoid dehydration, which can lead to significant health consequences during pregnancy, she asked her manager if she could keep a water bottle behind the counter. He refused.

Worried about the health of her pregnancy she left her job. Sarah, a healthcare worker in Kansas, resorted to pumping milk in her car just once a day after her boss disparaged her for pumping at work. She frequently became engorged and suffered from painful clogged milk ducts. Her milk supply dropped.

This took place in spite of the fact that at least of her coworkers regularly took smoke groups multiple times a day. Why, nearly 10 years later was Tasia in the same position as Armanda? Why didn't Sarah have any recourse when she needed to pump?

Why have we heard from hundreds more women in the same exact position? The answer is gaps in the law itself. Neither the Pregnancy Discrimination Act, nor the Americans With Disabilities Act provide an explicit right for pregnant workers with no limitations, and need accommodations to maintain a healthy pregnancy?

In our 2019 report, long overdue, we found that pregnant workers are losing two-thirds of their pregnancy accommodation cases because the 2015 Supreme Court case, Young versus UPS, laid out an overly complicated burdensome standard requiring pregnant workers to jump through legal hoops and prove discrimination to get something as simple as a water bottle.

This standard is unfair and a barrier to justice, especially for black and Latino women in low-wage, inflexible and physically demanding jobs who need timely accommodations to protect their health and their paycheck. Alternatively, the Americans With Disabilities Act covers those with disabilities, but a worker with a routine pregnancy who needs an accommodation to prevent a complication is completely out of luck.

The Pregnant Worker Fairness Act would finally put an end to the second class treatment and ensure that pregnant workers have an affirmative right to workplace accommodations. I was honored to testify in this legislation in October 2019, which passed in the House this past September with overwhelming bipartisan support, in the midst of a global pandemic and [inaudible] session.

There is simply no reason for it not to pass again without delay. The 2010 Breaktime for Nursing Mothers Law is also falling well short due to broad exclusions and weak enforcement mechanisms. Due to where the law is placed in the Fair Labor Standards Act, nearly 9 million women of child-bearing age are excluded from the law's protections.

Those who are covered have no effective remedy for violations of the law. One Federal judge put it best, calling the Breaktime Law's remedy "toothless", and the law's incentive to terminate a breastfeeding worker, rather than accommodate her, "an absurdity."

Extensive research shows that breastfeeding has immense benefits for mothers and children from preventing breast cancer in moms, to preventing obesity and asthma in children. While most women start out breastfeeding, the numbers sharply drop as time goes on.

This is often because women lack the workplace supports to continue breastfeeding. The PUMP Act will change that by closing gaps in the law, and finally guaranteeing fair treatment to nursing mothers. As Armanda told the Senate Help Committee, having a baby should not mean losing your job. It should not lead to fear and financial dire straits.

In 2021 women in America should not be forced to choose between becoming a mother and earning a paycheck. Passage of these critical measures is long overdue. Thank you.

[The prepared Statement of Ms. Bakst follows:]

PREPARED STATEMENT OF DINA BAKST

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

**Subcommittees on Civil Rights and Human Services and Workforce Protections**
**Committee on Education and Labor**
**U.S. House of Representatives**

**"Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination"**

**March 18, 2021**

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

A Better Balance is a national legal advocacy organization, using the power of the law to advance justice for workers, so they can care for themselves and their loved ones without risking their economic security. We founded A Better Balance fifteen years ago because we recognized that a lack of fair and supportive work-family laws and policies, or more broadly, a "care crisis"[1] was harming a majority of workers, particularly women, especially Black and Latina women, in low-wage jobs. Gaps and limitations in our nation's laws and policies make it difficult, often impossible, for them to work and adequately care for their families.[2] This bias and inflexibility often starts when women become pregnant and snowballs into lasting economic[3] and health

[1] A BETTER BALANCE, MOVING FAMILIES FORWARD: REFLECTIONS ON A DECADE OF CHANGE 3 (2016), https://www.abetterbalance.org/wp-content/uploads/2017/03/Moving_Families_Forward_Report.pdf.
[2] *See* Dina Bakst, Opinion, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES, Jan. 30, 2012, at A25, https://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html; A BETTER BALANCE, OUR ISSUES: BREASTFEEDING WHILE WORKING, https://www.abetterbalance.org/our-issues/breastfeeding-while-working/ (last visited Mar. 11, 2021) (outlining federal and state advocacy efforts to strengthen laws for lactating workers).
[3] *See Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab.*, 116th Cong. (2019) [hereinafter *Bakst Testimony*], https://edlabor.house.gov/download/10/22/2019/baksttestimony102219 (testimony of Dina Bakst) (explaining how when pregnant workers are forced off the job, they lose income, retirement contributions, health insurance, and "other long-term benefits earned on the job," leading to "economic inequality over the long run, exacerbating the wage gap, and negatively affecting families as a whole, not to mention the harm it causes the economy . . . in its effect on women's labor force participation") (footnotes omitted); DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE 23–24 (2019) [hereinafter LONG OVERDUE], https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf (noting that, "losing out on even one paycheck, let alone multiple, can spell financial ruin for families").

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

The COVID-19 pandemic has laid bare the urgent need for solutions. Workers, disproportionately Black and Latina women,[8] have exited the workforce in droves due to caregiving responsibilities[9] and a lack of supportive work-family policies.[10] At the same time, millions of women remain in the workforce, with women of color disproportionately represented

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

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

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

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

[8] *See* Ella Koeze, *A Year Later, Who Is Back to Work and Who Is Not?*, N.Y. TIMES (Mar. 9, 2021), https://www.nytimes.com/interactive/2021/03/09/business/economy/covid-employment-demographics.html (reporting that Black and Hispanic women experienced more dramatic job loss after the onset of the pandemic than any other demographic, with Hispanic women experiencing a 24 percent decrease and Black women a nearly 20 percent decrease in employment from February 2020 to April 2020, compared to less than 15 percent for white men; and also have experienced the slowest recovery, with nearly 10 percent fewer Black women employed in March 2021 than were employed a year ago, compared with 5 percent fewer white men); *see also* Jocelyn Frye, *On the Frontlines at Work and at Home: The Disproportionate Economic Effects of the Coronavirus Pandemic on Women of Color*, CTR. FOR AM. PROGRESS (Apr. 23, 2020, 9:00 AM), https://www.americanprogress.org/issues/women/reports/2020/04/23/483846/frontlines-work-home/ (finding that women of color disproportionately work in industries experiencing significant pandemic-related job losses).

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

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

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

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

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

Last Congress, in October 2019, I submitted detailed testimony[12] outlining the crucial need for the Pregnant Workers Fairness Act (PWFA). Forty-two years after the passage of the Pregnancy Discrimination Act (PDA), pregnant workers, disproportionately Black and Latina women, in low-wage, inflexible, and physically demanding jobs, are routinely fired or forced out on unpaid leave—or are forced to risk their health—instead of being granted a temporary, reasonable accommodation that would allow them to keep working and maintain a healthy pregnancy. The PWFA would remedy this injustice by creating an affirmative right to reasonable accommodations for known limitations related to pregnancy, childbirth, and related medical conditions absent undue hardship on employers—a similar standard to the one in place for workers with disabilities under the Americans with Disabilities Act (ADA).

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

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

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

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[11] *See* Hye Jin Rho, Hayley Brown, & Shawn Fremstad, *A Basic Demographic Profile of Workers in Frontline Industries*, CTR. FOR ECON. & POLICY RESEARCH (Apr. 7, 2020), https://cepr.net/a-basic-demographic-profile-of-workers-in-frontline-industries/.
[12] *See Bakst Testimony*, *supra* note 3.
[13] Mississippi does not have a state Pregnant Workers Fairness Act.

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

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

**The Legal Problems Necessitating the Pregnant Workers Fairness Act**

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

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

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

As outlined in my prior testimony:

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

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

[16] 42 U.S.C. § 2000e(k).

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

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

[19] *See Young*, 135 S. Ct. at 1345.

> The most salient aspect of Justice Breyer's opinion for the majority [in *Young v. UPS*] rested on a new modified *McDonnell Douglas* burden-shifting framework that pregnant women must use to prove individual unlawful treatment when an employer fails to accommodate her pregnancy and there is no other clear evidence of wrongdoing on the employer's part.
>
> The three-step disparate treatment test first requires a plaintiff to show that she was protected under the law (i.e. pregnant), that she sought, and was denied, an accommodation, and that her employer accommodated others "similar in their ability or inability to work." If a worker can meet this first step—which even after *Young* often proves insurmountable—the employer may then counter the plaintiff's claim by putting forward a "legitimate, non-discriminatory reason for denying the accommodation," though the [C]ourt clarified that expense and inconvenience do not independently qualify as legitimate justifications. Finally, the plaintiff can respond to the employer's justification by offering evidence that said reasoning was simply pretext for intentional discrimination. One way a plaintiff can prove pretext, the Court said, is by a showing that an employer's policy placed a "significant burden" on women in the workplace, and that the employer's justification was not "sufficiently strong" to justify that burden.[20]

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

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

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

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

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[20] *See Bakst Testimony*, *supra* note 3, at 13 (footnotes omitted).
[21] *See* LONG OVERDUE, *supra* note 3, at 13.
[22] *See id.* at 14–16; *see also Bakst Testimony*, *supra* note 3, at 15 & n.67 (citing *Luke v. CPlace Forest Park SNF*, 747 F. App'x 978, 980 (5th Cir. 2019); *Turner v. Hartford Nursing and Rehab*, No. 16 Civ. 12926, 2017 WL 3149143, at *6 (E.D. Mich. July 25, 2017)).
[23] *See* LONG OVERDUE, *supra* note 3, at 20.
[24] *See Bakst Testimony*, *supra* note 3, at 15 & n. 67–73; *see also* LONG OVERDUE, *supra* note 3, at 14–16.
[25] *See* LONG OVERDUE, *supra* note 3, at 14–16; *Equal Emp't Opportunity Comm'n v. Wal-Mart Stores East, LP*, No. 18-cv-783-bbc, 2021 WL 664929 (W.D. Wis. Feb. 19, 2021) (granting summary judgment for employer in case where pregnant and breastfeeding employees were denied lifting accommodations and time and space to pump, because the plaintiff could not demonstrate that non-pregnant employees who were injured off the job were treated more favorably); *Reyes v. Westchester County Health Care Corporation*, No. 19-CV-08916 (PMH), 2021 WL

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

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

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

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

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

[27] *Id.*

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

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

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

[31] *Id.* at *10–11.

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

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

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

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

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

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

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

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

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

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

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

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

Despite Congress's efforts via the PDA to eradicate "the pervasive presumption that women are mothers first, and workers second,"[40] employers, including state actors, continue to participate in and foster unconstitutional gender-role stereotyping[41] in the provision of accommodations to pregnant workers.[42] For instance, in late 2015, Devyn Williams, a correctional officer trainee,

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et al., *Examining the Effects of Perceived Pregnancy Discrimination on Mother and Baby Health*, J. APPLIED PSYCH. 1, 8 (2020), https://doi.apa.org/doiLanding?doi=10.1037%2Fapl0000788.

[38] Zaske, *supra* note 37.

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

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

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

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

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

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

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

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

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

[44] *Id.* at 1241–42.

[45] *Id.* at 1242.

[46] *Id.*

[47] *Id.* at 1242–43.

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

[49] *Hibbs*, 538 U.S. at 736.

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

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

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

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

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

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

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

Although the Americans with Disabilities Act (ADA),[57] provides an explicit right to reasonable accommodation for workers with disabilities, most pregnancy-related conditions are not deemed "disabilities" as required to trigger protection under the law, even though Congress expanded the ADA in 2008.[58] As one court recently concluded in 2018, "[a]lthough the 2008 amendments broadened the ADA's definition of disability, these changes only have had a modest impact when applied to pregnancy-related conditions."[59] Another court said, following the expansion of the ADA, that "[o]nly in extremely rare cases have courts found that conditions that arise out of pregnancy qualify as a disability."[60]

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

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

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

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

[56] *See The Pregnant Citizen*, *supra* note 42, at 225 ("The reasonable accommodation framework relieves individual employees of the burden of proving animus: of showing that an employer's inflexible imposition of workplace standards reflects sex stereotyping that flows from the invidious assumption that pregnant workers are not competent or committed workers."); *id.* at 225 n.322 (citing A BETTER BALANCE & NAT'L WOMEN'S LAW CTR., IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS 7 (2013), https://www.abetterbalance.org/resources/it-shouldnt-be-a-heavy-lift/ ("When a woman worker is already seen as an outsider, her pregnancy and any requests for changes in her job related to the pregnancy can be taken as further evidence that the job is inappropriate for a woman, leading employers to refuse to make accommodations.")).

[57] 42 U.S.C. §§ 12101–12213 (2012).

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

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

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

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

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

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

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

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[61] *See Bakst Testimony*, *supra* note 3, at 17–19.
[62] *See id.* at 19–20; *see also* Dina Bakst, Responses to Questions for the Record at 5–8, *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. On Ed. & Lab.*, 116th Cong. (2019) [hereinafter *Bakst Questions for the Record*].
[63] *See Bakst Questions for the Record*, *supra* note 62, at 7 (citing *Tomiwa v. PharMEDium Servs., LLC*, No. 4:16-CV-3229, 2018 WL 1898458, at *5 (S.D. Tex. Apr. 20, 2018) (dismissing plaintiff's ADAAA claim because, despite the two emergency surgeries she had to undergo for a high risk pregnancy, "'[a]bsent unusual circumstances, pregnancy and related medical conditions do not constitute a physical impairment' under the ADAAA")).
[64] *Wonasue v. Univ. of Md. Alumni Ass'n*, 984 F. Supp. 2d 480, 482 (D. Md. 2013).
[65] *Id.* at 483–84, 490.
[66] *Id.* at 490. For a discussion about why the Family and Medical Leave Act is also an insufficient solution for pregnant workers in need of accommodations, *see Bakst Testimony*, *supra* note 3, at 20–21.
[67] *See, e.g., Andrews v. Eaton Metal Prods., LLC*, No. 20-CV-00176-PAB-NYW, 2020 WL 5821611, at *8 (D. Colo. Sept. 8, 2020), *report and recommendation adopted*, No. 20-CV-00176-PAB-NYW, 2020 WL 5815059 (D. Colo. Sept. 30, 2020) (holding that, under federal law, Plaintiff's "pregnancy . . . do[es] not fall under the scope of the ADA" and "thus, Plaintiff's allegations are insufficient to state a claim under the ADA for discrimination, failure to accommodate, or failure to promote").
[68] *Shaw v. T-Mobile*, No. 18-2513-DDC-GEB, 2020 WL 5231309, at *12 (D. Kan. Sept. 2, 2020).
[69] Labib Ghulmiyyah & Baha Sibai, *Maternal Mortality from Preeclampsia/Eclampsia*, 36 SEMINARS IN PERINATOLOGY 56 (2012), https://www.sciencedirect.com/science/article/abs/pii/S0146000511001571.

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

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

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

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

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

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

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[70] *See* A BETTER BALANCE, FACT SHEET: STATE AND LOCAL PREGNANT WORKERS FAIRNESS LAWS, https://www.abetterbalance.org/resources/fact-sheet-state-and-local-pregnant-worker-fairness-laws/ (last updated Jan. 28, 2021).
[71] *Id.*
[72] *Id.*
[73] *See* Hearing on H.B. 986 Before the H. Subcomm. on Employee Affairs (Tenn. Mar. 19, 2019) (Statement of Rep. Coley); Hearing on S.B. 18 Before the S. Comm. on the Judiciary, 2019 Gen. Assemb., Reg. Sess. (Ky. Feb. 14, 2019) (statement of Sen. Alice Forgy Kerr), https://www.ket.org/legislature/archives/?nola=WGAOS+020057&stream=aHR0cHM6Ly81ODc4ZmQxZWQ1NDIyLnN0cmVhbWxvY2submV0L3dvcmRwcmVzcy9fZGVmaW5zdF8vbXA0OndnYW9zL3dnYW9zXzIyMDA1Ny5tcDQvcGxheWxpc3QubTN1OA%3D%3D&part=2.
[74] *See Bakst Testimony*, *supra* note 3, at 8, 27.
[75] *Id.* at 4.
[76] *Id.* at 8.
[77] *Id.* at 8–9.
[78] *Id.* at 4.

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

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

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

Pregnancy accommodation are a critical maternal health measure, and one tool to help address the Black maternal health crisis, specifically. Accommodations are often low or no-cost[84] but high impact, helping to prevent miscarriage, preterm birth, low-birth weight, preeclampsia, birth defects, and more.[85] Not only are accommodations a critical public health measure but they also help drive down health care costs. As the March of Dimes noted in its 2020 Report Card, the average cost of a preterm birth is now $65,000.[86]

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

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[79] *Id.*
[80] *Id.* at 6.
[81] *Id.; see also, id.* at 4–6, 14–16, 18–19 (describing other pregnant workers' experiences).
[82] *See* Lulu Garcia-Navarro, *The Economic Fallout of the Pandemic Has Had a Profound Effect on Women*, NPR (Jan. 31, 2021), https://www.npr.org/2021/01/31/962528953/the-economic-fallout-of-the-pandemic-has-had-a-profound-effect-on-women; *see also* Koeze, *supra* note 8.
[83] *See, e.g.*, CONGRESSIONAL RES. SERV., THE COVID-19 PANDEMIC: LABOR MARKET IMPLICATIONS FOR WOMEN (2020), https://fas.org/sgp/crs/misc/R46632.pdf; Julie Kashen, Sarah Jane Glynn, & Amanda Novello, *How COVID-19 Sent Women Backward,* CTR. FOR AM. PROGRESS (Oct. 30, 2020, 9:04 AM), https://www.americanprogress.org/issues/women/reports/2020/10/30/492582/covid-19-sent-womens-workforce-progress-backward/; André Dua et al., MCKINSEY, ACHIEVING AN INCLUSIVE US ECONOMIC RECOVERY (2021), https://www.mckinsey.com/industries/public-and-social-sector/our-insights/achieving-an-inclusive-us-economic-recovery.
[84] JOB ACCOMMODATION NETWORK, ACCOMMODATION AND COMPLIANCE SERIES, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 4 (2015), https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628.
[85] *See* LOUISVILLE DEP'T OF PUB. HEALTH & WELLNESS, PREGNANT WORKERS HEALTH IMPACT ASSESSMENT 5–7 (2019), https://louisvilleky.gov/document/pregnant-workers-hia-final-02182019pdf; *see also Bakst Testimony*, *supra* note 3, at 26–28.
[86] *2020 March of Dimes Report Card: United States*, https://www.marchofdimes.org/materials/US_REPORTCARD_FINAL_2020.pdf (last visited Mar. 13, 2020).

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

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

In addition to the health impacts described above, workplace accommodations may also be a powerful tool to reduce COVID-19 transmission, which is especially critical since pregnant people have both a higher contraction rate of COVID-19[89] and a far higher rate of serious illness or death if infected with COVID-19.[90] Accommodations such as protective equipment, changes in schedule to avoid customer contact, protective barriers, or remote work could help reduce transmission of COVID-19, especially in frontline industries.

**The Pregnant Workers Fairness Act Is the Solution**

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

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[87] Letter from Black Mamas Matter Alliance, et al., to U.S. Representatives 2 (Sept. 11, 2020), https://www.abetterbalance.org/wp-content/uploads/2020/09/PWFA_SignOnLetterForFloorVote_BlackMaternalHealthLetter.pdf.
[88] *Id.* at 1–2 (internal quotations and citation omitted).
[89] *See* Erica M. Lokken, et al., *Higher SARS-CoV-2 Infection Rate in Pregnant Patients*, AM. J. OBSTETRICS & GYN. 1, 10 (2021), https://www.ajog.org/article/S0002-9378(21)00098-3/pdf ("The SARS-CoV-2 infection rate in pregnant people was 70% higher than similarly aged adults [in the state surveyed], which could not be completely explained by universal screening at delivery. Pregnant patients from nearly all racial/ethnic minority groups and patients receiving medical care in a non-English language were overrepresented.").
[90] *See* Erica M. Lokken, et al., *Disease Severity, Pregnancy Outcomes, and Maternal Deaths Among Pregnant Patients with Severe Acute Respiratory Syndrome Coronavirus 2 Infection in Washington State*, AM. J. OBSTETRICS & GYN, 1.e1, 1.e2 (2020), https://www.ajog.org/action/showPdf?pii=S0002-9378%2821%2900033-8 ("[T]he coronavirus disease 2019—associated hospitalization rate was 3.5-fold higher than in similarly aged adults in [the state surveyed]. . . . The COVID-19 case-fatality rate in pregnant patients was 13.6-fold higher than similarly aged individuals with COVID-19.").
[91] *See* Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. (2021).

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

At the Pregnant Workers Fairness Act markup in January 2020, the Committee introduced an Amendment in the Nature of a Substitute, making several key amendments to the introduced language.[93] That version of the bill passed the House in September 2020 by a vote of 329-73.[94]

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

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

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[92] *Id.* at § 5(7).
[93] Amendment in Nature of a Substitute: Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (2019), https://edlabor.house.gov/imo/media/doc/HR2694ANS.pdf.
[94] Pregnant Workers Fairness Act, H.R. 2694: Roll Call No. 195, 116th Cong. (2020), https://clerk.house.gov/Votes/2020195.
[95] Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. § 5(5) (2020), https://www.congress.gov/bill/116th-congress/house-bill/2694/text (Engrossed in House).
[96] *Id.*
[97] *Id.* at § 2(1).
[98] *Id.* at § 5(6). Similar to the ADA context, this temporary excusal of essential functions means that an accommodation like time off can qualify as a reasonable accommodation under the PWFA, including time off to recover from childbirth. *See, e.g. Seward v. City,* No. 1:17-cv-00109-JNP-DBP, 2020 WL 362824 (D. Utah Jan. 22, 2020) (denying employer's motion for summary judgment in ADA accommodation case because "[a] temporary reprieve from an essential function, such as a leave of absence or a light-duty assignment, for treatment of or recovery from an injury can be a reasonable accommodation"); *Napoli v. Greenwood Gaming & Entertainment,*

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

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

Moreover, employers, particularly religious employers should *want* to make sure their employees' pregnancies are safe and healthy, especially now. In January 2021, a study found that pregnant women are 13 times more likely to die than other similarly aged people if they contract COVID-19. [103] For pregnant essential workers who must continue working in order to keep feeding their families, the ability to get an accommodation to protect themselves from contracting COVID-19 can be a matter of life and death.

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

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

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

[100] *Id.* at § 3(g).

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

[102] Analysis on file with A Better Balance.

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

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

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

Finally, for an exemption that is already unnecessary, ample escape hatches already exist for religious employers. The Title VII religious exemption for religious organizations[105] will remain in place after the PWFA's passage. Further, the bill does not include a carveout of the Religious Freedom Restoration Act[106] and a religious employer could still claim an exemption under that law. In addition, the "ministerial exception" which exempts certain religious employers from complying with Title VII and other civil rights laws as related to "ministerial" employees,[107] may also apply to the PWFA. Finally, religious employers could also bring a constitutional Free Exercise Clause claim that providing accommodations burdens or violates their religious exercise.[108]

With an overwhelmingly supportive vote in the House just six months ago—with 226 Democrats and 103 Republicans voting in favor of the same exact bill as is before you today[109]—the Pregnant Workers Fairness Act deserves to be signed into law by this Congress. For the pregnant workers whose lives this bill will indelibly change, the bill is not just due, but long overdue.

## The PUMP for Nursing Mothers Act

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

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[105] 42 U.S.C. § 2000e-1(a).
[106] 42 U.S.C. § 2000bb *et seq*.
[107] *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012); *see also Our Lady of Guadalupe v. Morrisey-Berru*, 140 S.Ct. 2049 (2020).
[108] U.S. CONST. amend. I cl. 2.
[109] Pregnant Workers Fairness Act, H.R. 2694: Roll Call No. 195, 116th Cong. (2020), https://clerk.house.gov/Votes/2020195.
[110] LIZ MORRIS, JESSICA LEE, & JOAN C. WILLIAMS, CTR. FOR WORKLIFE LAW, EXPOSED: DISCRIMINATION AGAINST BREASTFEEDING WORKERS 4 (2018) [hereinafter EXPOSED], https://www.pregnantatwork.org/wp-content/uploads/WLL-Breastfeeding-Discrimination-Report.pdf (finding that "almost three-fourths of breastfeeding discrimination cases involved economic loss, and nearly two-thirds ended in job loss.").

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

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

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

**Current Federal Law Leaves Behind Millions of Breastfeeding Workers**

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

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

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[111] Name changed to protect privacy and confidentiality.
[112] *Breastfeeding Report Card*, CTRS. FOR DISEASE CONTROL & PREVENTION (2020) [hereinafter *Breastfeeding Report Card*], https://www.cdc.gov/breastfeeding/data/reportcard.htm.
[113] Sharon Lerner, *The Real War on Families: Why the U.S. Needs Paid Leave Now*, IN THESE TIMES (Aug. 18, 2015), https://inthesetimes.com/article/the-real-war-on-families.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[121] EXPOSED, *supra* note 110, at 26.

[122] 29 U.S.C.A. § 213 (2021).

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

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

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

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

Second, because of the 2010 Break Time for Nursing Mothers Act's placement in FLSA's overtime provisions, an employee who is denied break time and space lacks any effective remedy—a likely unintentional[126] gap in protection. The remedy available for an overtime violation is to pay a worker the overtime owed to them (and an equal amount in liquidated damages).[127] Such a remedy makes sense in the context of overtime: an employee who works forty-five hours in a week without overtime pay should be compensated with the missing payment to be made whole.

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

As the Department of Labor put it:

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

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

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

[127] 29 U.S.C.A. § 216(b) (2021).

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

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

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

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

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[130] EXPOSED, *supra* note 110, at 33.

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

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

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

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

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

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

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

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

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

[133] *Id.* at *29 n.14.

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

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

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

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

*The PUMP Act will close the coverage gap.*

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

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

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

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

*The PUMP Act will provide appropriate remedies for employees.*

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

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

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

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

## The Paycheck Fairness Act and Protecting Older Workers Against Discrimination Act

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

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

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[138] *Hicks*, 2015 WL 6123209, at *29 n.14.
[139] 29 U.S.C. § 216(b).
[140] *See, e.g., Moore v. Freeman*, 355 F.3d 558, 563 (6th Cir. 2004) (noting that FLSA's "statutory scheme contemplates compensation *in full* for any retaliation employees suffer" (emphasis added)); *Pineda v. JTCH Apartments, LLC*, 843 F.3d 1062, 1066 (5th Cir. 2016).
[141] *See* THE PREGNANCY PENALTY, *supra* note 5, at 3; *see also, e.g.*, Jocelyn Frye, *Racism and Sexism Combine to Shortchange Working Black Women*, CTR. AM. PROGRESS (Aug. 22, 2019, 12:01 AM), https://www.americanprogress.org/issues/women/news/2019/08/22/473775/racism-sexism-combine-shortchange-working-black-women/; Robin Bleiweis, *The Economic Status of Asian American and Pacific Islander Women*, CTR. AM. PROGRESS (Mar. 4, 2021, 9:01 AM), https://www.americanprogress.org/issues/women/reports/2021/03/04/496703/economic-status-asian-american-

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

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

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

## Conclusion

Congress has an extraordinary opportunity to transform the lives of pregnant and breastfeeding workers and remedy decades of injustice. The heart-rending challenges that face the women with whom we have worked for over a decade—women like Armanda and Natasha—find a reasoned and tailored solution in the Pregnant Workers Fairness Act and the PUMP for Nursing Mothers Act. We want to live in a world where women cry tears of joy because they welcomed a baby into the world while also continuing to flourish at work, not tears of anguish because they were fired and left homeless for needing a modest accommodation. Congress owes it to these women to pass the PWFA and PUMP Act. They are long overdue.

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

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

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

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

Chairwoman BONAMICI. Thank you for your testimony and next we will hear from Ms. Olson. Ms. Olson you are recognized for five minutes for your testimony.

**STATEMENT OF CAMILLE OLSON, ESQ., PARTNER, SEYFARTH SHAW LLP**

Ms. OLSON. Thank you. Good morning subcommittee Members. As an employment attorney at Seyfarth Shaw, I work with companies nationwide to ensure they maintain legally compliant employment policies and practices. I've also litigated numerous cases alleging violations of Title XII, the ADA, the ADEA and the Equal Pay Act.

My written testimony contains my analysis of the four pieces of legislation under consideration. Today I will discuss a number of significant concerns with the Paycheck Fairness Act and POWADA. I will also discuss opportunities to strengthen the Equal Pay Act.

First, with respect to the Paycheck Fairness Act, I'd like to share three of those opportunities and concerns now. H.R. 7 presume all employee pay rates result from employer discrimination and rewrites existing legal standards, remedies, and class action procedures contained in the Equal Pay Act.

First H.R. 7 effectively eliminates the factor other than sex defense. Under the Equal Pay Act, most courts currently require an employer to prove that any pay difference is business or job related. If the employer cannot do so, the Plaintiff prevails without any showing of discriminatory intent under the Equal Pay Act.

Under H.R. 7, an employer would also be required to prove with respect to every pay differential, not only that the reason was business or job related, but also that it paid differently because of a business necessity, that the business necessity explain 100 percent of any pay difference, and the business necessity was not derived from a sex-based differential in compensation.

Even if an employer meets these high burdens, it still loses. If years later a litigant identifies an alternative employment practice that would have serve the same purpose without a wage difference. But what if the alternative offered in litigation is when implemented less efficient, more costly, or an unproven alternative in a time sensitive project that needed immediate staffing.

Is the employer's proven business necessity now rejected? Under H.R. 7 the answer is yes. Similarly, H.R. 7 would require employers to ignore an employee's competitive job offer, or salary expectations unless it can prove that the higher competitive wage offer, or salary expectation is not the result of historical wage discrimination by prior or other employers. This by definition, is an impossible burden.

Second, H.R. 7 goes too far by prohibiting an employer from considering prior salary information volunteered by the applicant at the outset of the application process. The majority of courts of appeals recognize justifiable reasons for considering an applicant's prior salary as a factor other than sex.

Third, H.R. 7's expansion of available remedies and class action procedures under the Equal Pay Act is unwarranted. For example, H.R. 7's unlimited compensatory and punitive damages far exceed the available remedies under Title VII and are in addition to significant penalties that already exist under the Equal Pay Act.

Despite these Stated concerns, there are opportunities to improve the Equal Pay Act. For example, adding language that expressly States the pay differential between workers performing the same

work must be based on business or job-related reasons. Providing employees with an express protection against retaliation from engaging in reasonable activities related to a good faith belief that an unlawful wage disparity may exist.

And providing employers with incentives to engage in voluntary self-critical jobs and compensation analysis. Moving on to one other bill before you today POWADA, I must note it is not legislation designed to strengthen the ADEA or the rights of older workers, notwithstanding its title.

Instead it attempts to import into the ADEA, the ADA, the Rehab Act, and Title VII for retaliation purposes the concept of mixed motive discrimination. But a mixed motive theory does not provide workers under any statute with any job-related monetary or injunctive relief. It is a run at the U.S. victory for a worker. It only provides for attorney's fees.

And for all the reasons discussed from my testimony, a mixed motive theory is inappropriate to apply to these statutes or for determining retaliation under Title VII. Subcommittee Members thank you for the opportunity to share my perspective with you today.

[The prepared Statement of Ms. Olson follows:]

PREPARED STATEMENT OF CAMILLE OLSON

# STATEMENT
# OF
# CAMILLE A. OLSON

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**ON:** **FIGHTING FOR FAIRNESS: EXAMINING LEGISLATION TO CONFRONT WORKPLACE DISCRIMINATION**

**TO:** **THE UNITED STATES HOUSE OF REPRESENTATIVES**
**COMMITTEE ON EDUCATION AND LABOR**
**SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES**
**SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

**BY:** **CAMILLE A. OLSON**
**PARTNER**
**SEYFARTH SHAW LLP**

**DATE:** **MARCH 18, 2021**

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**TESTIMONY OF CAMILLE A. OLSON**

**BEFORE THE HOUSE COMMITTEE ON EDUCATION AND LABOR SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES AND SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

**FIGHTING FOR FAIRNESS: EXAMINING LEGISLATION TO CONFRONT WORKPLACE DISCRIMINATION**

**MARCH 18, 2021**

Good morning, U.S. House of Representatives Education & Labor Committee; Workforce Protections Subcommittee Chair Alma S. Adams and Ranking Member Fred Keller; Civil Rights and Human Services Subcommittee Chair Suzanne Bonamici and Ranking Member Russ Fulcher; and members of the Subcommittees.

Thank you for inviting me to testify at this Joint Subcommittee Hearing entitled "Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination."[1] My testimony will focus principally on the Joint Subcommittee's consideration of H.R. 7, the "Paycheck Fairness Act" ("PFA" or "H.R. 7"). I will also provide some additional limited testimony with respect to H.R. 1230, the "Protecting Older Workers Against Discrimination Act" ("POWADA" or "H.R. 1230) (previously introduced in the 116th Congress (2019-2020), H.R. 1065, the "Pregnant Workers Fairness Act" ("PWFA" or "H.R. 1065"), and H.R. 5592, the "PUMP for Nursing Mothers Act" ("PUMP Act" or "H.R. 5592) (previously introduced in the 116th Congress (2019-2020)).

I am a partner with the law firm Seyfarth Shaw LLP where I chair the Labor and Employment Department's Complex Discrimination Litigation Practice Group and am a core leader within the Firm's Pay Equity Practice Group.[2] I am a woman, working mother, and over the age of 40. I testify today as an attorney committed to ensuring equal employment opportunities for all applicants and employees, including women and working mothers and, specifically, that with respect to pay, ensuring that any pay differences between employees performing equal work under similar working conditions are based on bona fide, business or job-related factors.

I have represented companies nationwide in all areas of proactive workplace compliance and litigation matters involving the issues of legally compliant and appropriate employment policies and compensation practices. I provide counsel to employers designing, reviewing, evaluating, and, as appropriate, taking remedial steps with respect to their employment pay practices, to ensure compliance with federal and local equal employment opportunity laws. I have also regularly provided employers counsel to ensure that they meet their obligations to workers under the Americans with Disabilities Act of 1990, PL 101-336, 104 Stat. 327, as amended by the Americans with Disabilities Act Amendments Act of 2008, (see 42 U.S.C. Sections 12101, et seq) ("ADA"), and

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[1] I would like to acknowledge Seyfarth Shaw LLP attorneys, Richard B. Lapp, Lawrence Z. Lorber, Annette Tyman, and Ryan L. Young, as well as Bill Varade, Cameron Van, Korin T. Isotalo, and Abigail Hodonicky, for their invaluable assistance in the preparation of this testimony.

[2] Seyfarth Shaw LLP is a global law firm of over 900 attorneys specializing in providing strategic, practical legal counsel to companies of all sizes. Nationwide, over 400 Seyfarth attorneys provide advice, counsel, and litigation defense representation in connection with discrimination and other labor and employment matters affecting employees in their workplaces.

the Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 621, et seq, as amended by the Older Workers Benefit Protection Act, PL 101-433, 104 Stat. 978, ("ADEA"). My litigation practice has specialized in representing employers in individual, multi-plaintiff, and class action litigation in federal and state court involving claims of employment discrimination, including claims of pay discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq*, as amended by the Civil Rights Act of 1991, PL 102-166, 105 Stat. 1071 ("Title VII") (*see* 42 U.S.C. Sections 2000e-5(e), (g), (k), 1981a(1)), the Equal Pay Act of 1964, 29 U.S.C. Section 206(d)(1) ("EPA") and state equal pay laws.

I have also represented business and human resource organizations as *amicus curiae* in landmark employment cases, including *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and *Rizo v. Yovino,* 950 F.3d 1217, 1224 (9th Cir. 2020), cert. denied, *Yovino v. Rizo,* 141 S. Ct. 189 (2020), and have also testified before the Equal Employment Opportunity Commission ("EEOC") on issues involving non-discrimination in compensation and other compliance and enforcement matters. I also frequently speak and write on equal employment opportunity law topics.[3]

I begin with an analysis of The Paycheck Fairness Act, and then briefly discuss the remaining three bills - POWADA, PWFA, and the PUMP Act.

## H.R. 7 -- The Paycheck Fairness Act

### I. EMPLOYERS ARE DEDICATED TO ENSURING COMPLIANCE WITH THE EQUAL PAY ACT, AND WHILE ADDITIONAL STEPS CAN BE TAKEN TO FURTHER ENHANCE COMPLIANCE, H.R. 7 IS UNWORKABLE FOR LEGAL AND PRACTICAL REASONS, AND WOULD DISADVANTAGE ALL EMPLOYEES

Reflecting on my experience in counseling employers regarding compensation practices, at the highest levels of organizations, employers have a deep commitment to paying all employees based on bona fide, business or job-related factors. Many employers across the country are proactively evaluating and modifying their pay practices, policies, and procedures, through voluntary compensation reviews and implementing educational programs to ensure compliance with the law. In doing so, they are identifying, and where appropriate, correcting unexplained pay differentials that are not a function of business or job-related factors. Compensation is an evolving concept designed to keep the enterprise productive, successful, and able to attract and retain competent employees.

The focus that employers have on creating and maintaining compensation systems that pay employees based on the work performed under similar conditions and business or job-related factors is not surprising. Key objectives of sound compensation systems include: (1) attracting qualified

[3] I am a member of the Board of Directors of America's Newspapers, Inland Press Foundation, and the University Club of Chicago Foundation. I am a member of the Executive Committee of the Coalition for Workforce Innovation ("CWI"). I am a Trustee of the Committee for Economic Development ("CED") of The Conference Board, and a Member of CED's Women in Corporate Leadership Committee and Fixing America's Infrastructure Committee. Since 2013, I have Chaired the Equal Employment Opportunity Subcommittee of the United States Chamber of Commerce's Labor and Employment Policy Committee. The views expressed in my written and verbal testimony are those personally held by me, and should not be attributed to Seyfarth Shaw LLP, or any other organization or private employer.

talent through competitive wages that recognize an applicant's potential based on past experiences, education and other business or job-related factors; (2) retaining and rewarding current employees for their contributions and dedicated service to the company; (3) driving motivation and performance to boost employee engagement; (4) enhancing job satisfaction, commitment, and productivity; (5) optimizing company resources; and (6) compliance with applicable laws and collective bargaining agreements.

Employers seek predictability and clear guidance in applying legal standards to their employment policies and practices. Thus, adding the proposed language to the EPA that expressly states that an employer's differences in pay between workers performing the same work under similar work conditions must be based on bona fide business or job-related reasons would further this objective and the goals of the Equal Pay Act. Providing employees with an express protection within the Equal Pay Act against retaliation for engaging in reasonable discussions and gathering information regarding compensation for the purpose of determining whether an unlawful wage disparity exists promotes informed compensation discussions and is also consistent with existing protections in Title VII and other employment laws. The PFA could go even further, though, in promoting the polices underlying the EPA. For example, providing employers with incentives to engage in voluntary self-critical job and compensation analyses would be effective for encouraging self-evaluation and the implementation of concrete steps to eliminate unexplained pay differentials without the need for litigation.

However, H.R. 7 seeks to provide a rigid, one-size-fits-all solution to one of the most complex issues facing U.S. employers. The American workforce is among the most varied workforces in the world. Because there is no one-size-fits-all workplace, there is no one-size-fits-all compensation program. Employers need flexibility in making key decisions about their businesses, including compensation decisions. With limited exception, existing workplace protection laws such as Title VII and the ADEA acknowledge this need and allow employers the latitude to make employment decisions that best fit the particular employer's workplace and discourage the second guessing of these kinds of decisions.

Compensation is dynamic and complex; driven by job, business, and local and national economic factors. Employers place different values on worker skills, experience, education, certifications and abilities.[4] Employers have different components of compensation.[5] These differences are, in fact, the core strength of the American economy, not a flaw. Employers and employees flourish because of the diversity of the American workplaces. H.R. 7, if passed in its current form, would not ensure greater equal pay compliance but would, instead, blunt the very diversity that is a core asset of the United States' economy.

For these reasons and others contained in my written testimony, I express my significant concerns with respect to certain components of H.R. 7. Chairman and other Members of the Subcommittees, I thank you for the opportunity to share some of those concerns with you today.

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[4] CONTEMPORARY LABOR ECONOMICS, BY CAMPBELL R. MCCONNELL, STANLEY L. BRUE AND DAVID A. MACPHERSON, CHAPTER 4, "LABOR QUALITY: INVESTING IN HUMAN CAPITAL" (11th edition).

[5] CONTEMPORARY LABOR ECONOMICS, BY CAMPBELL R. MCCONNELL, STANLEY L. BRUE AND DAVID A. MACPHERSON, CHAPTER 7, "ALTERNATIVE PAY SCHEMES AND LABOR EFFICIENCY" AND CHAPTER 8, "THE WAGE STRUCTURE" (11th edition).

In today's testimony I discuss the application and impact of H.R. 7 on the Equal Pay Act. If enacted, H.R. 7 would alter the Equal Pay Act significantly in substantive and procedural ways, all upon a fundamental yet unsubstantiated premise – namely, that throughout the United States of America, all wage disparities existing between men and women are necessarily the result of discrimination by employers, and that employer and employee discussions regarding their wage expectations will perpetuate and lead to inherently discriminatory pay practices.[6]

On the unsupported assertion that many pay disparities "can only be due to continued intentional discrimination or the lingering effects of past discrimination," H.R. 7 would impose harsh penalties upon all employers, essentially eliminate the "factor other than sex" defense, restrict employer speech and make available a more attorney-friendly class action device. For example, revisions to the "factor other than sex" defense contained within H.R. 7 would render the defense a nullity, allowing judges and juries to second guess employers and the marketplace as to the relative worth of job qualifications in individual pay decisions. H.R. 7, in effect, will require employers to implement a civil service philosophy with respect to all pay decisions, eliminating individual pay advancements unless an employer can prove its pay raise was a business necessity. H.R. 7 contends that these changes are necessary to ensure equal pay for women.

While, as noted above, certain clarifications and incentives may be useful in enhancing compliance with the Equal Pay Act, in its current enforcement structure, the Equal Pay Act, along with Title VII, already provide robust protections and significant remedies to protect applicants and employees against gender-based pay discrimination.[7] Plaintiffs are taking advantage of the multiple forms of redress available to remedy pay discrimination through both the filing of discrimination charges as well as federal and state court individual lawsuits and class actions.

The proposed changes to the EPA are also contrary to its most fundamental underpinnings: the requirement of *equal pay for equal work* balanced against the mandate that government not interfere with private companies' valuation of a worker's qualifications, the work performed, and more specifically, the setting of compensation. The proposed changes are also inappropriate given

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[6] Over the years, labor economists and scholars have observed that wage differences between men and women are attributable to a number of factors, including the identification of numerous business-related factors that are unrelated to any alleged employer discrimination. *See, e.g.*, BUREAU OF LABOR STATISTICS REPORT 1045, HIGHLIGHTS OF WOMEN'S EARNINGS (2013); JOINT ECON. COMM., INVEST IN WOMEN, INVEST IN AMERICA (2010); and AN ANALYSIS OF REASONS FOR THE DISPARITY IN WAGES BETWEEN MEN AND WOMEN Commissioned by the U.S. Dep't of Labor, Office of Employment Standards Administration, and prepared in conjunction with CONSAD Research Corp. (2009) (when accounting for factors such as: occupation, human capital development, the quality and quantity of relevant work experience, industry, health insurance, fringe benefits, and overtime work, the 2009 Report found that the unexplained hourly wage differences were between 4.8 and 7.1 percent). Complex factors that have been identified in social science research to explain the differences in wage rates between men and women include the following, many of which are the function of employee choice: the availability of other non-economic benefits provided by the employer; an employees' pay history; the number of hours worked; an employee's willingness to work during certain shifts and in certain locations; certifications and training obtained by the employee; the amount and type of education achieved; the quality and quantity of prior experience; length of time in the workforce; length of service with the employer; time in a particular job; the frequency and duration of time spent outside the workforce; job performance; personal choices regarding other family or social obligations; occupational choice, self-selection for promotions and the attendant status and monetary awards; and other "human capital" factors. Indeed, the EPA already recognizes that there may be lawful pay differences between jobs which are caused by compensation systems that govern seniority, merit pay, and productivity and quality.

[7] *See*, Title VII, 42 U.S.C. at Sections 12117(a), 1981a(2).

the EPA's distinguishing features, relative to other anti-discrimination legislation. Perhaps the most notable difference is the lack of any requirement that a prevailing EPA plaintiff prove intentional employer discrimination. This feature separates the EPA from Title VII, as well as Section 1981 of the Civil Rights Act of 1866 and Section 1983 of the Civil Rights Act of 1871.[8] These statutes allow for the imposition of compensatory and punitive damages, but only upon a finding of intentional discrimination by the employer. In contrast, the EPA currently imposes liability on employers for backpay damages without any required showing that the employer intended to discriminate against the worker.

Commentators and courts have often referred to this leniency of proof in the EPA as rendering employers "strictly liable" for any pay disparity between women and men for substantially equal work, which is not the result of: a seniority system; a merit system; a system measuring quality or quantity of work; or any other factor other than sex. The irrelevancy of an employer's intent is a defining feature of the EPA, and must be remembered as the significant amendments to the EPA suggested by H.R. 7 are debated. By effectively eliminating the "factor other than sex" defense, and replacing it with an unattainable standard of an affirmative employer showing that any individual wage difference is: (1) job-related and required by "business necessity" and (2) not "derived from a sex-based differential in compensation," H.R. 7 imports a business necessity "plus" standard for an employer to defend every individual pay decision even where no evidence of intentional discrimination is required to be shown.[9]

For these reasons, and all of the reasons set forth below, I urge the Subcommittee members to carefully reconsider certain concepts proposed by H.R. 7.

## II. CERTAIN CONCEPTS IN H.R. 7 CREATE BURDENS ON EMPLOYERS THAT ARE UNTENABLE

The Equal Pay Act now imposes strict liability on employers found to have violated the law. In other words, employees are not required to show that the employer intended to discriminate based on gender, only that the employer engaged in an impermissible disparate pay practice. Employees who prove a violation of the EPA are entitled to double damages, attorneys' fees and costs.

The EPA provides that no employer shall pay employees of one sex at a rate less than the rate at which the employer pays employees of the opposite sex for equal work, unless the difference in pay is the result of: a seniority system; a merit system; a system which measures earnings by quantity

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[8] 42 U.S.C. Sections 1981 and 1983, respectively.

[9] Under H.R. 7, market forces would effectively be excluded from consideration when an employer sets an individual's pay rates unless an employer is able to prove a negative – that the market rate used was not derived or influenced by a sex-based differential in pay. Under H.R. 7, an employee's request for higher pay to match a competitor's offer could not be "matched" unless, first, the employer proved the competitor's offer was not influenced by a sex-based differential (practically, a very difficult burden) and second, the employee's increase was a business necessity (how does an employer prove that one employee's retention is a business necessity?). Imposing this significant additional burden on employers is also unnecessary. Under the EPA the catch-all defense must be a factor *other than* sex. If the employer's asserted explanation for a pay disparity was actually sex-based, the defense would fail. *See Corning Glass Works v. Brennan,* 417 U.S. 188 (1974) (employer failed to carry its burden of proof on the factor other than sex defense where the evidence showed the employer paid males who worked the night shift more than females who worked the day shift, when the differential arose simply because men would not work at the low rates paid women inspectors, and reflected a job market in which Corning could pay women less than men for the same work).

or quality of production; or "any factor other than sex."[10] To meet their burden of proof under the EPA, an employee must demonstrate that: (1) different wages were paid to employees of the opposite sex; (2) the employees performed equal work requiring equal skill, effort, and responsibility; and (3) the employees shared similar working conditions.[11] If the employee makes that showing, the burden of persuasion then shifts to the employer, who can only avoid liability by proving that the wage differential is pursuant to: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any factor other than sex.[12] Critically, there is no requirement under the EPA for a plaintiff to identify a specific employment policy that is being challenged, or to prove any discriminatory intent or animus on the part of the employer.[13]

H.R. 7 does not change the EPA's first three affirmative defenses. Pay differences based on seniority and merit pay systems or compensation based on productivity or quality of work are business or job-related and appropriate factors upon which to base differences in pay for employees performing equal work. However, it changes the "factor other than sex" defense by narrowly limiting its application to only those situations where an employer proves that the factor (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related and consistent with business necessity; and (3) accounts for the entire differential in compensation at issue." Finally, the proposed change would alter the burden-shifting mechanism of the EPA by requiring that "[s]uch defense shall not apply where a litigant later demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice."

In so doing, H.R. 7 pushes the EPA to heights that would essentially obliterate the "factor other than sex" affirmative defense out of the statute. That is because employers would have to demonstrate that a pay difference is not only based on a job-related reason, but is also consistent with business necessity, not based on or derived on a "sex-based differential" and accounts for the entire wage differential. And these showings are required for a factor that is – by definition – *not* gender-based. Even if the employer is able to meet such a heightened standard, H.R. 7 would still find the employer to have violated the EPA if years later an attorney suggests an alternative practice could have been chosen that the employer did not adopt. The practical result is that employer burdens are so high, that any plaintiff bringing an EPA claim will prevail by simply showing a wage differential for employees doing the same work, unless the employer can demonstrate the differential was based on (1) a seniority system, (2) a merit system, or (3) a system which measures earnings by quantity or quality of production.

The "factor other than sex" affirmative defense forms the crux of the EPA.[14] It provides that, where a wage differential exists, the employer has not engaged in sex discrimination under the EPA

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[10] 29 U.S.C. Section 206(d).

[11] *Id.*; *Fallon v. Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989).

[12] 29 U.S.C. Section 206(d)(1).

[13] *See id.* (making clear only relevant inquiry is whether alleged disparity resulted from "any factor other than sex"); *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310-11 (10th Cir. 2006).

[14] 109 CONG. REC. 9198 (1963) (statement of Rep. Goodell, principal exponent of the EPA) ("We want the private enterprise system, employer and employees and a union . . . to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it. . . . Yes, as long as it is not based on sex. That is the sole factor that we are inserting here as a restriction").

if the reason for the wage differential is a business or job-related factor other than sex.[15] This affirmative defense properly enables employers to consider a wide range of permissible, i.e., non-discriminatory, bona fide, business or job-related factors in setting salaries. For example, employers may consider an applicant's or employee's education, experience, special skills, seniority, and expertise, as well as other external factors such as competitive bids and marketplace conditions, including the pay an applicant is leaving to accept a new job when an employer sets salaries.

If enacted, H.R. 7's proposed restrictions would upset the delicate balance that the drafters of the EPA sought to maintain between the goals of the EPA – requiring differences in pay amongst employees performing equal work be limited to bona fide, business or job-related factors – and the need to allow managers to exercise their own business judgment and discretion without undue and unnecessary interference by the courts.

A. The EPA's "Factor Other Than Sex" Is a Business or Job-Related Factor, as Expressly Defined by Courts and Rules of Statutory Construction

While the text of the EPA does not use the words "business-related" or "job-related" it is already part of the EPA as construed by a majority of courts of appeal across the United States and the general rules of statutory construction. The so-called "catch-all" defense is not without existing limiting principles. Indeed, under ordinary rules of statutory interpretation the "factor other than sex" defense should be framed by the first three specifically enumerated defenses (seniority, merit pay, and productivity).

As a rule of statutory construction, or interpretation, where a class of things is followed by general wording, the general wording is usually restricted to things of the same type as the listed items. This rule of statutory construction is sometimes referred to in Latin as *ejusdem generis* or "of the same kind." As the Supreme Court stated in *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001), *ejusdem generis* is a situation in which "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."

Here, the Equal Pay Act requires that any differential in pay between individuals performing the same work must be proven by the employer to be the result of a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or any factor other than sex. The language "or any factor other than sex" follows three business or job-related differentiators used by employers in compensation decisions. Under the doctrine of *ejusdem generis*, the general words are construed to include business or job-related differentiators in pay.

The majority of circuit courts of appeals have held that the "factor other than sex" defense must be business or job-related. The business or job-related factor other than sex test used by circuit courts includes the following:

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[15] *See*, *e.g.*, *Fallon,* 882 F.2d at 1211-12 (7th Cir. 1989) (ruling that the district court prematurely rejected the State's asserted affirmative defense that Veterans Service Officers' requisite war-time veteran status was a factor other than sex justifying the pay differential).

The Second Circuit explains that, an employer proffering a "factor other than sex" defense must demonstrate that any "other differentials" causing "wage disparities" were "implemented for a **legitimate business reason**."[16]

Applying the current EPA's "factor other than sex" test, the Third Circuit explained: "the district court was correct to hold in this case that economic benefits to an employer can justify a wage differential"; because the differential was based on a **legitimate business reason**.[17]

Similarly, the Fourth Circuit found that the "factor other than sex" test is not satisfied by a gender-neutral pay system unless the employer demonstrates reliance on "**job-related distinctions underlying**" the wage differentials.[18]

The Sixth Circuit explained that "[t]he Equal Pay Act's catch-all provision 'does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a **legitimate business reason**."[19]

Similarly, the Ninth Circuit defines the EPA's "factor other than sex" as "compris[ing] only **job-related factors**."[20]

The Tenth Circuit Court of Appeals explained that the "factor other than sex" test is satisfied only if "any resulting difference in pay is '**rooted in legitimate business-related differences in work responsibilities and qualifications for the particular position**.'"[21]

The Eleventh Circuit Court of Appeals defines the "factor other than sex" in the EPA as including business or job-related factors such as the "unique characteristics of the same job; . . ., an individual's experience, training or ability; [and] . . . **circumstances connected with the business**."[22]

Given the above, to expressly provide that the factor other than sex in the EPA be business or job-related, would provide employers with specific guidance as to the application of the EPA's legal standards to their employment policies and practices. Most importantly, inserting "business or job-related" into the "factor other than sex" defense does not force the federal court system to function as a "super personnel department," inquiring into the reasonableness of employers' day-to-day compensation decisions.[23]

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[16] *Forden v. Bristol Myers Squibb*, 63 Fed. Appx. 14, *15 (2d Cir. 2003) (citation omitted).

[17] *Hodgson v. Robert Hall Clothes, Inc.,* 473 F.2d 589, 596 (3rd Cir. 1973).

[18] *United States E.E.O.C. v. Md. Ins. Admin.*, 879 F.3d 114, 123 (4th Cir. 2018) (citation omitted).

[19] *Balmer v. HCA, Inc.* 423 F.3d 606, 612 (6th Cir. 2005) (citation omitted) *abrogated on other grounds by Fox v. Vice*, 563 U.S. 826 (2011).

[20] *Rizo v. Yovino*, 950 F.3d at 1224.

[21] *Riser v. QEP Energy*, 776 F.3d 1191, 1198 (10th Cir. 2015) (citation omitted) (analyzing "[a] bona-fide, gender-neutral pay classification system.").

[22] *Lima v. Fla. Dep't of Children & Families, 627 Fed. Appx. 782, 786 (11th Cir. 2015) (alteration in original) (citation omitted).*

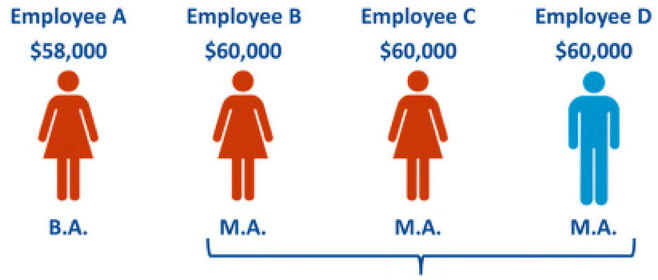
[23] *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2003) (court noted its function is not to sit as a "super personnel department" and that inquiring into the reasonableness of an employer's decision would narrow the exception

B. Requiring That the "Factor Other Than Sex" Defense Satisfy the Concept of Business Necessity Is Unworkable

Requiring that employers demonstrate a "factor other than sex" is also "consistent with business necessity" is an impossibly high standard.

If a "business necessity" requirement is imported into the EPA "factor other than sex" defense, then even if an employer proved an applicant's job experience or education was the factor considered when paying a male applicant more than a female applicant, the employer would still face liability if it cannot prove that the reason for the pay differential (i.e., greater job experience or education) was a matter of "business necessity." Business or job-related is fundamentally different from business necessity. Business or job-related requires that a nexus is shown between a compensation decision and the business enterprise. Business necessity suggests that the very viability of the business is dependent upon the compensation decision. Requiring an employer to prove that a *wage differential* between two individuals is a business necessity is unworkable. It would require an employer to meet an impossible threshold – to prove that it is a *business necessity* for the employer to pay one person more than another based on innumerable intangible criteria such as relative levels of education, experience, or job performance. The following examples may be instructive for demonstrating the unworkable nature of H.R. 7's business necessity requirement with respect to all factors employers use to differentiate pay amongst employees performing the same work. These examples also show that H.R.'s business necessity requirement will discourage employers from making and rewarding these differences between applicants and employees, regardless of their sex, to their detriment.

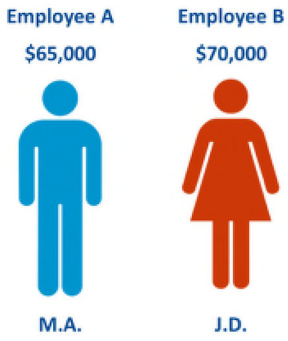
**Example 1: Paying A Higher Salary to All Employees Whose Educational Qualifications Exceed Minimum Educational Requirements Benefits Everyone, But May Not Qualify as a Business Necessity, and thus, Relying on Higher Educational Qualifications To Pay Women More May Violate the PFA.**




beyond the plain language of the statute). *Smith v. Leggett Wire Co.*, 220 F.3d 752, 763 (6th Cir. 2000) ("[I]t is inappropriate for the judiciary to substitute its judgment for that of management."). *See also Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 697 (7th Cir. 2006) (holding that courts do not "sit as super-personnel department with authority to review an employer's business decision as to whether someone should be fired or disciplined because of a work-rule violation.").

In this first example, an employer has chosen to pay higher salaries to all employees (men and women) who have higher educational qualifications for a marketing manager position than the minimum qualifications; here a Master's degree as opposed to a Bachelor's degree. In this example, that job-related decision has an overall positive effect on female employees' salaries. If a Bachelor's degree is the minimum requirement for this position, then an employer may have a difficult time establishing that its decision to pay higher salaries for a more advanced degree is "consistent with business necessity." And yet, individuals with higher level degrees will command higher compensation in the market and thus a higher salary may be necessary to employ the applicant (and their higher education qualification may provide enhanced contributions to the business). In this example, Employee A may have a claim under the PFA when she compares her salary to Employee D. This is true, even though Employees B and C, who are also females with Master's degrees, are being paid the same salary as Employee D because a Master's degree that is not a job requisite may not be viewed by some courts as a "business necessity". Such a finding is a realistic outcome given that some courts have found that an employee need only identify a single comparator of the opposite sex who is paid more for the same position.

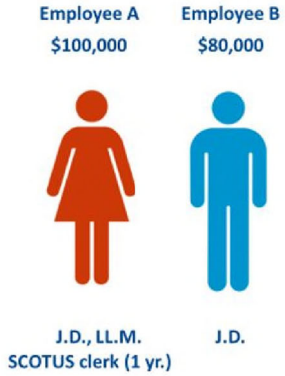
**Example 2: The Factor Other Than Sex Defense of Additional Qualifications Benefits All Employees Regardless of their Sex, But May Not Qualify as a Business Necessity, and thus, Reliance on it To Pay A Woman More, May Violate the PFA.**




In this example, an employer has chosen to offer a higher starting salary to a female Law Firm Office Administrator applicant who has a J.D. degree based on the employer's belief that her J.D. will provide her with unique insights in performing her management responsibilities of a law firm, and because her qualifications provide her with other employment opportunities at higher salaries, than a male office administrator received in another office. So, while the job duties for that position do not include legal work, in the employer's judgment, the performance of the administrator duties will be enhanced by the additional qualifications of a J.D., justifying the higher salary. But under a "business necessity" framework, this job-related reason may not qualify as a business necessity, as the job could be done without it. The employee may have a claim even if the advanced

degree does actually improve performance or serve another legitimate business goal, where it was not absolutely "required" for the job.

**Example 3: The Factor Other Than Sex Defense of Additional Experience Benefits All Employees Regardless of their Sex, But May Not Qualify as a Business Necessity, and thus, Reliance on it To Pay A Woman More, May Violate the PFA.**




In this third example, two second-year associates are paid differently based on their different levels of experience. A female associate who holds an LL.M. degree and was a Supreme Court clerk, is paid $20,000 more than a male associate who holds only a J.D. degree. As with the other examples, the employer's judgment that Employee A's additional experience (and qualifications) improves job performance or serves another legitimate business goal (e.g., impressing prospective clients) may not qualify as a "business necessity" since, technically, both employees are performing equal work as second-year associates, but present business or job-related reasons for the difference in compensation between these two associates.

**Example 4: The Factor Other Than Sex Defense of An Applicant's Negotiating Skills Based on Prior Salary and Other Factors Benefits All Employees Regardless of their Sex, But May Not Qualify as a Business Necessity, and thus, Reliance on it To Pay A Women More, May Violate the PFA.**

In summary form (without illustrations), I have also described below six real-life examples of female applicants and a current employee who used their prior salary or overall compensation package with a prospective employer, or a competitive bid from another potential employer to increase their pay. Under the PFA, these employers who increased the female applicants' pay and also increased the pay of an existing female employee with a more lucrative job offer risk non-compliance with its requirement that the reason it did so was a business necessity and/or that in doing so it was obligated to raise the pay of all other employees as "an alternative measure" to eliminate differences between the pay of men and women performing the same job.

First, a software development company is filling two positions in a new role involving highly specialized software engineering. No salary surveys are on point. The employer offers both successful candidates—one man and one woman—a starting rate of $150,000, in line with what the company pays its incumbent software engineers. The man accepts the offer but the woman, having a better understanding of the highly specialized arcane knowledge that her specialized role requires, demands $185,000. The company meets her demand because no other candidate is available and because the need for her specialized talent is urgent. In doing so has the employer met the business necessity requirement of the PFA? If so, has it also adopted the least impactful practice, where it doesn't raise the male applicant's pay as well?

Second, an engineering firm is recruiting two engineers, with an onboarding date of July 1. The recruiting process identifies the two most qualified applicants: one man and one woman. Each is offered a starting salary of $87,000. The man accepts the offer. The woman thinks the $87,000 offer is fair, but asks for a sign-on bonus, explaining that the $10,000 annual retention bonus she expects at her current employer will not come due until October 1. The man, too, had a $10,000 annual retention bonus at his company, but that bonus was already paid, on April 1. Animated by a sense of equity and fairness, and wanting to hire the woman quickly, the firm pays her (but not the man) a $10,000 sign-on bonus. In increasing the female employee's offer to entice her to accept it and because the employer believes it's the fair thing to do, has the employer met the business necessity requirement of the PFA? If so, has it also adopted the least impactful practice, where it doesn't provide the male applicant the $10,000 as well?

Third, a professional services company, in recruiting for a vice president to lead a region, identifies a highly qualified woman working as an executive at another firm. The company's standard executive contract includes base pay, bonus, and stock options. During contract negotiations, the female executive outlines the three-year vesting schedule for her stock options at her current firm, which she expects to yield her a value of $200,000. The employer raises its salary offer to make the woman whole (for the predicted value of her loss in stock options) over the next three years. Meanwhile, the salary for an incumbent male vice president leading a different region, while performing a job requiring equal skill, experience, and responsibility, would be $200,000 less over the three years in question. In raising its salary offer for the female applicant has the employer met the business necessity requirement of the PFA? If so, has it also adopted the least impactful practice, where it doesn't raise the male applicant's pay as well?

Fourth, an manufacturer is recruiting two sales managers, one a man and one a woman. Each is offered a starting salary of $75,000. The man accepts the offer. The woman points out that her salary at her current employer is $85,000, and though she wants to accept the offer, because she is the sole financial support for her family of four, she cannot tolerate a $10,000 pay cut. The company responds with an offer of $80,000, which she accepts. In raising its salary offer for the female applicant has the employer met the business necessity requirement of the PFA? If so, has it also adopted the least impactful practice, where it doesn't raise the male applicant's pay as well?

Fifth, a private high school, filling two teaching positions, considers two prime candidates—a man making $60,000 at his current school and a woman making $59,000 at her current school. During the interview process, the woman reveals she is considering an offer from a competing private school at $66,000. The man has no other prospects. The school hires both candidates, the man at $63,000 and the woman at $66,000 (matching her competing offer). When the employer matches the female applicant's competing offer has the employer met the business necessity requirement of the PFA? If so, has it also adopted the least impactful practice, where it offers and the male applicant

accepts an offer that is $3,000 less than the female applicant's starting pay, but later files suit against the high school alleging an equal pay violation?

Sixth, a photojournalist is enticed to leave her position at a major metropolitan daily in Ohio when she receives an unsolicited offer to join another daily in Michigan that pays $10,000 more in annual salary. She informs her employer of her dilemma; her family could really use the additional $10,000. Concerned about losing this prize-winning journalist, the Ohio daily matches her competitive offer, and she decides to stay put. In doing so, she now makes $10,000 annually more than any other photojournalist at the Ohio newspaper, including male photojournalists. When the employer matches the female photojournalist's competing offer has the employer met the business necessity defense in the PFA? If so, has it also adopted the least impactful practice where it doesn't raise the pay of other male photojournalists who now make $10,000 less than the female photojournalist?

As these examples show, both practically and analytically, this "business necessity" showing cannot be made with respect to an individualized employee pay decision every time a pay decision is made (i.e., engage an expert to perform a study or otherwise prove it is a business necessity to pay Employee A, X dollars more than Employee B, because of Employee A's greater experience or education, for example). Put differently, applying H.R. 7's "consistent with business necessity" test to the EPA would require employers to prove – as to each wage differential – the ultimate business goal achieved by the higher pay is significantly correlated with the job's requirements and bears a demonstrable relationship to the successful performance of the job. This highly onerous standard would place an unrealistic burden on employers that would be virtually impossible to achieve. And, the losers under H.R. 7 would be workers, both women and men.

### C. Requiring That the "Factor Other than Sex" Defense Be the Least Impactful in Terms of Pay Disparities Is Unworkable

Under the proposed amendments to the EPA, even if an employer could demonstrate that the "factor other than sex" was bona fide, *and* job related, *and* consistent with business necessity, it could still be held liable if the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing a wage differential. In other words, liability would still be imposed because the employer paid a male applicant a higher wage rate that was job-related, consistent with business necessity, and not the result of sex discrimination, because, in retrospect, years later, a judge or jury determined the employer could have chosen an alternative employment practice. This just encourages after-the-fact second-guessing and creates uncertainty for employers in the examples provided above, and every day in workplaces across America. Examples of that specific second-guessing have been included alongside the examples described under Example 4 immediately above.

Under H.R. 7, plaintiffs' lawyers will no doubt argue that employer liability attaches every time they second-guess an employer's employment practice by identifying another employment practice that doesn't produce the differential in pay between a male and female employee. This is true even where the employer shows that the factor other than sex justifying the differential in pay is education, training, or experience. H.R. 7 does not describe any examples of alternative employment practices that would suffice to defeat the employer's burden. If a plaintiff countered an employer's justification of education, training, or experience by suggesting that the employer had the financial ability to raise everyone's pay in the same job – is financial ability to raise another employee's wage rate an alternative employment practice that would defeat the employer's defense (in every case, so

that the Equal Pay Act's "factor other than sex" defense is in fact a complete illusion)? In effect, H.R. 7 suggests that the universal alternative would be to "round up" any wage distinction with other employees. No answer is found in H.R. 7; yet, this one issue would lead to considerable uncertainty and litigation. The proposed changes to the EPA would invite such disputes into courtrooms, forcing the judiciary to weigh the merits of countless economic judgments of employers. In this sense, the proposed changes represent an unprecedented intrusion of government into the independent business decisions of private enterprises, and should not be imparted into the EPA.

### D. Requiring Employers to Explain 100% of Any Differential Is Undefined and Unworkable

H.R. 7 requires employers to explain the "entire" pay differential between male and female employees. Such an exacting standard is unworkable. Advancing the obligation to employers to explain the "entire pay differential" assumes that compensation decisions are modeled after a civil service system whereby all jobs are compressed into distinct pay grades and each pay grade is compensated at the same wage rate.

Compensation decisions in the private sector are made based on a variety of factors that are not capable of an exact dollar-for-dollar comparison. Differences in experience, education and performance, among other business or job-related factors, matter significantly for purposes of setting compensation. How would an employer ever be able to explain that it credited an employee with X dollars for their 6.3 years of prior experience, and Y dollars because the candidate went to a top tier school verses Z dollars for a mid-tier school? It will be virtually impossible for employers to meet such a standard.

In analyzing compensation across organizations, employers often rely on statistical analyses to test whether pay is correlated with gender. A finding of 1.96 standard deviations (assuming a "normal distribution" manifested by the familiar bell curve graphic) indicates that a given pay difference would be expected to occur by chance 5% of the time if pay was set in a sex-neutral environment and if the regression model correctly incorporates all of the job-related determinants of pay. Courts have approved this statistical standard in employment discrimination cases.[24]

When statistical analyses show a pay difference of fewer than 1.96 standard deviations, then labor economists, statisticians and courts generally conclude that the statistical evidence do not give rise to an inference that a gender pay difference exists, even though the same analyses do not explain 100% of all pay differences between male and female employees.

Relying on statistical significance when measuring pay differences is critically important. That is, because a statistical analysis can never capture or precisely account for all of the factors that influence pay, the effect of a factor like gender on pay is necessarily measured by using a margin of error. For example, in political polling, a voter survey reveals 60% of voters are likely to vote for a candidate in the next election, usually accompanied by a caveat such as "plus or minus 3%." What that means is that there is a 3% margin of error surrounding the estimate of 60% of voters choosing

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[24] *Adams v. Ameritech Servs.*, Inc., 231 F.3d 414, 424 (7th Cir. 2000) (noting that in employment discrimination cases, "[t]wo standard deviations is normally enough to show that it is extremely unlikely ... that [a] disparity is due to chance."); *Cullen v. Indiana Univ. Bd. of Trustees*, 338 F.3d 693, 702 (7th Cir. 2003) (explaining in an Equal Pay case that "generally accepted principles of statistical modeling suggest that a figure less than two standard deviations is considered an acceptable deviation").

to vote for your re-election. More precisely, it is expected that somewhere between 57% and 63% of the voters will end up voting for the candidate—the 60% reported estimate is simply the middle of that range.

A statistical analysis of pay differences between male and females also includes a margin of error. For example, a statistical analysis could find that female employees at Company XYZ are paid 1% less than comparable male employees, but this difference is not statistically significant (e.g., -1.00 standard deviations). This means that the margin of error surrounding this pay discrepancy includes the possibility that female employees are actually paid more than comparable males: a 3% margin of error surrounding a pay difference of negative 1% means that the likely gender pay difference is somewhere between -4% and +2%.

To the extent the "entire differential" is interpreted to mean that 100% of the wage differences must be explained – i.e., that all employees performing equal work must be paid *exactly the same* regardless of the statistical significance of any differences across the group – that standard is untested and unworkable. State laws that have recently adopted similar "entire differential" language do not provide any clear guidance and will result in considerable litigation. For example, the California, Massachusetts, New Jersey and Oregon laws similarly require employers to explain the entire differential, but courts in those states have not yet interpreted those laws. For example, while the Massachusetts Attorney General's office has taken the position that "eliminating unlawful pay disparities means adjusting employees' salaries or wages so that employees performing comparable work are paid equally," the Guidance does not address whether statistical significance may be considered.

Requiring employers to explain *every cent* of difference among a group of employees performing the same work is unworkable because such differences could have occurred by legitimate factors. Indeed, multivariate regression models are specifically designed to determine if there is a pattern that suggests a discriminatory motive, (i.e., gender discrimination) is at play. The absence of a statistical finding suggests that differences are likely occurring by random chance and not as a pattern that is based on gender.

If enacted as proposed, employers would be forced to concoct a precise equation to determine pay, by assigning a base pay to each level in each job family and assigning a precise dollar amount to each year of experience, educational degree, and performance rating, along with every other factor used to determine pay. This would require a radical overhaul in approach and general compensation philosophies for most private employers across the country. For this reason, H.R. 7's requirement that employers explain 100% of any differential should be rejected.

## III. OTHER PARTS OF H.R. 7 ARE UNWORKABLE, AS WRITTEN

### A. There are Circumstances Where Consideration of An Applicant's Prior Pay are Not Inconsistent with the Equal Pay Act, and An Employer's Consideration of Same In Setting Initial Pay Should Not Be Banned As Directed by H.R. 7

Throughout the more than 50 years after the EPA's enactment in 1963, courts have held that employers could, in appropriate circumstances, treat prior salary as a factor other than sex, while forbidding employers to pay women less simply because market forces would permit the employers

to get away with it.[25] To do otherwise adopts an extreme rule that offends common sense and business realities, while undermining employers' reliance on 50 years of EPA jurisprudence.

Salary history information, in combination with other information provided by applicants, provides employers with a holistic view of the relative qualifications, experience levels, and immediate prior performance of candidates. An applicant's past salary is also useful for assessing real time information about the competitive market wage for a given job. It is often a critical factor in an applicant's decision as to whether to apply for, interview for, and accept a new job. Few applicants voluntarily change employers for lower-paying positions. Information about an applicant's salary history has long been used by employers to make informed decisions about candidates during the hiring process, not for the purpose of perpetuating historical inequality, but because consideration of prior pay, alongside other business-related factors such as experience, education, past performance, and training advantages all job applicants. To be sure, it is possible that an applicant's past salary may reflect historical sex discrimination in pay. Today, under the EPA as written, and interpreted by courts of appeals, employers who consider prior salary among other factors when setting initial wages do not automatically violate the EPA. However, employers, as always, have the burden of showing that any resulting pay differential is based on a valid factor other than sex.

Without any stated reason or justification, H.R. 7 would prohibit employers from seeking or using information about an applicant's prior salary in connection with the hiring process, including formulating an initial pay offer. Specifically, it would prohibit employers from relying on prior salary information, unless (1) it is provided voluntarily after an offer of employment that includes compensation is extended, and (2) it may be used for the sole purpose of supporting a wage that is higher than the wage offered by the employer. Such prohibitions raise serious concerns for the employer community and will hamper its ability to compete for talent in a competitive labor market.

1. Employers Use Prior Salary History for Legitimate Reasons That Often Benefit Women

H.R. 7 proposes to amend the EPA by severely limiting an employer's right to utilize wage history information from a prospective employee. However, employers frequently make business decisions where the consideration of an applicant's prior salary, among other factors, does not involve any pay discrimination because of sex, but instead benefits employees, regardless of their sex.

For example, when an employer considers an applicant's salary history, coupled with other data like education or experience, it provides a holistic measure of an applicant's relative skill, responsibility, and job performance. Salary history information also helps assess an applicant's interest because it avoids the awkward scenario of an applicant seeking a salary higher than an employer can pay.[26] Finally, salary history allows an employer to make a competitive offer to an

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[25] The Ninth Circuit Court of Appeals is the only outlier, disagreeing with the EEOC, all other courts of appeals and previous panels of the Ninth Circuit Court of Appeals when it held in a confusing 2020 opinion that prior salary can be considered for setting salary, but not as an affirmative defense to the EPA (described in the opinion's concurrence as an "indefensible contradiction" by Judges McKeown, Tallman and Murguia). *Rizo v. Yovino*, 950 F.3d at 1236.

[26] Yuki Noguchi, Nat. Pub. Radio, Proposals Aim to Combat Discrimination Based on Salary History (May 30, 2017), https://tinyurl.com/ya67hrua.

applicant because it allows the employer to meet, or exceed raises or offers the applicant received from competing employers.[27]

In an April 2020 survey, the Society for Human Resource Management ("SHRM") asked its members how they use information regarding an applicant's prior salary history.[28] SHRM respondents reported using prior salary history for one or more legitimate business purposes, including: framing an attractive offer; screening out applicants they could not afford; and increasing an offer to attract an applicant away from his or her current job. The survey found that this market data also helped employers assess their own pay structures to ensure they maintained competitive wages for current and prospective employees.

*Landing candidates:*

- 65.3% of respondents report screening out candidates whose salary demands are too high.
- 64.6% of respondents report framing an offer that would be attractive to the applicant.
- 51.9% of respondents report inducing a candidate to leave a current job.
- 37.8 % of respondents report gauging candidate's likely interest in an open position.
- 32.6% of respondents report obtaining important negotiation information.
- 24.2% of respondents report negotiating a higher rate of pay with an applicant who has opportunities for higher-paid jobs with other employers.

*Evaluating candidates:*

- 14.1% of respondents report ensuring the candidate has the desired experience, ability, etc.
- 13.6% of respondents report learning about a candidate's prior performance, education, skill or experience.

*Improving internal pay structures:*

- 58.4% of respondents report gathering market data to compare against employer's own pay structure.

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[27] See, e.g., Amy Gallo, Harv. Bus. Rev. Online, Setting the Record Straight: Using an Outside Offer to Get a Raise (July 5, 2016) (outside offers "a legitimate way to get … higher compensation"), https://tinyurl.com/jhm2eub; see also *Horner v. Mary Inst.*, 613 F.2d 706, 714 (8th Cir. 1980) (citation omitted) ("[A]n employer may consider the market place value of the skills of a particular individual when determining his or her salary").

[28] These results are from a poll taken April 16–20, 2020, with 616 SHRM member respondents. See https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/data-snapshot-how-employers-use-prior-pay-in-decision-making.aspx (accessed March 14, 2021).

- 25.3% of respondents report inducing an existing employee to reject a competitive offer from another employer.[29]

Stifling an employer from utilizing information provided by an applicant about their prior salary will hurt all applicants, regardless of their sex. Some specific examples illustrate how employers consider prior salary without blindly accepting any socially biased market forces creating endemic pay discrimination.

Considering prior or current salary information benefits all employees. The following are but a few real life examples:

In example one, a real estate brokerage is recruiting new residential sales agents. In deciding how much to offer new hires, the brokerage relies on a mix of factors, including information provided by applicants regarding their years of experience, written recommendations, prior sales revenue, and current salary. It turns out that female agents in the relevant market generally earn higher salaries and among the brokerage's new hires the women are paid more because they had been earning higher salaries at their former employers. Without the ability to use this critical information, the employer and female applicant are disadvantaged.

In example two, a grocery store must quickly replace two junior managers just as a global pandemic erupts. Store management generally knows that competing stores have a pandemic premium pay program for store managers, but does not know the amounts being paid. Store management identifies two candidates of equal skill and experience—one a man, one a woman, and both working at different competing stores. During the hiring process both individuals ask whether their current pandemic premium pay will be matched at the store, noting the amount of their current premium pay. The store responds positively to each applicant, offering each the store's base annual pay for a junior manager plus a guarantee to pay each applicant the premium pay the applicant was earning elsewhere. The male candidate is thus hired at $60,000 and the woman at $65,000. Without using the information provided by each applicant regarding the applicant's pandemic pay premium and agreeing to pay it, the grocery store would not be extending a competitive offer to the female or male candidate. Here, the female candidate would miss an opportunity to increase her salary (by her higher premium pay) and the store would be disadvantaged in its recruitment efforts.

In the final example,[30] a smaller law firm merges into a bigger law firm. The bigger firm has a lock-step salary system for associates. The smaller firm had been paying associates smaller base salaries, while awarding widely varying performance bonuses, with the larger bonuses generally going to female associates because of their generally higher performance. The female associates share this information during the hiring process with the bigger law firm, concerned that their pay will not recognize their performance. Upon the merger, the larger firm integrates the smaller-firm associates into its lock-step payment system on the basis of their total pay earned during the prior year (as a result of the information provided by the associates), with the result that women integrated into the bigger firm now have a higher salary than their male counterparts who have been integrated into the bigger firm. If the acquiring firm is prohibited from relying on prior salary information for

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[29] *Id.*

[30] *See also, supra*, at pages 10 - 14 for additional examples of an employer's use of prior salary that may be unlawful under H.R. 7.

the merged employees in setting their compensation offer, the women would be disadvantaged in their compensation.

In these examples, considering prior salary in setting pay is neither a pretext for unlawful discrimination, nor a disadvantage to women, but a sound and important factor appropriately considered in setting starting salary in many circumstances to attract and to retain employees. The EPA allows employers, exercising their discretion, to decide when the use of prior salary is appropriate, and the EPA allows courts, exercising their judgment, to determine where employers have crossed the line from permissible use to impermissible use.

The above examples show various ways in which employers making real-world pay-setting decisions sometimes utilize an employee's or applicant's prior (or current) salary (or competitive future salary offer), as one factor among others, in setting pay. One might object that the examples show how *women* can benefit from consideration of prior salary. But that is the point. Considering prior salary (and in the example of a competitive offer, a market salary proposal) can benefit women as well as men. And employers could not decide to consider prior salary *only* when the practice would benefit women, because any such practice would be unlawful. H.R. 7's categorical ban on considering prior salary as a factor other than sex under the EPA in setting initial salary offers may, in fact, have the perverse effect of hurting women, as well as men, in their pay aspirations.

### 2. Courts Have Long Recognized That Under Certain Circumstances Prior Salary History Is A Legitimate Factor Other Than Sex

Under certain circumstances, courts have found that prior salary history can constitute a "factor other than sex" if considered for legitimate business reasons.[31] This often includes looking at prior salary history alongside additional factors, other than sex.[32]

The Eighth Circuit Court of Appeals explained that prior salary can constitute a "factor other than sex" because it may also demonstrate a candidate's superior "education, experience, or other qualifications."[33] The Second Circuit similarly found that prior salary history could justify wage differentials, where a higher starting salary was required to attract qualified candidates.[34] Affirming the district court, the Sixth Circuit Court of Appeals explained "a higher salary history" was a legitimate "factor other than sex," when coupled with "a higher salary" demand and "greater relevant industry experience."[35] The Federal Court of Claims has also found that "qualifications and existing

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[31] As noted above, the Ninth Circuit Court of Appeals is the only outlier, determining that prior salary history can never play a role in an initial pay decision. *Rizo v. Yovino*, 950 F.3d at 1232.

[32] *See Drum v. Leeson Elc. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009).

[33] *Id. See, also, Taylor v. White*, 321 F.3d 710, 714–15, 717 (8th Cir. 2003).

[34] *Belfi v. Prendergast*, 191 F.3d 129, 137 (2d Cir. 1999) (The LIRR had legitimate business reasons for considering prior salary history "to attract union employees to management by including overtime pay in calculating the 10 percent promotion increase given under the Salary Plan."); *see also*, *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525, 527 (2d Cir. 1992) (employers may rely on prior pay if it "is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue" and "has some grounding in legitimate business considerations");.

[35] *Balmer v. HCA, Inc.*, 423 F.3d 606, 613 (6th Cir. 2005) abrogated on other grounds by *Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 180 L. Ed. 2d 45 (2011). *See id.* at 612 (citation omitted) ("Consideration of a new employee's prior salary is allowed as long as the employer does not rely solely on prior salary to justify a pay disparity."). *See*

income" may justify wage differentials when "equitably applied to each candidate."[36] Furthermore, the Fourth, Tenth and Eleventh Circuits have all found that employers may rely on prior pay as one such "factor other than sex."[37] Similarly, the Seventh Circuit Court of Appeals has issued numerous decisions holding that prior salary information can be a legitimate factor other than sex when considered with other information.[38]

The Ninth Circuit itself once recognized the wisdom of a "pragmatic standard, which protects against abuse yet accommodates employer discretion," by requiring that an employer use prior salary as a "factor reasonably in light of the employer's stated purpose as well as its other practices." *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876–77 (9th Cir. 1982). This "pragmatic standard" necessarily recognized that the EPA "does not impose a strict prohibition against the use of prior salary." *Id.* at 878.

The EEOC, the federal agency empowered to enforce the EPA as of 1978, has, since at least 1997, agreed with these court decisions, that prior salary can be a legitimate factor other than sex. *See, e.g.*, EEOC Notice Number 915.002 (Oct. 29, 1997), Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions (advising further inquiries in cases where a defendant employer has asserted prior salary as a factor other than sex). However, while the EEOC has noted that prior salary information "can" reflect sex-based compensation disparities, it has also noted that an employer could be justified in relying on prior salary information if it "accurately reflected the employee's ability based on his or her job-related qualifications" or that it "considered the prior salary, but did not rely solely on it in setting the employee's current salary."[39]

### 3. Employers Should Not Be Prohibited from Considering Prior Salary for Legitimate Job-Related Reasons

Employers routinely rely on prior salary information for competitive purposes as a way to gather real time market data. It is also used to benchmark against the pay of current employees or to target offers to top performing employees at competitor firms. It can also be used as an indicator of a candidate's experience, performance or level of expertise in an area.

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*also, Beck-Wilson v. Principi*, 441 F.3d 353, 365, 366 (6th Cir. 2006) ("any other factor" exception includes factors "adopted for a legitimate business reason"; employers can rely on a sex-neutral system such as prior pay if there are "business-related" reasons to do so).

[36] *North v. United States*, 123 Fed. Cl. 457 , 467 (2015).

[37] *See United States EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 123 (4th Cir. 2018) (citations omitted) ("[Q]ualifications, certifications, and employment history fall within the scope of . . . 'a differential based on any factor other than sex.'"); *see also Riser v. QEP Energy*, 776 F.3d 1191, 1198 (10th Cir. 2015) (citation omitted) (employers may rely on prior salary history if it is "rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue"); *Lima v. Fla. Dep't of Children & Families*, 627 Fed. Appx. 782, 786 (11th Cir. 2015) (citation omitted) (prior salary history related to "an individual's experience, training, or ability" can be one such "[other] factor than sex.").

[38] *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904, 908 (7th Cir. 2017) (citing *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005); *Dey v. Colt Constr. & Dev't Co.*, 28 F.3d 1446 (7th Cir. 1994); *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987); *Covington v. S. Ill. Univ.*, 816 F.2d 317 (7th Cir. 1987)).

[39] EEOC, Compliance Manual, No. 915.003 Section 10-IV.F.2.g (Dec. 2000).

Prohibiting employers from relying on prior salary information, even if it's voluntarily provided, until after an offer that includes compensation information has been extended will invoke an unnatural cadence that does not reflect the realities of the workforce. Indeed, human resources representatives will be forced to issue "Miranda-type" warnings to applicants advising them that they cannot provide information regarding prior salary. And that even if they do, the employer must make a salary offer unrelated to their prior salary.

The only effect that the current proposal is guaranteed to have are steeper recruiting costs which will be borne by both employers and applicants. Employers, particularly small businesses that lack access to expensive third-party market data, and applicants will be forced to proceed through the hiring process without an understanding of whether an applicant's pay is in line with what the employer is willing to pay. This disconnect would normally be addressed early on in the hiring process and would allow both the employer and the candidate to proceed if there is at least some mutual understanding of the salary range for the position.

In the United States, prices of goods and services are based on the fundamental economic principles of supply and demand. Highly competent, qualified and talented employees – whether male or female – are in greater demand, yet in smaller supply, which creates competition for their services. Employers should not be restricted from relying upon salary information that is voluntarily provided by applicants that fosters competition under our free market system and benefits applicants and employees.

### B. Prohibiting Retaliation Against Employees Who Request or Discuss Wage Data to Enforce the Non-Discrimination Provisions of the Equal Pay Act Is Important but Must Be Balanced Against Legitimate Privacy Interests

Section 3 of H.R. 7 creates new non-retaliation provisions which, while seemingly benign, are in fact overly broad and can have adverse consequences when one considers their application to common workplace situations. While everyone recognizes the importance of ensuring non-retaliation for requesting or discussing certain wage data, certain unintended consequences need to be discussed. Moreover, this new language may not be necessary given the breadth and matrix of existing laws providing protections against retaliation, as discussed below.

Existing equal employment opportunity laws on the federal and state level prohibit employees from being retaliated against for asserting their rights to be free from discrimination in compensation. These protections include protection for discussions relating to compensation, including discussions and gathering information regarding compensation with management or coworkers for the purpose of determining whether an unlawful wage disparity exists. Title VII of the Civil Rights Act of 1964,[40] the Age Discrimination in Employment Act,[41] Title V of the Americans

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[40] Title VII states, "[n]o person reporting conditions which may constitute a violation under this subchapter shall be subjected to retaliation in any manner for so reporting." 42 U.S.C. Section 2000e 3(a).

[41] The Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 621 states, "[i]t shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge,

with Disabilities Act,[42] Section 501 of the Rehabilitation Act,[43] the Equal Pay Act,[44] and Title II of the Genetic Information Nondiscrimination Act[45] **all** currently prohibit retaliation and related conduct against an employee for engaging in protected activity by engaging in an equal employment opportunity process or reasonably opposing conduct made unlawful by an equal employment opportunity law.

Applicants and employees who assert these rights are engaged in what is called "protected activity" which can take many forms. Examples of protected activity described on the Equal Employment Opportunity Commission's website[46] include protections against an applicant or employee being retaliated against for:

- Reasonably opposing conduct made unlawful by any EEO law (including the EPA);
- Raising an internal complaint of wage discrimination;
- Filing an EEOC charge or lawsuit (or serving as a witness, or participating in any other way in an equal employment opportunity matter) even if the underlying pay discrimination allegation is unsuccessful or untimely; and
- Filing a lawsuit alleging wage discrimination.

The EEOC has provided guidance that employers must not retaliate against an individual for "opposing" an employer's perceived unlawful employment practice, including unequal pay for equal work.[47] Opposition is protected even if it is informal or does not include the words unequal pay or

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testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." 29 U.S.C. Section 623(d).

[42] The Americans with Disabilities Act states, "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. Section 12203(a).

[43] Section 501 of the Rehabilitation Act states, "[t]he standards used to determine whether this section has been violated in a complaint alleging non-affirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, 1 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment." 29 U.S.C. Section 791(f); *Coons v. Sec'y of the Treasury*, 383 F.3d 879, 887 (9th Cir. 2004). (liability standards the same as those under the ADA)

[44] The Equal Pay Act states, "it shall be unlawful to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee[.]" 29 U.S.C. Section 215(a)(3).

[45] The Genetic Information Nondiscrimination Act states, "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection." 42 U.S.C. Section 2000ff-6(f).

[46] EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES (Aug. 25, 2016), *available at* https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#A._Protected.

[47] *Id.*

discrimination. Instead, the communication or activity is protected under federal equal employment opportunity laws as long as the circumstances show that the activity is in relation to perceived unlawful wage discrimination. For example, it is currently unlawful for an employer to retaliate against an applicant or employee for:

- Talking to coworkers to gather information or evidence in support of an employee's claim of an unlawful compensation disparity;
- Threatening to complain about alleged wage discrimination against oneself or others;
- Providing information in an employer's internal investigation of an alleged unlawful wage disparity; or
- Complaining to management about sex-based compensation disparities.

Additional protections against retaliation for asserting rights to discuss wages with other employees can also be found in the National Labor Relations Act ("NLRA").[48] The NLRA protects non-supervisory employees and applicants from employer retaliation when they discuss their wages or working conditions with their colleagues as part of a concerted activity, even if there is no union or other formal organization involved.[49]

Under existing federal law, protections against retaliation apply to conduct that is conducted in a reasonable manner (for example, without threats of violence, or badgering a subordinate employee to give a witness statement) by those with a reasonable good faith belief that an unlawful wage disparity may exist (for example, that a woman is being paid less than a man who is performing equal work).

However, Section 3(b) of H.R. 7 would extend unprecedented anti-retaliation protections to employees who inquire about, discuss, or disclose the wages of themselves **or others**. This Section of H.R. 7 is written so broadly that employees would have the right to inquire about, discuss, or disclose wage information **without limitation**. Under Section 3(b)(1)(A) an employee who has served or is planning to serve on an "industry committee" also specifically enjoys this right to disclose the wages of other employees **without limitation**.

There is no consideration of the reasonableness of the employee's actions with respect to their inquiries, discussions, or disclosures, nor is the permissibility of such action tethered to the alleged underlying pay disparity. Further, the proposed bill does not take into account or protect the privacy rights of other employees with respect to publicly disseminating information about their pay, nor does it contain a mechanism for balancing and protecting employers' legitimate business concerns in maintaining confidentiality of certain compensation information.

Under H.R. 7, an employee who chooses to post on social media the wages of all other employees, by name, would be deemed to be engaging in protected activity, against which other employees and the employer would have no recourse. An employee whose compensation information

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[48] 29 U.S.C. Section 158(a)(4).

[49] *N.L.R.B. v. Lloyd A. Fry Roofing Co. of Delaware*, 651 F.2d 442, 445 (6th Cir. 1981) ("Employees may engage in concerted activities protected by section 7 regardless of whether the employees are members of a union.").

is made public in this manner who felt their right to privacy had been violated would have no ability to stop this co-worker's protected activity. The employer would also have no ability to object to such a broad disclosure of data, notwithstanding the potential proprietary nature of such information and the potential disadvantage that could result from a competitor's possession of the identity and current compensation of its employees. H.R. 7 expands an employee's right to inquire, discuss and disclose wages of other employees such that it trumps legitimate privacy and confidentiality rights of other employees and the employer.

H.R. 7 further extends employees' rights to discuss their pay and that of others' by failing to connect the protected activity of discussing pay information with a permissible purpose. The broadness of the proposal protects employees from retaliation for inquiring about, discussing, or sharing pay information regardless of whether they do so with the intent to identify or remedy an unlawful pay disparity that is attributable to sex. For example, as currently written, the bill would allow an employee who is angry at their manager to survey co-workers to obtain compensation information and publish it in a public forum – without any connection to a desire to remedy a discriminatory pay practice or other unlawful employment practice.

Finally, unlike existing federal law, H.R. 7 does not attach any standard of "reasonableness" to an employee's activity to be deemed protected activity. An employer would have no remedy against an employee who undertook a mass mailing of pay information, or took out an ad in the local paper, for example, even though most would not consider such activity a reasonable disclosure of employer information – again, even if such activity were not in connection with a good faith concern of an unlawful pay disparity.

This language goes far beyond any rights enjoyed by non-unionized and unionized employees under other federal employment laws.[50]

In contrast, here, H.R. 7 provides an open door for an employee's inquiries and disclosures of the wages of all employees, both within and outside the company, without any balancing of the privacy rights of other employees, an employer's need for confidentiality, and other legitimate concerns. As noted, current law establishes a broad protection to employees or applicants who inquire about general compensation practices or compensation for similar employees, but H.R. 7 stretches these protections unnecessarily to the potential detriment of employees and employers.

### C. The PFA Inappropriately Expands EPA Remedies for Unintentional Wage Discrimination to Include Unlimited Compensatory and Punitive Damages

The EPA provides a mechanism under which aggrieved employees can seek damages and employers will be deterred from engaging in practices that perpetuate unequal pay for equal work. An employee adversely affected by a violation of the EPA is entitled to backpay for the wages not properly paid as well as an amount equal to such backpay as liquidated damages. An employer may avoid liability for liquidated damages under certain conditions where it shows its actions, or its failures to act, were in good faith, believing it was never in violation of the EPA. Reasonable attorney's fees and costs may also be awarded. The EEOC can enforce the EPA on behalf of an employee or an employee can bring a private lawsuit in court with jury trials. The EEOC may request

[50] For example, under the NLRA, non-unionized employees have the right to discuss their own wages with other employees, but this right is not without boundaries and not without safeguards.

injunctive relief and an employer that willfully violates the EPA is subject to criminal prosecution and fines up to $10,000. H.R. 7 would layer upon these provisions an award of unlimited compensatory and punitive damages. H.R. 7 would not require a showing of intent to support an award of unlimited compensatory damages. This expansion would be inappropriate and provides a level of damages far exceeding those available under Title VII of the 1964 Civil Rights Act, as amended in 1991 by Congress.

In passing the Civil Rights Act of 1991, Congress expanded the forms of relief available to an individual who is the victim of *intentional discrimination* under Title VII so as to include compensatory and punitive damages, capped at certain levels (depending on the size of the employer). Importantly, one of the key compromises which led to the 1991 CRA's passage was to limit these damages to intentional cases of discrimination. (In disparate impact cases, where intent need not be shown, damages are limited to lost backpay.) And yet the Bill before you would provide for unlimited compensatory damages without proof of intent. The required showing for proof of an EPA violation is lower than under Title VII, but the available damages are higher. What is more, H.R. 7 would also allow for uncapped punitive damages in addition to the EPA's existing double recovery of economic damages.

The current damage mechanisms under the EPA serve their intended purpose of eliminating wage disparities, making employees whole, compensating employees with an equal amount of special liquidated damages, and paying all attorneys' fees and costs. These remedies are appropriately proportional as a remedy for an employer's actions that produce unintentional, unlawful wage disparities. To upend this design through a contortionist's attempt to carry over parts of Title VII's remedial scheme in a selective manner, and expand damages under lower proof requirements is not appropriate.

D. The EPA's Collective Action Mechanism in Section 216(b) Should Not Be Amended to Incorporate Fed. R. Civ. P. 23

Like multi-plaintiff actions under the FLSA and the ADEA, EPA actions brought by individuals on behalf of themselves and others similarly situated under the collective action mechanism of Section 216(b) require interested parties to file with the court a consent that they wish to "opt-in" to the case before becoming part of the action. This is a mechanism that gives workers the choice of whether to become affirmatively bound by any adverse rulings against the employees' interests adjudicated in the case. The other benefit to Section 216(b) collective action plaintiffs in cases brought under the FLSA, ADEA, and EPA is that courts generally impose a more lenient standard with respect to a plaintiff's initial showing of being similarly situated to fellow employees in order for their claim to survive the early phases of litigation. This standard is more stringent under Federal Rule of Civil Procedure 23(a), which is applicable to class actions sought under Title VII, and under H.R. 7, would also apply to multi-plaintiff cases under the EPA. The proponents of H.R. 7 have not articulated a compelling reason for any change in the current collective action mechanism available to plaintiffs under the EPA.

Under Rule 23, to bring a class action a plaintiff must first meet all of the "strict requirements" of Rule 23(a) and at least one of the alternative requirements of Rule 23(b). Under Rule 23(a), a plaintiff must show: the class is too numerous to join all members; there exist common questions of law or fact; the claims or defenses of representative parties are typical of those of the class members; and the representative parties will fairly and adequately represent the

class. Once these requirements are satisfied, a plaintiff must also satisfy one of the subsections of Rule 23(b). Rule 23(b) requires that a plaintiff show either: that prosecution of individual actions would result in inconsistent holdings or that adjudications would be dispositive of the interests of those not named in the lawsuit; that the party opposing the class has acted on grounds applicable to the entire class making relief appropriate for the class as a whole; or that questions of law or fact common to the members of the class predominate over questions affecting only the individual members of the class and that certification is superior to other available methods for fairness and efficiency purposes. When conducting the required analysis under Rule 23, courts must perform a "rigorous analysis" of plaintiff's ability to meet each of these enumerated requirements.[51]

Conversely, under Section 216(b), while some courts use the Rule 23 approach to the extent those elements do not conflict with Section 216 (such as numerosity, commonality, typicality and adequacy of representation), many courts use a less stringent standard, requiring plaintiff to show only that she is similarly situated to other employees. [52] The similarly situated requirement is met through sufficiently pleading and offering evidence obtained in early phases of discovery that discrimination occurred to a group of employees. Courts generally apply a lenient standard to conditional certification of an EPA claim. A person is considered a member of a collective action under Section 216(b) and is bound by and will benefit from any court judgment upon merely filing a written consent with the court and affirmatively "opting into" the suit. This requirement was added to collective actions under Section 216(b) to ensure that a defendant would not be surprised by their testimony or evidence at trial.[53]

Courts regularly face and grant requests to certify both Federal Rule of Civil Procedure 23(a) class actions alleging wage disparity based on sex as a form of sex discrimination under Title VII, as well as Rule 216(b) collective actions under the EPA.[54] When faced by facts presenting a close call as to whether a purported class of workers is similarly situated under the EPA's Section 216(b) and Title VII's Rule 23 mechanisms, and otherwise appropriate for mass action treatment, it is generally the EPA collective claim that survives opposition to a motion to certify a class or collective action alleging sex discrimination in pay.[55] The reason is clear – Section 216(b) contains a more lenient standard for a plaintiff who is attempting to bring a claim

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[51] *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, 671 (N.D. Ga. 2003).

[52] *See Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001) (at the notice stage, the court makes a decision using a fairly lenient standard that typically results in "conditional certification" of a collective or representative action); *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996); *Garza v. Chicago Transit Auth.,* No. 00 C 0438, 2001 U.S. Dist. LEXIS 6132, at *5 (N.D. Ill. 2001), citing *Woods v. New York Life Ins. Co.,* 686 F.2d 578 (7th Cir. 1982).

[53] Portal-to-Portal Pay Act, 29 U.S.C. Section 256(b); *Allen v. Atl. Richfield Co.*, 724 F.2d 1131, 1134 (5th Cir. 1984).

[54] *See, e.g., Jarvaise v. Rand Corp.*, No.96-2680 (RWR), 2002 U.S. Dist. LEXIS 6096, at *5 (D.C.C. Feb. 19, 2002) (class certification granted under EPA and Title VII to all female employees in exempt positions who did not make compensation decisions); *Garner v. G.D. Searle Pharm. & Co.*, 802 F. Supp. 418, 422-24 (M.D. Ala. 1991) (EPA collective action motion granted on behalf of female medical sales representatives).

[55] *See, e.g., Rochlin v. Cincinnati Insurance Co.*, No. IP 00-1898-C H/K, 2003 U.S. Dist. LEXIS 13759, at *49-51, 64 (S.D. Ind. July 8, 2003) (Rule 23 class certification of sex discrimination in pay claim denied, but Section 16(b) collection action claim allowed to proceed as a class action as the standard is more lenient under the EPA).

on behalf of herself and other similarly situated women for unequal pay. Specifically, it is viewed by many courts as encompassing a more liberal standard for conditional certification relative to Rule 23. For these reasons, this collective action mechanism should not be amended to conform to Rule 23 requirements as proposed by H.R. 7, as the current mechanism sufficiently balances the interests of employers and aggrieved employees, and the proponents of the bill have not sufficiently demonstrated a need for such a procedural overhaul.

E. Requiring the EEOC to Collect Disaggregated Pay Data from Employers Raises Significant Concerns

The unquenched interest of the government in collecting reams of data from the regulated community is an ongoing issue. Data collection is often viewed as a mere ministerial act by which employers can access an HR information system and automatically prepare reports containing the most intimate details of their employees. Such a mindset is reflected in Section 8 of H.R. 7 which would establish a significant new data collection obligation to be administered by the EEOC. This new requirement does not provide adequate protection for the privacy and confidentiality of employee personnel and compensation information.

H.R. 7's Section 8 proposes that the EEOC "issue regulations to provide for the collection from employers of compensation data and other-employment-related data (including hiring, termination and promotion data) disaggregated by the sex, race, and national origin of employees." This sweeping, new authority is based on an amendment to Title VII.[56] H.R. 7 has been premised on alleged weaknesses of the Equal Pay Act. The data to be collected under Section 8, however, has very little to do with the Equal Pay Act. Rather, it is a new provision designed to greatly enhance the data collection of the EEOC in support of its Title VII authority. The implications are substantial.

The core element of the Equal Pay Act begins with a comparison of pay between equal jobs. The requirements of Section 8 ignore this basic focus. For instance, H.R. 7 refers to collecting compensation data by "job categories, including the job categories" set forth in the EEOC's Information Report ("EEO-1). Such job categories are exceedingly broad and share no relationship to the basic tenants of "equal work" required under the EPA. Likewise, requiring collection of hiring, promotions and terminations data are also data points that have no relevance to EPA claims. Thus, by compelling employers to create new personnel data collection systems for information generally not relevant to the Equal Pay Act, H.R. 7 will impose new vastly expensive and intrusive obligations on employers unrelated to the Equal Pay Act's purposes.

The Equal Pay Act does not address race or national origin discrimination, nor does H.R. 7 as a whole. There are no findings supporting a broad new assertion of data collection authority relating to the race or national origin of employees. What's more, employers under Title VII have never been required to collect, let alone maintain or submit, data on the national origin of employees. H.R. 7 does not contain any reference to an empirical study to support the collection of such data or any official estimates of its costs. And, perhaps most importantly, there are no outer boundaries limiting the reach of this data collection requirement.

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[56] The current survey tool used by the EEOC under Title VII, the EEO-1 report which collects only demographic employee workforce counts is limited to employers with 100 or more employees or government contractors with 50 or more employees. In contrast, the Equal Pay Act covers employers with 2 or more employees and business volume of $500,000 or more.

For these reasons Section 8 of H.R. 7 should not be inserted into the Equal Pay Act.

F. H.R. 7's Mandates Regarding OFCCP's Investigative Techniques and Methods Are Inappropriate

Statutes provide relatively broad policy goals and enforcement schemes in which the agencies with subject matter expertise are delegated the power to fill in the details, monitor compliance, investigate potential violations, and enforce H.R. 7.[57] Enforcement policies and procedures are left to the responsible agencies who engage in rulemaking pursuant to the Administrative Procedures Act. Those requirements ensure the public has an opportunity to participate in a meaningful way in the rulemaking process.[58] In contrast, H.R. 7 rejects these fundamental principles and micromanages how the OFCCP should conduct its investigations and the procedures it and the regulated contractor community must follow. More importantly, H.R. 7 imposes EPA requirement son federal contractors where there is currently no authority for doing so.

Section 9(b)(2) of H.R. 7 mandates that the OFCCP follow the EEOC Compliance Manual with respect to defining "similarly situated employees," even though the EEOC's current Compliance Manual definition is not otherwise included in any statute, and it therefore seems inappropriate to be codified into law and prescribed for the OFCCP to follow. The EEOC Compliance Manual is not law, nor regulation, and can be changed at any time by the EEOC. The Supreme Court has repeatedly declined to give *Chevron* deference to EEOC Guidance.[59] H.R. 7 would effectively codify EEOC guidance that could be changed at any time at the EEOC's discretion, without legislative, court, or public comment. This is inappropriate.

Also, in a change that would upend the OFCCP's neutral selection system, H.R. 7 would also mandate a compensation data collection survey to be collected annually from at least half of all non-constructor *establishments* each year for purposes of developing a target list of companies to audit. Such a change implicates Fourth Amendment concerns that require either "evidence" of a violation

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[57] Enforcement of the Equal Pay Act's mandate that any differences in pay between men and women performing equal work under similar working conditions, must be explained by job-related reasons such as a seniority system, merit system or a system which measures earnings by quantity or quality of work, was allocated to the Secretary of Labor and then - by Reorganization Plan 1 of 1978, to the EEOC. Similarly, Reorganization Plan 1 consolidated enforcement of the executive orders requiring affirmative action to the Department of Labor, but did not change any of the enforcement procedures of the OFCCP.

[58] United States Attorney General's Manual on the Administrative Procedure Act, p. 1 (1947).

[59] *See e.g., Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S. Ct. 2517, Slip. Op. at 21 (2013) ("Respondent and the Government also argue that applying the motivating-factor provision's lessened causation standard to retaliation claims would be consistent with longstanding agency views, contained in a guidance manual published by the EEOC. It urges that those views are entitled to deference under this Court's decision in Skidmore v. Swift & Co., 323 U. S. 134 (1944) . . . . The weight of deference afforded to agency interpretations under Skidmore depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." 323 U. S., at 140; see Vance, post, at 9, n. 4. . . . [The explanations provided] lack the persuasive force that is a necessary precondition to deference under Skidmore."); Ledbetter v. Goodyear Tire & Rubber Co. , 550 U.S. 618, 127 S.Ct. 2162, 2177 n. 11 (2007), dissenting position adopted by legislative action on other grounds ("Ledbetter argues that the EEOC's endorsement of her approach in its Compliance Manual and in administrative adjudications merits deference. But we have previously declined to extend Chevron deference to the Compliance Manual, Morgan, supra, at 111, n. 6, and similarly decline to defer to the EEOC's adjudicatory positions.").

or a neutral administrative plan to select contractors for audit.[60] To this end, the OFCCP already has in place a robust mechanism for selecting contractors for audit that comports with applicable Fourth Amendment Standards.[61]

Indeed, the collection of data on this scale would be a monumental burden on federal contractors with minimal benefit. In 2015, the OFCCP estimated that a proposed rule would impact over 500,000 federal contractors based on the number of contractor companies registered in the System for Award Management (SAM).[62] While H.R. 7 is limited to non-construction contractors (i.e., service and supply contractors), the report would be required from at least half of service and supply *establishments*, not just contractors. As a result, this number would apply to an exponentially greater number of federal contractors. However, in the last four years, the OFCCP scheduled, on average, only 1,025 service and supply contractor audit annually (2020 - 1,538; 2019 - 1,042; 2018 - 785; and 2017- 735).[63] Thus, to mandate a survey system that would create unduly burdensome requirements applicable to hundreds of thousands of employers, and to expect the agency to then scour the survey data as a method for identifying contractors for evaluation is simply nonsensical and a waste of government resources.

Moreover, there are no identified protections or standards for determining whether the burden of collecting and producing the requested data is appropriate in light of the utility of the data, and that employee privacy and employer confidentiality and trade secret considerations with respect to an employer's compensation data have been addressed before the data is collected. H.R. 7's recordkeeping obligations should not be considered without a thorough analysis of the Fourth Amendment implications, along with the benefit, burden and privacy considerations with respect to compilation and production of sensitive wage data.

G. H.R. 7's Definition of Establishment Is Overly Broad

Currently, the EPA requires that an employee compare their wages against other employees within the same physical place of business in which they work. According to the regulations issued by the EEOC interpreting the EPA, the term *establishment* "refers to a distinct physical place of business" within a company. "[E]ach physically separate place of business is ordinarily considered a separate establishment" under the EPA. The regulations contrast this with the entire business which "may include several separate places of business."[64] Courts presume that multiple offices are not a "single *establishment*" unless unusual circumstances are demonstrated.[65] H.R. 7 assumes the

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[60] *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).

[61] "Contractors can expect OFCCP to use a neutral selection system to identify contractors for compliance evaluations that meets applicable Fourth Amendment standards. OFCCP's neutral process for selecting contractors for compliance evaluations relies on multiple information sources and analytical procedures." https://www.dol.gov/ofccp/regs/compliance/posters/FS_WhatFedContractorsCanExpect-v2ESQA508c.pdf

[62] 80 Fed. Reg. 54933, at 54951 (September 11, 2015). While the OFCCP suggested the number could be overstated because of the monetary threshold of $10,000 for OFCCP covered, they conceded the number might be understated because it may not capture all of the subcontractors over which the OFCCP also has jurisdiction.

[63] OFCCP By the Numbers, Supply and Service Compliance Evaluations Conducted, available at https://www.dol.gov/ofccp/BTN/index.html, last viewed Feb. 9, 2019.

[64] 29 C.F.R. Section 1620.9(a).

[65] *Chapman v. Fred's Stores of Tennessee*, No. 08-cv-01247, at 2013 W.L. 1767791, at *11 (finding relevant establishment was all stores in the nation because there was centralized control applicable to the one job at issue).

opposite, and the expansion of the definition of *establishment* will lead to inappropriate comparisons of employee pay.

H.R. 7 broadens the definition of *establishment* to include "workplaces located in the same county or similar political subdivision of a State." H.R. 7's proposed expansion of the definition of *establishment* within which to consider compensation decisions redefines and expands "equal work performed under similar working conditions" in a way that is inconsistent with rational business decisions. Shouldn't employees who experience a higher cost of living as well as higher commuting costs and longer commuting distances be paid more than other employees performing the same job? Under H.R. 7 an employee bringing an EPA claim could compare their pay to that earned by an employee who performs work outside their physical place of business, but at a completely separate place of business within the same county (or similar political subdivision). For example, H.R. 7 would allow a male employee working in an employer's office in Sauk Village, Illinois, a small suburban village on the outskirts of Cook County, Illinois (with low commuting costs) to that of a female employee who performs the same work in a downtown Chicago, Illinois high rise office building (in a dense urban environment with high commuting costs). It would come as no surprise that an employer might pay the male employee working in Sauk Village with lower commuting costs less compensation for equal work performed by a female employee who experiences higher commuting costs to travel to her worksite each day in downtown Chicago, Illinois. Yet, H.R. 7 would compare their compensation without regard to this geographic difference that explains a difference in pay between the two employees.

H.R. 7's new definition of *establishment* is contrary to the EEOC's regulations that treat the definition of *establishment* as the specific circumstances of the work environment would dictate, including defining *establishment* as beyond one physical location in the presence of "unusual circumstances."[66] H.R. 7's expanded definition to include all physical locations within a county (or similar political subdivision) as one *establishment* should be rejected because it operates on a faulty assumption that all physical locations within a county or political subdivision present similar working conditions for purposes of setting employee compensation. H.R. 7's assumption that all locations within a county should be aggregated as one *establishment* ignores the many geographically-based reasons locations within a county do not present similar working conditions as a result of different costs of living, average commuting distances, and commuting costs. The EEOC's regulations are consistent with the EPA's purpose of ensuring equal pay for equal work, under similar working conditions. Those regulations acknowledge that "unusual circumstances" may exist that require the application of *establishment* across more than one physical location.

## IV. CONSIDER PROVIDING EMPLOYERS INCENTIVES TO PROACTIVELY EVALUATE THEIR PAY PRACTICES TO ENSURE COMPLIANCE WITH THE EQUAL PAY ACT

The most efficient and long lasting improvements in employment practices emanate from voluntary efforts by employers to critically review and implement improvements to those practices.

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[66] Courts interpreting this provision have held that such circumstances may be present when pay and promotion decisions across different locations are controlled from a centralized location. *See, e.g.*, *Mulhall v. Advance Sec. Inc.*, 19 F.3d 586, 591-92 (11th Cir. 1994) ("A reasonable trier of fact could infer that because of centralized control and the functional interrelationship between plaintiff and the comparators . . . a single establishment exists for purposes of the EPA."); *Brennan v. Goose Creek Consol. Ind. Sch. Dist.*, 519 F.2d 53, 57-58 (5th Cir. 1975) (treating schools within the same school district as one establishment).

Today, many employers improve their compensation practices through intense voluntary reviews of employee pay to ensure that differences amongst employees who perform the same work are accounted for by explanatory, job-related variables. And, if the differences cannot be explained by those variables, by revising their pay practices.

These compensation reviews are voluntarily undertaken by employers to ensure compliance with law and to ensure a sound compensation system. Proactive voluntary employer self-evaluations and related pay adjustments can ensure an employer's compliance with the EPA's mandate that differences in pay between employees performing equal work under similar working conditions are explained by job-related reasons, even though an undertaking of that analysis may require significant resources and third party expertise. Today, across the country, employers are motivated to undertake these reviews to ensure sound compensation systems that reward employees based on legitimate job-related reasons.

However, some employers hesitate to perform those reviews for fear that those self-critical analyses may increase their legal risk and exposure if they are subject to disclosure to plaintiffs' attorneys (who may use the information gathered in these self-audits out of context or in other misleading ways to support litigation against the employer), and are not treated as confidential privileged analyses. This disincentive to employer voluntary compensation reviews could be solved through enactment of a safe harbor encouraging employers to perform compensation audits, and protecting those employers who engage in voluntary audits that meet certain specific requirements from having those audits used against them in any future litigation.

Subcommittee members may wish to consider the positive impact of incentivizing employers to voluntarily perform self-evaluations of compensation practices by including safe harbors and limitations on their disclosure, admissibility, or use in future litigation and other proceedings. For example, employers would be even more likely to perform periodic compensation audits if the performance of such a self-evaluation provided the employer: (1) a safe harbor against disclosure of the results of the audit, and (2) other possible affirmative relief (such as an affirmative defense) where the employer conducts the self-evaluation in good faith to assess pay practices and discrepancies in pay between employees performing equal work, and takes prompt appropriate reasonable action to eliminate pay discrepancies that are not explained by job or business-related factors.[67]

The Massachusetts Equal Pay Act, as amended, effective July 1, 2018, M.G.L. Ch. 149, Section 105A**,** provides similar incentives to employers who perform self-evaluations; and it has, in fact, encouraged self-evaluations. The Massachusetts Attorney General has explained that self-evaluations should not be used to second guess employers, noting that whether an employer is eligible for either a safe haven or affirmative defense does not "turn on whether a court ultimately agrees with the employer's analysis of whether jobs are comparable or whether pay differentials are justified under the law, but rather turns on whether the self-evaluation was conducted in good faith and reasonable in detail and scope."[68] I urge Subcommittee members to consider including a similar

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[67] Similarly, an employer's decision to implement only part of the recommendations of a voluntary audit should not be able to be used to demonstrate willful unlawful action.

[68] Office of the Attorney General, Overview and Frequently Asked Questions, at 17 (March 1, 2018).

safe haven for employers who engage in good faith self-evaluations of their pay practices under the Equal Pay Act and Title VII.[69]

## H. R. 1230 -- Protecting Older Workers Against Discrimination Act

In the 116th Congress, the Protecting Older Workers Against Discrimination Act ("POWADA") was introduced as H.R. 1230 on February 14, 2019. This Committee held an omnibus hearing on May 21, 2019, addressing POWADA and other legislation, marked up the bill on June 11, 2019 and the House passed it on January 15, 2020. There had been no action on the bill in the Senate. This testimony is addressing the version passed by the House in 2020.

H.R. 1230 was introduced to address an asserted lapse in the reach of the Age Discrimination in Employment Act caused by the Supreme Court decision in *Gross v FBL Financial Services*, 557 U.S. 167 (2009). *Gross* held that the specific language in the 1991 Civil Rights Act which recognized a mixed motive theory in Title VII did not extend to other anti-discrimination statutes, such as the ADEA. In order to understand the implications of H.R. 1230, it would be helpful to understand what a mixed-motive theory of discrimination entails. Under standard and long accepted jurisprudence, anti-discrimination statutes require that plaintiffs prove either that the employer intended the practice or act which discriminated against a protected class member or class or that a practice otherwise neutral had an overwhelming negative numerical impact on the protected class. The 1991 CRA contained two provisions which were somewhat at odds. The first, 42 USC Section 2000e-2(k)(1)(A)(i), states that in disparate impact cases, " a complaining party demonstrates that a respondent uses a <u>particular</u> employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin and the respondent fails to demonstrate to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." ( emph. added). The act goes on to require in section (1)(B)(i) "the complaining party shall demonstrate that each particular challenged employment practice <u>causes</u> a disparate impact…" (emph. added). Thus the core provision defining disparate impact discrimination clearly requires singular proof of intent. However, the 1991 CRA went on to add another provision, 42 USC sect. 2000e-2(m) which provided that in addition to other provisions of the subchapter, discrimination can be established under the Title VII covered classes when the complaining party demonstrated that membership in one of the protected categories was a motivating factor for any employment practice, even though other factors also motivated the practice. Subsection (m) was an added alternative to the core requirement of required proof and was intended to clarify a concurring opinion in another Title VII Supreme Court decision, *Price Waterhouse v Hopkins* 490 U.S. 228 (1989), concurring opinion at 261 which suggested under the facts of the case that the court might consider alternative reasons advanced for the employment decision. It should be further noted that the plaintiff in the *Price Waterhouse* case prevailed by a 6-3 vote. It should be noted that Congress recognized that the mixed-

[69] Existing incentives to employers under Title VII have spurred the formulation of enhanced employer non-harassment and non-discrimination policies and practices. Under Title VII, an employer may avoid liability for harassment that does not involve an adverse employment action if the employer can demonstrate: (1) it took reasonable steps to prevent and promptly correct sexual harassment in the workplace, and (2) the aggrieved employee unreasonably failed to take advantage of the employer's preventive or corrective measures. *See, Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth* 524 U.S. 742 (1998). *See, also, Kolstad v. American Dental Association*, 527 U.S. 526 (1999) (employer may avoid liability for punitive damages if a discriminatory decision by a manager was made contrary to the employer's good faith efforts to comply with Title VII). After these cases were decided employers focused on the development and enhancement of policies and enhanced procedures to protect employees against workplace harassment and discrimination.

motive theory was subordinate to the core definition of discrimination by limiting remedies if a mixed motive was found to favor the complaining party to include only attorney's fees, and an order directing the employer to cease the offending practice.

While the question of defining mixed-motive proof of discrimination was raised by the 1991 CRA, it is clear beyond question that the Congress only considered its application to Title VII cases and that is what the Supreme Court held in the *Gross* decision. Notwithstanding this clear result, the proponents of POWADA suggest that every statute which addresses discrimination should be interpreted in the same manner notwithstanding differences in coverage, statutory structure and purpose. So the basic argument advanced for POWADA is that decisions addressing age discrimination under the Age Discrimination in Employment Act ("ADEA") should be governed by statutory construction established in a related but different statute, Title VII. This proposition was expressly disavowed by the Supreme Court in *Meachem et. al. v Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008). There the Supreme Court citing to *Smith v City of Jackson* 544 U.S. 228 at 233( 2005) held that "Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age, when it put the "reasonable factors other than age" ("RFOA") clause into the ADEA "significantly narrowing its coverage'" Congress did not denigrate the problem of age discrimination in the ADEA but rather recognized, as it should, that in dealing with the complexities of discrimination, and the unique circumstances of each protected category covered by the plethora of anti-discrimination statutes that not every form of discrimination is the same nor does it require the same definition and remedial response.

The basis for this decision lies not only in the express language of the ADEA and Title VII but in the legislative history of the treatment of age discrimination. Congress considered including age in the protected categories when it debated and passed Title VII as part of the 1964 Civil Rights Act. During the debate held on February 8, 1964, the House voted down an amendment which would have added age to the protected categories by a vote of 123 to 94. In the debate, the lead sponsor, Chairman Cellar (D-NY) stated that the reach of age discrimination, although inherently pernicious was not widely understood and differed from the focus of the Civil Rights Act. Similarly in the Senate debate on June 11, 1964, Democrat Senators Humphrey and Morse and Minority Leader Dirksen as prime sponsors of the Civil Rights Act argued that the problems of age discrimination were distinct from those of race discrimination and should be addressed separately. The amendment to include age in the Civil Rights Act was defeated 63 to 28. When age discrimination was finally addressed in the 1967 Age Discrimination in Employment Act, which was made part of the Fair Labor Standards Act and not Title VII, Congress determined in 29 U.S. 623 (f)(1) that it would not be unlawful for an employer to rely on RFOA.

It is thus antithetical to the structure and basis of the ADEA to drop into that statute a clause from another statute which has its own structure and long history of judicial interpretation and statutory amendment which neither comports with the clear intent of Congress and which cannot coherently exist with the RFOA provision in ADEA. A mixed motive as defined in Title VII would simply negate the RFOA section in ADEA. As drafted, the Title VII mixed-motive theory posits that there could be a good motive and a bad motive for an employment decision and the decider, either Judge or jury would weigh both to determine guilt. But under the RFOA theory, the issue is not to weigh different motivations but to determine if the defending theory was reasonable. If so, the issue is decided. If the mixed-motive theory of discrimination were dropped into the ADEA, it would revise in its entirety the long standing structure and interpretation of the ADEA.

Another significant concern about POWADA which should be addressed is that including a mixed-motive theory into the ADEA and the other statutes at issue will simply encourage needless litigation in which the only successful participant will be the plaintiff's attorney if the plaintiff prevails. If the employer demonstrates that it would have taken the same employment action in the absence of the impermissible motivating factor, by statute the "successful" plaintiff gains nothing from the proceeding and indeed may well be left with a tax liability , when his or her attorney's fee is paid. Too, because the theory of mixed-motive is so elusive, and under the RFOA theory in the ADEA so confusing, it will undoubtedly make it nearly impossible for an employer to prevail on summary judgment even if it has a persuasive explanation for its action. Such a result does not prevent discrimination. Rather, it furthers unnecessary litigation. Indeed, under the mixed-motive theory a persuasive explanation for an employer's action is not persuasive at all. While there could have been a justification to amend Title VII in view of the multiple opinions in the *Price-Waterhouse* decision, inclusion in the ADEA or the other statutes would only serve to upset the statutory structure of those statutes and change the theories under which the those theories of discrimination have been addressed.[70]

In addition to the attempt to include mixed-motive into three different statutes, H.R. 1230 also included language which would have inserted the mixed-motive theory of discrimination into the retaliation sections of Title VII, 42 USC 2000e-3(a), into the Rehabilitation Act and into the Americans with Disabilities Act. The Findings and Purposes section of H.R. 1230 provided no reason or purpose for the inclusion of this statutory addition. In the testimony provided by the advocates for POWADA it was stated that the effort was to reverse the decision of the Supreme Court in *University of Texas SW. Medical Center v. Nassar* 133 S. Ct. In *Nassar,* relying in part on the *Gross* decision, the Supreme Court held that " [t]he text, structure, and history of Title VII demonstrates that a plaintiff making a retaliation claim … must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Nassar* at 2534. In addition, and perhaps even more persuasive, the Court noted that the Congress choose not to amend section 2000e-2(a) when it included the "lessened causation test stated in 2000e-2(m)" *Nassar* at 2533. There was an obvious reason for Congress' decision and the Supreme Court's interpretation of "the text, structure and history of Title VII."

Retaliation is inherently a case of differing explanations. The plaintiff claims that the employer is taking an adverse action because the plaintiff complained of an employer's action. The employer then has to show that its action was otherwise justified because of an employment policy or some other independent reason. The plaintiff will then attempt to show that the employer's explanation is without substance. If the plaintiff is successful. Then all of the operative remedial provisions of the statute are available. The plaintiff will receive actual relief.

However, if the case is a mixed-motive case, which will involve the same set of facts, the plaintiff receives nothing. And since a retaliation case always involves mixed motives or dual motives, an employer's adverse action and the plaintiff's claim that the action was motivated in part at least in part by an improper motive, there will always be a "mixed-motive". However, even if a

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[70] In considering age discrimination and the reach of the ADEA, it should be noted that unlike other protected characteristics, age is not an immutable characteristic and the ADEA treats age differently even as compared to individuals within the protected age level but with different ages. See e.g. *O'Connor v Consolidated Coin Caterers,* 517 U.S. 308 (1996). So in attempting to rationalize the RFOA affirmative defense, with mixed motive treatment, it becomes even more difficult to reach a fair conclusion and the burden on employers is even greater 29 U.S.C. Section 623 (f) (1).

decider weighs the two motivations and determines in some way that the improper motivation was controlling, the plaintiff still receives nothing. This gives the plaintiff's attorney two bites at the apple but the plaintiff herself doesn't even get the core.

While Congress decided to incorporate the mixed-motive theory into Title VII it recognized that mixed-motive was a "lessened causation test" *Nassar* at 2533. It is clear that neither the ADEA nor the ADA are appropriate statutes to include this lessened or ancillary cause of action with limited remedies. To further amend the statutes as well as Title VII to include this theory into the retaliation provisions makes even less sense. It will upset the established methods of adjudicating retaliation and insert meaningless litigation into an already overburdened employment law system.

## H.R. 1065 - The Pregnant Workers Fairness Act

H.R. 1065 - The Pregnant Workers Fairness Act ("PWFA") was introduced in this Congress on February 15, 2021. It was considered in the previous Congress as H.R. 2694, and the issues raised by H.R. 1065 have been introduced and considered before the House in almost every legislative session beginning in 2012. Pregnant workers should be afforded accommodations to permit them to perform the essential functions of their job when limited by pregnancy-related conditions or conditions resulting from pregnancy. But, while H.R. 1065 supports that right, it misses the opportunity to provide employers, employees, courts and regulators much needed clarity on the scope of the affected rights and obligations in accommodating pregnant employees. The Subcommittees should consider incorporating H.R. 1065's protections into a uniform scheme within Title VII which acknowledges and harmonizes the interplay and overlap between and among the multiple laws and regulations in this important area of civil rights while preserving the intent of H.R. 1065.

The Pregnancy Discrimination Act of 1978 ("PDA") 42 U.S.C. Section 2000e(k) amended Title VII by making it illegal if an employer discriminates against a pregnant employee due to her pregnancy or maintains policies which adversely affect pregnant employees. The PDA requires an employer to treat pregnant employees as it treats any other temporarily disabled employee.

Pregnancy was also previously partially addressed in the Americans with Disabilities Act as amended by the Americans With Disabilities Act Amendments Act of 2008 ("ADAAA"). The ADAAA provided that limitations experienced by pregnant workers that were not of short term duration were covered by the ADA which triggered the obligation to engage in an interactive process in order to determine whether there was an accommodation which could be offered to the worker to enable her to continue her employment. While the ADAAA generally excluded disabilities of short term duration, if the pregnancy-related disabilities were "sufficiently severe," the condition was deemed to be covered by the ADA and the requirements of the ADA, including consideration of reasonable accommodations had to be examined.

The Family and Medical Leave Act of 1993 established a complex regulatory process whereby covered employees who experienced a serious medical condition could take leave, including intermittent leave in order to deal with the condition. Pregnancy and the various conditions emanating from pregnancy are generally considered to be serious medical conditions and the employee can take leave, including intermittent leave of up to twelve weeks. While FMLA leave is not compensated, the employees job is generally protected and the employee remains under employer provided health care coverage and other benefits during the leave. Each of these laws is accompanied by complex regulatory requirements.

In addition to the federal statutory coverage for pregnancy, thirty states and numerous local governments have enacted workplace protections for pregnant workers. These local laws all differ as to their definitions, procedures, duration and requirements including the requirement to provide accommodations.

H.R. 1065 further addresses and clarifies for employers and employees how to properly accommodate pregnancy in the workplace. And in addition to these federal and state laws and regulatory requirements, pregnancy has been the subject of various judicial interpretations to further define the obligations employers must comply with. In particular, in the case styled *Young v UPS* 575 U.S. 206 (2015) 135 S. Ct 1338 (2015), the Supreme Court undertook to define the obligations an employer owed to a pregnant employee under the PDA. In that decision, the court attempted to define the obligations of the PDA which provided that the accommodations owed to a pregnant employee had to mirror on some respects the accommodations offered to other employees who had disabilities which affected their ability to perform their job functions. Insofar as that case arose under the PDA, requirements which might have applied under the ADAAA or even the FMLA were not discussed.[71] And because of this narrow treatment of the issues in *Young* there has been confusion as to what the *Young* decision actually directs with respect to the accommodations to be offered to pregnant workers. This then is the nub of the issue with H.R. 1065.

I believe that pregnant workers should be afforded accommodations to permit them to perform the essential functions of their job when limited by pregnancy-related conditions or conditions resulting from pregnancy. The current patchwork of inconsistent and confusing laws have left employers and employees wondering what are their obligations and rights. As Marc Freedman, Vice President of Employment Policy at the U.S. Chamber of Commerce stated recently, "I defy anyone to read that decision and tell me with certainty what an employer is obligated to do or what an employee's rights are." *See There's a New Pregnancy Discrimination Bill in the House. This Time it Might Pass.* https://www.nytimes.com/2021/03/04/us/pregnancy-discrimination-congress-women.html (last visited on 3/12/2021).

Indeed, H.R. 2694 represented a unique situation whereby the impacted stakeholders, employer associations and women's advocacy groups in particular worked hard to reach consensus.[72] And this Committee similarly worked in a bi-partisan manner in order to reach agreement. However, the efforts of last Congress that have been carried forward in H.R. 1065 ignore one salient fact, the area of workplace pregnancy regulation is somewhat overwhelmed with statutory and regulatory requirements which overlap, and require different responses and involve their own complex statutory structure. To this point, section 7 of H.R. 1065 provides:

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[71] As Justice Breyer held : " We note that statutory changes made after the time of Young's pregnancy may limit the future significance of our interpretation of the Act. In 2008, Congress expanded the definition of "disability" under the ADA to make clear that "physical or mental impairment[s] that substantially limi[t]" an individual's ability to lift, stand, or bend are ADA-covered disabilities. ADA Amendments Act of 2008, 122 Stat. 3555, codified at 42 U. S. C. Sections 12102(1)–(2). As interpreted by the EEOC, the new statutory definition requires employers to accommodate employees whose temporary lifting restrictions originate off the job. See 29 CFR pt. 1630, App., Section 1630.2(j)(1)(ix). We express no view on these statutory and regulatory changes." *Young* at 10.

[72] *Id.* ("'The folks that we [the U.S. Chamber of Commerce] worked with on this bill are not folks that we are usually in agreement with,' said Mr. Freedman, but 'giving pregnant women the ability to stay in a workplace is a good thing, and we wanted to find a way to get to that endpoint.'").

> Nothing in this Act shall be construed to invalidate or limit the powers, remedies, and procedures under any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth or related medical condition."

To ensure the benefits of H.R. 1065 are universally and consistently implemented, I ask the Subcommittees to consider incorporating its protections into a uniform scheme rationalizing the interplay between these multiple requirements so that employers may be able to fashion policies consistent with the intent of the law and preserve the intent of HR 1065. Whether this should be a separate statute or, perhaps, replace the PDA and be included as an amendment to Title VII and include all of the provisions of Title VII, including the exemption for employees of religious entities,[73] which govern employment should be strongly considered. And while the historic policy of employment laws is that State and local laws be enforced in parallel with federal law, in this one instance, it seems that uniformity in the treatment of pregnancy would be in the public interest. It does not seem to be a rational public policy to have at least four federal laws dealing with pregnancy, thirty state laws, and additional local laws covering other jurisdictions all accompanied by different regulatory requirements and interpretations and all thereby subject to different judicial interpretations. Pregnant workers deserve a coherent policy structure whereby their rights are clearly set forth and employers need similar consistency. Often, additional statutes covering similar areas are placed upon each other so that the complexity of the area addressed is enhanced rather than limited. Perhaps in the area covered by H.R. 1065, in which their appears to be little difference in the desired outcome, the statute can be constructed to remove uncertainty and confusion rather than add to it.

## H. R. 5592 -- The Providing Urgent Maternal Protections for Nursing Mothers Act

The Providing Urgent Maternal Protections for Nursing Mothers Act (the "PUMP" Act) looks to expand the breastfeeding accommodation requirements and enforcement mechanisms originally provided in the Patient Protection and Affordable Care Act (often referred to as the Break Time for Nursing Mothers law). In particular, the Act extends the breastfeeding accommodation requirements found in Section 7(r) of the Fair Labor Standards Act (FLSA) to exempt employees, most notably expanding the requirements to cover salaried employees. The Act also expressly clarifies that employers are not obligated under the FLSA to compensate hourly employees for time spent during a pumping break if the employee is entirely relieved from performing any work during the break (unless otherwise required by Federal, State, or local law), and expands the private right of action to every technical violation of Section 7(r), regardless of whether the employee has sustained a monetary damage.

The health benefits of feeding infants with breastmilk are numerous and well documented. In addition to the current federal law -- thirty-two states, the District of Columbia, and Puerto Rico have laws concerning breastfeeding in the workplace.[74] For that reason I offer the following two comments for consideration:

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[73] *See*, 42 U.S.C. Section 2000e-1(a)

[74] Breastfeeding State Laws; https://www.ncsl.org/research/health/breastfeeding-state-laws.aspx. (Retrieved March 13, 2021.)

Providing clear guidance to employers in situations where employees are not working at a fixed location, as to how to comply with the Act's obligations. Employees who work in these work environments include commercial airline pilots, patrolling police officers, and delivery drivers (to name a few). How should employers meet their obligations to provide private space for their employees to express milk while they are on duty in these environments?[75]

It is important to consider whether it is appropriate to expand the private right of action under the PUMP Act to every possible violation of Section 7(r), including technical violations that do not result in monetary damages (e.g. a claim that the provided space did not properly shield the employee from view). Employees currently may bring a private right of action (including the right to bring a collective action on behalf of themselves and others similarly situated) when their employer's violation of Section 7(r) results in unpaid wages or when they suffer retaliation for complaining of a violation of Section 7(r)'s requirements. Extending the private right of action to its utmost limit will expose already overburdened courts with a flood of individual and collective actions for technical violations of Section 7(r) -- actions with limited, delayed recovery that will serve as little more than vehicles for attorney fees and will add additional costs and burdens to employers with no benefit to workers. The Department of Labor, which has the power to investigate alleged violations and impose penalties for repeated or willful violations of Section 7(r),[76] is better suited to quickly and sufficiently enforce such technical violations of Section 7(r).

## V. CONCLUSION

In conclusion, I have certain concerns and suggestions with respect to components of the Paycheck Fairness Act and the other bills discussed above. Workforce Protections Subcommittee Chair Alma S. Adams and Ranking Member Fred Keller; Civil Rights and Human Services Subcommittee Chair Suzanne Bonamici and Ranking Member Russ Fulcher; and members of the Subcommittees, thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me if I can be of further assistance in this matter.

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[75] Fact Sheet #73: Break Time for Nursing Mothers under the FLSA; https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers. (Retrieved March 13, 2021.)

[76] The Department can impose a penalty of up to $2,074 per violation against any employer who repeatedly or willfully violates Section 7(r). 29 C.F.R. 578.3.

Chairwoman BONAMICI. Thank you for your testimony. And finally, we'll hear from Ms. Goss Graves. Ms. Goss Graves you're recognized for five minutes for your testimony.

## STATEMENT OF FATIMA GOSS GRAVES, PRESIDENT AND CEO OF THE NATIONAL WOMEN'S LAW CENTER

Ms. GOSS GRAVES. Thank you Chair Bonamici, Chair Adams, Ranking Member Fulcher, Ranking Member Keller, and Chair Scott and Ranking Member Foxx, and all the Members of the com-

mittee for the opportunity to submit this testimony today on the Paycheck Fairness Act and the Pregnant Workers Fairness Act.

I'm Fatima Goss Graves, President and CEO at the National Women's Law Center. This hearing on workplace fairness really couldn't come at a more critical time. Women, and particularly women of color, have been bearing the brunt of the pandemic and economic recession, as essential workers who are risking their lives for minimum wage, and too low wages, as those who have disproportionately born the devastation of job losses and those who are shouldering the majority of responsibility of caregiving without necessary supports.

In many ways the last year has only heightened the importance of proactive efforts to address gender waste gaps and discrimination. Workers are more desperate to keep a paycheck at any cost. They are less willing to uncover and challenge discrimination and workplace abuses, and often face retaliation for doing so.

Again, the pandemic is also likely to deepen the challenges women already faced in hiring and promotion and advancement. And at the same time workers have fewer resources to formally challenge this discrimination. We know that there is a pay gap across occupations including front line workers. It amounts to about 10,000 per year with even higher losses for women of color.

That gap means that Latinos lose well over a million over their lifetime compared to white non-Hispanic men. COVID–19 also has brought home the many ways pregnant workers are already left unprotected on the job. Pregnant workers are doing essential work, and frontline jobs like home health aides and nursing assistant jobs are physically demanding and come with even greater risk during COVID.

No one should have to choose between a paycheck and a healthy pregnancy. But without a clear Federal standard many pregnant workers will continue to be denied accommodations and pushed out of work. And we've already heard today the point that discrimination is already against the law. That's of course the case, and now for five plus decades.

But the truth is we know that the ways that our laws aren't working and allow discrimination to continue to persist. States have moved forward because Congress has not. We have thirty States and the District of Columbia have passed bills, or issued executive orders to explicitly grant pregnant employees, or certain categories of pregnant employees the right to reasonable accommodations at work.

On equal pay we've seen a similar movement. Since 2016 we've had fourteen States plus several localities prohibit employers from relying on prior salary information to set new salaries. And new research shows that these laws are working to narrow gender and racial wage gaps and increase wages for women and black workers.

Multiple States have tightened legal loopholes that allowed employers to justify paying women less for equal work. In addition, pay discrimination because it's often cooped in secrecy and seldom obvious to the person directly affected. States and localities around the country are taking measures in recent years to bring paid practices into the light.

Nineteen States passed laws protecting employee's rights to talk about how much they make. Three States have passed laws requiring businesses to provide salary information to applicants during the hiring process, and States, including California and New Jersey have enacted pay date of recording requirements.

Globally we've seen movement too. In Europe we've seen legislation requiring analysis and reporting of compensation data, and public disclosure of wage gaps. And research shows the positive effects of these mandates on driving employer pay analysis and closing dates gap.

But it's not enough for States to pass laws, and it's not enough for global corporations to feel any direct pressure to address their U.S. pay practices because of other countries like the U.K. And it's also not enough for some employers to voluntarily take steps to close the wage gaps, although we have been heartened to see that happen.

This country deserves robust baseline protections in our Federal law that actually work. So the Paycheck Fairness Act is definitely part of this response. When it bars retaliation and gets workers who talk about pay and requires employers to report pay data, that's promoting both transparency and compliance.

When it prohibits employers from relying on salary history to set new pay, it prevents pay discrimination from following people from job to job. When it closed the loopholes in the law, it actually ensures that our pay discrimination laws work, and ensures women can receive the same robust remedies for sex-based pay discrimination.

We just believe we can't build back an economy that works for everyone without ensuring all women can work with the quality, safety, and dignity. Thank you for the opportunity to testimony, and my full written testimony is submitted for the record. I look forward to any questions.

[The prepared Statement of Ms. Goss Graves follows:]

PREPARED STATEMENT OF FATIMA GOSS GRAVES


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**Statement of Fatima Goss Graves**

**President and CEO**

**National Women's Law Center**

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

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

**March 18, 2021**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**C. Current law falls short.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**5. Modifying the "establishment" requirement to strengthen employees' ability to prove pay discrimination.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

This overwhelming voter support has been a factor leading to a wave of bipartisan legislation in the states ensuring reasonable accommodations for pregnant workers. Thirty states and the District of Columbia have passed bills or issued Executive Orders to explicitly grant pregnant employees, or certain categories of pregnant employees, the right to reasonable accommodations at work. Twenty-five of these bills have been passed in the last eight years alone, all with bipartisan support, and in the majority of cases with unanimous or near-unanimous support.[86] 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.[87]

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

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

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

most common occupations for pregnant workers—retail salesperson; waiter or waitress; nursing, psychiatric and home health aide; and cashier[88]—report continuously standing on the job,[89] and prolonged standing at work has been shown to more than triple the odds of pregnant women taking leave during pregnancy or becoming unemployed.[90] 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.[91] Indeed, one survey estimated that a quarter of a million pregnant workers are denied their requests for reasonable workplace accommodations nationally every year.[92] When an employer refuses an accommodation request, requiring a pregnant worker to choose between following medical advice and following a boss's orders, it can have grave implications for her health and the health of her pregnancy, as well as serious financial repercussions.

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

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

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.[98] 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.[99] 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.[100] While many measures must work in lock-step to ensure the best possible health outcomes for pregnant people—including ensuring that workers and their dependents have access to comprehensive and affordable pregnancy and post-partum health coverage—the Pregnant Workers Fairness Act is a critical measure to help address our nation's unacceptable pregnancy-related health outcomes.

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

employers' burden in providing such accommodations is slight. Only about 1.5% of workers give birth each year, and only a fraction of those pregnant workers would require accommodations.[101] 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. [102]

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

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

The existing federal laws on the books are not sufficient to protect pregnant workers with medical needs for accommodation from discrimination. Some pregnant workers experiencing significant pregnancy complications have been able to obtain accommodations under the Americans with Disabilities Act or state law equivalents.[104] 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.[105] Pregnancy is not considered a disability as a matter of law or logic, and thus courts have typically required plaintiffs seeking a pregnancy-related accommodation under the Americans with Disabilities Act to demonstrate that they have a significant pregnancy complication that constitutes a disability[106]—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.[107]

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.[108] While the Family and Medical Leave Act is very important and helpful to many individuals who need time off, what many pregnant workers want is to be able to continue to do their job—and many could do so and keep earning income for their families with reasonable accommodations to work rules or duties. The Family and Medical Leave Act does not provide a solution for these workers. And while the Pregnancy Discrimination Act significantly changed the landscape for pregnant workers and provides critical protections against pregnancy discrimination, many courts have unfortunately interpreted the Pregnancy Discrimination Act and state law equivalents narrowly and allowed employers to refuse to accommodate workers with medical needs arising out of pregnancy, even when they routinely accommodated other limitations.

In 2015 in *Young v. United Parcel Serv. (UPS)*,[109] 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.[110] 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.[111] 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."[112] Second, the Court offered some clarification about how an employer may and may not defend an accommodation policy when the pregnant worker has made their showing. The employer may offer a "legitimate, nondiscriminatory" reason for the difference in treatment, but evidence that it is more expensive or less convenient to accommodate pregnant workers does not constitute a legitimate reason.[113] 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.[114]

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

[26] *Id.*

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

[28] *Id.*

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

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

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

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

[33] As Justice Ruth Bader Ginsburg noted in her dissenting opinion:

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

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

[34] *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

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

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

[37] Sun et al., *supra* note 36.

[38] U.S. GOV'T ACCOUNTABILITY OFFICE, GENDER PAY DIFFERENCES: THE PAY GAP FOR FEDERAL WORKERS HAS CONTINUED TO NARROW, BUT BETTER QUALITY DATA ON PROMOTIONS ARE NEEDED (Dec. 2020), https://www.gao.gov/products/gao-21-67#:~:text=The%20overall%20pay%20gap%20between,of%20Personnel%20Management%20(OPM).

[39] NWLC, PROGRESS IN THE STATES FOR EQUAL PAY (Nov. 2020), https://nwlc.org/wp-content/uploads/2019/11/State-Equal-Pay-Laws-2020-11.13-v2.pdf. Research indicates that some workers fared better in states that passed such laws. *See* Marlene Kim, *Pay Secrecy and the Gender Wage Gap in the United States*, INDUS. RELATIONS (Oct. 2015) (finding that "women with higher education levels who live in states that have outlawed pay secrecy have higher earnings, and that the wage gap is consequently reduced"), https://www.researchgate.net/publication/281769563_Pay_Secrecy_and_the_Gender_Wage_Gap_in_the_United_States.

[40] DEP'T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, *Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions*, 80 Fed. Reg. 54934 (Sept. 11, 2015), https://www.govinfo.gov/content/pkg/FR-2015-09-11/pdf/2015-22547.pdf.

[41] 29 U.S.C. § 157; *see also Flex Frac Logistics, L.L.C. v. N.L.R.B.*, 746 F.3d 205, 208 (5th Cir. 2014) ("A 'workplace rule that forb[ids] the discussion of confidential wage information between employees . . . patently violate[s] section 8(a)(1)[of the NLRA].'") (internal citations omitted); *N.L.R.B. v. Inter-Disciplinary Advantage, Inc.*, 312 F. App'x 737, 744 (6th Cir. 2008); *Campbell Elec. Co. & Local Union 153*, 340 N.L.R.B. 825, 836 (2003); *N.L.R.B. v. Main St. Terrace Care*, 218 F.3d 531, 538 (6th Cir. 2000); *Wilson Trophy Co. v. N.L.R.B.*, 989 F.2d. 1502, 1510-11 (8th Cir. 1993); *N.L.R.B v. Vanguard Tours, Inc.*, 981 F.2d 62, 66-67 (2d. Cir. 1992); *Jeannette Corp. v. N.L.R.B*, 532 F.2d 916, 918 (3d Cir. 1976).

[42] *See* NWLC, COMBATING PUNITIVE PAY SECRECY POLICIES (Feb. 2019), https://nwlc.org/resources/combating-punitive-pay-secrecy-policies/.

[43] *See* 29 U.S.C. § 152 (defining "employer" and "employee"). In 2006, the National Labor Relations Board issued three decisions providing further guidance for determining supervisor status under the NLRA. *See Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 (Sept. 29, 2006); *Croft Metals Inc.*, 348 NLRB No. 38 (Sept. 29, 2006); and *Golden Crest Health Care Ctr.*, 348 NLRB No. 39 (Sept. 29, 2006).

[44] 29 U.S.C. § 152.

[45] 41 C.F.R. § 60-2.1.

[46] In FY 2020, retaliation accounted for 55.8% of all charges filed. *See* EEOC, EEOC Releases Fiscal Year 2020 Enforcement and Litigation Data, Feb. 26. 2021, https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data.

[47] *See* NWLC, PROMOTING PAY TRANSPARENCY TO FIGHT THE GENDER WAGE GAP: CREATIVE INTERNATIONAL MODELS (Mar. 2020), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/06/International-Pay-Transparency-Models-v2.pdf (providing an overview of the legislation); FAWCETT SOCIETY, THE GLOBAL INSTITUTE FOR WOMEN'S LEADERSHIP AND THOMSON REUTERS FOUNDATIONS, GENDER PAY GAP REPORTING: A COMPARATIVE ANALYSIS (Sept. 2020), https://www.kcl.ac.uk/giwl/assets/gender-pay-gap-reporting-a-comparative-analysis.pdf.

[48] *See* Morten Bennedsen et al., *Research: Gender Pay Gaps Shrink When Companies Are Required to Disclose Them*, HARV. BUS. REV. (Jan. 23, 2019), https://hbr.org/2019/01/research-gender-pay-gaps-shrink-when-companies-are-required-to-disclose-them; AUSTRALIA'S GENDER PAY GAP STATISTICS 2020, https://www.wgea.gov.au/data/fact-sheets/australias-gender-pay-gap-statistics-2020; Progress Report, 2017-18, Australian Government Workplace Equality Agency (2019), https://www.wgea.gov.au/sites/default/files/documents/wgea-progress-report-2017-18.pdf.

[49] *See* HARV. BUS. REV. ANALYTIC SERVS., *Pulse Survey: Navigating the Growing Pay Equity Movement: What Employers Need to Know About What To Do* 3 (2019), https://resources.trusaic.com/pay-equity-resources-hub/harvard-business-review-trusaic-pulse-survey.

[50] *See* U.S. DEP'T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP), NON-DISCRIMINATION IN COMPENSATION; COMPENSATION DATA COLLECTION TOOL, ADVANCED NOTICE OF PROPOSED RULEMAKING, 76 Fed. Reg. 49398 (Aug. 10, 2011); OFCCP, GOVERNMENT CONTRACTORS, REQUIREMENT TO REPORT SUMMARY DATA ON EMPLOYEE COMPENSATION, NOTICE OF PROPOSED RULEMAKING, 79 Fed. Reg. 46561 (Aug. 8, 2014).

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

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

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

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

[66] *Id.*

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

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

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

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

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

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

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

[74] 29 U.S.C. § 206(d)(1).

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

[76] *See* S.B. 358, 2015 Reg. Sess. (Cal. 2015) (amending Cal. Lab. Code § 1197.5 to eliminate the requirement that employees whose wages are compared work within the same establishment); N.Y. Lab. Law §§ 194(3) ("For the purposes of subdivision one of this section, employees shall be deemed to work in the same establishment if the employees work for the same employer at workplaces located in the same geographical region, no larger than a county, taking into account population distribution, economic activity, and/or the presence of municipalities"). *See also* Equal Employment Opportunity Commission, EEOC COMPLIANCE MANUAL, SECTION 10: COMPENSATION DISCRIMINATION, § IV(D), https://www.eeoc.gov/policy/docs/compensation.html#N_44_ (2000).

[77] 29 U.S.C. § 216(b).

[78] 29 U.S.C. § 216(b); 29 C.F.R. § 1620.33.

[79] 42 U.S.C. § 1981a(b)(3).

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

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

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

[83] 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.

[84] 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.

[85] Brian Nienaber & Ed Goeas, *Pregnant Workers Fairness Act Polling Memo*, THE TARRANCE GROUP (Feb. 2020) (commissioned by ACLU), *available at* https://www.aclu.org/sites/default/files/field_document/pwfa_survey_memo_2-20-20_1_1_2.pdf.

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

[87] *Id.*

[88] 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.

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

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

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

[92] *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.

[93] *See* Covert, *supra* note 911.

[94] *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.

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

[96] *Id.* at 5.

[97] *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.

[98] NWLC & ABB, *supra* note 911, at 12.

[99] MARCH OF DIMES, PREMATURE BABIES (OCT. 2019), https://www.marchofdimes.org/complications/premature-babies.aspx.

[100] *Id.*

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

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

[103] 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.

[104] 42 U.S.C. § 12111 et seq.; 21 V.S.A. § 495 et seq.

[105] NWLC & ABB, *supra* note 911, at 14.

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

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

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

[108] 29 U.S.C. § 2601 et seq.

[109] *Young v. UPS*, 135 S. Ct. 1338 (2015).

[110] *Id.* at 1354.

[111] *Id.*

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

[113] *Id.*

[114] *Id.* at 1354–55.

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

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

[117] 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.

[118] 42 U.S.C. § 12111.

[119] *Id.*

[120] *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

[121] *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) (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).

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

[123] *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

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

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

[126] "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).

[127] *Hibbs*, 538 U.S. at 727.

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

[129] Siegel, *supra* note 122, at 225 ("The reasonable accommodation framework relieves individual employees of the burden of proving animus: of showing that an employer's inflexible imposition of workplace standards reflects sex stereotyping that flows from the invidious assumption that pregnant workers are not competent or committed workers."). In this way, the protections offered by the Pregnant Workers Fairness Act would be analogous to Title VII's disparate impact provision, justified under Section 5, as a remedy for intentional discrimination that is difficult to prove. *In re Empt. Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1321–23 (11th Cir. 1999); *see also 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).

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

[131] *Id.*

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

[133] NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 132.

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

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

[136] *Id.*

[137] *Id.*

Chairwoman BONAMICI. Thank you for your testimony.

Under Committee Rule 9(a), we will now question witnesses under the five-minute rule. After the Chairs and Ranking Members, I will recognize Members of both subcommittees in the order of their seniority on the full committee.

Again, to make sure that the Members' five-minute rule is adhered to the staff will be keeping track of time and the timer will sound when the time has expired. Please be attentive to the time and wrap up when your time is over and then re-mute your microphone.

And as chair, I recognize myself for five minutes.

We have discussed how reasonable accommodations do not need to be, nor are they typically complicated or costly. But when pregnant workers do not have access to the accommodations they need, they are forced to choose between their financial security and their pregnancy, and the results can be devastating.

Ms. Bakst can you describe which pregnant workers are most negatively affected by the lack of a reasonable accommodation?

Ms. BAKST. Absolutely, thank you. So, the pregnant workers who are most negatively affected are women in low-age inflexible and physically demanding jobs, disproportionately black and Latino women who work in both the private and State employers.

Many low-income workers can't work from home. Millions remain in the work force with women of color disproportionately represented in frontline, often low-wage jobs such as fast food, retail, home health, and State police officers, where they continue to fact structural biases that prevent them from caring for themselves and their loved ones, and maintaining their economic security.

When a low-income pregnant worker loses her income, she doesn't have access to job protective leave, too often doesn't have access to fall back on, so she spirals into deeper economic trouble with lasting economic and health consequences. We've seen workers who've lost their health insurance, forcing them to delay or avoid critical pre or post-natal care.

Or leaving them with crippling medical bills. Others like Armanda struggling to feed their families, or others wind up homeless. Some prospects of promotion, advancement and retirement savings also disappear, especially as it becomes more difficult to reenter the work force after becoming a mother, exacerbating their gender wage gap, and many mothers falling deeper into poverty.

Preserving pregnant workers economic security is especially important at a time when the COVID–19 pandemic has disproportionately again for women of color and low-wage jobs, with many experts suggesting that it could take years to undo the economic damage.

And many will have experienced long-term hits to their careers, earnings, and retirement security. While the PWFA was needed before the pandemic, it has taken on a new urgency as a critical measure to keep women health and attached to the work force.

Chairwoman BONAMICI. Thank you Ms. Bakst. I know you mentioned a bit in your oral testimony, but can you briefly talk about what kind of health complications can arise when pregnant workers don't have a reasonable accommodation? And I do want to allow time for another question, so if you could be brief thanks.

Ms. BAKST. Sure. Look, pregnancy accommodations are a crucial tool to address our Nation's maternal and infant health crisis right. Just I'll never forget a pregnant cashier who fainted and collapsed on the retail floor due to dehydration because her employer wouldn't let her carry a water bottle.

A former client, Tasha Morell in Tennessee, was forced to continue heavy lifting while pregnant and working in a factory and wound up miscarrying. And just this past year one court held that a pregnant worker with complications including preeclampsia, was

unprotected, and not entitled to accommodations because she didn't have a disability.

This is absurd. These accommodations are low-cost, often with low or no cost, but with high impact having to prevent miscarriage, pre-term birth, low birth weight, preeclampsia, birth defects, and the racial disparities and maternal health outcomes are truly just staggering.

Chairwoman BONAMICI. Thank you very much. And I'm going to have to move on, and I know that my home State of Oregon has passed at the State level, similar legislation, which was broadly supported, including by the business community because it's given them certainty about what they need to do to accommodate pregnant workers.

So, my home State of Oregon has one of the most rapidly aging populations in the country, and I've heard from workers particularly in the technology industry who have been dismissed or denied employment because of their age.

But investigations by the U.S. Equal Employment Opportunity Commission often take years to complete, and age discrimination is as we heard in the testimony often very challenging to prove. So, Ms. McCann, can you explain how the change in the standard of proof in the 2009 Gross decision, and I note that Mr. Jack Gross was with us when we had a hearing on this in the last Congress.

How has that adversely affected age discrimination in employment claims? And are ADEA claims more difficult to prove after the Gross decision, and if so, how? And there's not a lot of time left if you could be brief.

Ms. MCCANN. Sure. So, I think there's three ways that it's negatively impacted age claims. One as I said, it sends a message to the courts that age discrimination is not as wrong, and that translates into bad decisions. In the mixed motive framework, once the age discrimination Plaintiff is able to prove that there age did motivate the employer's actions, they cannot prevail unless they are also able to prove that another factor did not influence the adverse decision, which is an almost impossible task for the older worker.

Chairwoman BONAMICI. And Ms. McCann, I'm sorry but I have to set a good example and cut myself off because I'm out of time, but I look forward to continuing the conversation. I'm sure you will get other questions.

Ms. MCCANN. Understood OK.

Chairwoman BONAMICI. And I now recognize Ranking Member Fulcher for the purpose of questioning the witnesses for five minutes.

Mr. FULCHER. Thank you, Madam Chair. I've got a question for Ms. Olson if I may. I just want to touch on what I think could be a significant real-world application here. So, Ms. Olson thank you for your testimony.

When Congress considers a piece of legislation, I believe we should be absolutely clear about how the legislation would affect the American people, and when it comes to protecting Older Workers Against Discrimination Act, my experience tells me that most workers filing lawsuits, even if successful, will not likely recover any damages, but their attorneys will be awarded costs and fees. Is that your sense with this?

Ms. OLSON. Thank you for your question. And the answer is yes. It's not just my sense, and it's not just the majority. No worker under a mixed motive theory, whether it's brought under Title VII, the Age Discrimination Employment Act, or any other act, receives any monetary remedy.

That is why you don't see many of the mixed motives cases that are brought, so to amend the Age Discrimination Employment Act, or any of the other acts that are at issue here with the language from POWADA, is going to do nothing to help workers.

That's true today. That's true today under Title VII in terms of mixed motive that's available for certain types of causes of action, and that would be true tomorrow with respect to older workers. And if I just might note. If you look after the Gross decision in 2009, 10 years after it, the average percentage of EEOC charges that are age case, age charges, 21 percent.

The ten years prior to Gross it was 22 percent, virtually the same. Since Gross I have counted at least twenty-two different Court of Appeals decisions that have granted summary judgment under the Gross standard for Plaintiff, or reverse summary judgment for Defendant, saying the ultimate question of whether the Plaintiff's termination was a result of age must go to a jury.

So, I don't see the need, and I don't see the benefits. Most importantly, under POWADA, for a mixed motive theory in either the Age Act, or any other statute that's considered under POWADA.

Mr. FULCHER. Ms. Olson thank you for that. You mentioned mixed motive claims, and so my next question is kind of two stage, but it brings that in. In 2013 the Supreme Court ruled that mixed motive claims are not allowed in Title VII retaliation cases.

And retaliation cases are especially ill-suited to include mixed motive claims. So from a policy perspective could you explain if and why the court's 2013 decision was sensible, and also this is the second part of the question, based on your experience as a litigator, what concerns would you have in allowing mixed motive claims in these retaliation cases?

Ms. OLSON. Thanks for your question. The concern I have is limitless, never-ending litigation that's going to go beyond summary judgment but will not result in an award for anybody in terms of a worker alleging retaliation.

In terms of why it's not suited, why mixed motive isn't suited for retaliation claims, it's because the mixed motive says if a person—if retaliation, or an element of retaliation, such as the engaging in a protected activity is 1 percent, it's in the room. It's in the air. It's relevant.

It was close in time the protected activity that was engaged in. That becomes part of a potential motive for a jury to determine, even if everybody agrees that the reason the employer took the action was not for retaliatory basis. Even so, even if everyone agrees that the reason was a good reason, it was not retaliation, the fact that the prima facia case in a retaliation claim includes the fact that the Plaintiff engaged in a protected activity, sometime close in time, that leads you to a potential jury verdict, and a potential result that again is not going to benefit the worker because they get no monetary damages.

They get no employment injunctive relief for themselves, even if their lawyers win that case.

Mr. FULCHER. OK Ms. Olson, just thank you for that. I could do about 10 more questions but thank you for your answers. I've run out of my time. You were very clear on this, and I greatly appreciate your testimony. Madam Chair I yield back.

Chairwoman BONAMICI. Thank you, Ranking Member Fulcher. I next recognize Chair Adams for five minutes for your questions.

Chairwoman ADAMS. Thank you, Madam, Chair, and thank you to all the witnesses for your testimony. Ms. Goss Graves, the Paycheck Fairness Act clarifies that if an employer justifies pay disparity based on a factor other than sex, such defense must be based on a bona fide job related factor, such as education, training or experience that is consistent with business necessity.

So, can you give us examples of how this business defense has historically been applied in ways that perpetuate gender-based waves of discrimination?

Ms. GOSS GRAVES. Sure. The first thing I just want to remind everyone is that there are already defenses embedded in the Equal Pay Act that go beyond the factor of sex. So, we're not talking about thinks like experience or education, or different specific skills. Those are listed out specifically.

What we're talking about is the factor other than sex, and there what we have seen is some employers pointing to vague notions of the market, or the ability to negotiate more, even though there's all of this research that shows that women are often penalized when they negotiate. They are considered to be too mean or bossy when they engage in behavior that's considered typically male behavior.

Or sometimes, people just point to the fact that men make more in the market. And so, what the factor other than sex defense would do is tighten the number of reasons and justifications for people paying people who were basically doing the same thing, different salaries.

Chairwoman ADAMS. So, Ms. Olson claims that H.R. 7 pushes the EPA to heights that would essentially obliterate the other factor, other than sex affirmative defense, out of the statute. Is this the case?

Ms. GOSS GRAVES. It certainly does not, but it does actually require a legitimate business justification, and require that it be tested. It's not enough for an employer to just say here's a business justification. It's important for that justification to be tested so that you don't have someone doing something that basically is a proxy for sex discrimination.

Otherwise, the factor other than sex, would continue to be such a large loophole it swallows the whole requirement that you pay people equal wages for doing equal jobs.

Chairwoman ADAMS. Thank you. Ms. Bakst I've heard some concerning reports of workers who are currently eligible for breastfeeding protections being denied accommodations during the pandemic. Why are workplace accommodations for nursing mothers to pump breastmilk even more important now during the pandemic as workplaces reopen?

Ms. BAKST. Sorry about that.

Chairwoman ADAMS. Oh, that's all right, go ahead.

Ms. BAKST. That's right. And at A Better Balance we've also heard concerning reports as well where the pandemic seems to be used as an excuse by some employers to dodge their legal responsibilities to breastfeeding employees, even when providing breaktime and space is no harder than it was before.

It is essential that employers follow the law, and provide breaktime and space to their breastfeeding employees during the pandemic because hundreds of thousands of women have left the work force as a result of caregiving responsibilities and pregnancy discrimination, providing support for new mothers is critical to helping women get back into the workplace.

The pandemic has laid bare the systemic barriers that prevent women from staying in the workplace and thriving. Breaktime and space are part of a broader range of solutions. We need to support mothers so they can work and care for their families without risking their economic security.

Chairwoman ADAMS. Thank you, ma'am. Madam Chair I yield back.

Chairwoman BONAMICI. Thank you, Chair Adams. I next recognize Ranking Member Keller for five minutes for your questions.

Mr. KELLER. Thank you, Madam Chair. Ms. Olson I want to thank you and all the other witnesses for your testimony, but under H.R. 7 to defend against a claim of pay discrimination, an employer must show the pay differential is a business necessity, even after showing this, the employer defense does not apply if the Plaintiff can demonstrate an alternative business practice would not result in a pay differential.

Do you agree the business necessity requirement in H.R. 7 is unworkable, and makes it nearly impossible for a business owner to defend against a pay discrimination claim?

Ms. OLSON. Unequivocally, it does make it impossible. It is unworkable. And I really have to correct the record on the last couple of questions and answers. Business necessity is not currently part of the Equal Pay Act, and in addition experience and special skills are not enumerated factors in the Equal Pay Act, notwithstanding what's been said in this hearing.

The only factors that are enumerated are seniority, merit and productivity, and other factors similar to those other than sex.

Mr. KELLER. Thank you. I appreciate that. Also, you State in your testimony Ms. Olson employers of all sizes need clear guidance and predictable outcomes when applying the law to their employment policies and practices. In your view, does H.R. 7 provide clear guidance and predictability?

Ms. OLSON. It absolutely does not, and I would tell you that if you look at my testimony which is quite detailed, that I included 9 different examples on pages 9 through 14 of specific real-life cases where an employer could not show business necessity.

Ms. Graves just mentioned that the business is required to test. So, if a business determines that it is going to pay more for an applicant because of their years of experience, or their seniority at another employer, which they believe is relevant to the job, how is that tested?

Business necessity has never been part of the Equal Pay Act. Job related and business related has always been part of the factors other than sex, as all the Court of Appeals that I've cited in my testimony have noted, and that's how employers are in fact understanding the Equal Pay Act, and applying their pay practices.

What is business related? That employers know. What is a business necessity? It's not defined. It's nothing defined by any witness here. It's not defined by any court cases, and as I described in my testimony, does that mean the business can't live without it? How does an employer show when an applicant says, "I won't become employed unless my pay is $1.00 more an hour because I've got five more years of experience, or I've got more education than someone.

Those are factors that fall under the factors other than sex affirmative defense. How does an employer show that to business necessity? And even if they can they lose if later on in litigation a litigant says what? You could have made up the difference by increasing everybody's pay.

What the Paycheck Fairness does in terms of business necessity and the other unworkable changes to the Equal Pay Act, is it disadvantages all workers who have higher qualifications, and seek, and employers believe justifiably, have qualifications that relate to their business and the job, and want to pay them for that.

Mr. KELLER. Thank you. That answered actually the questions I had regarding experience and other business-related factors, education, productivity, job skills. But I have another question Ms. Olson. H.R. 7 provides for unlimited compensatory and punitive damages, and it also expands class action lawsuits for pay discrimination claims.

Will these provisions address pay discrimination in the workplace, or will they merely encourage costly litigation that will benefit trial lawyers?

Ms. OLSON. There's no question that changing the class action procedure under the current Equal Pay Act from a collective action to a Rule 23 class action will slow recovery, will slow the course of litigation, will not allow the litigants to actually focus on—and the difference is currently under the Equal Pay Act, if a collective action is brought, which is a class action procedure, the court sends out a notice to all potential workers and says, do you want to be part of this?

And if so, just send back in a form. Anybody who sends back in a form then is part of it, and you focus on that group of individuals to determine whether the case will be settled, or it will be litigated, but on real facts.

In a Rule 23 class action it is my day to day experience that employers spend hundreds of thousands of dollars, if not millions of dollars on class certification, procedural arguments that take years to be resolved before anyone ever gets the resolution.

And in terms of unlimited compensatory and punitive damages, remember the Equal Pay Act is a strict liability. You don't have to prove intentional discrimination. It already allows double damages. It allows Plaintiffs to go back 3 years of willful, as opposed to 300 days for a charge of discrimination under Title VII.

These damages are greater and different than any other damages we see in any discrimination law and are unnecessary under the Equal Pay Act.

Mr. KELLER. Thank you. I appreciate that and I yield back.

Chairwoman BONAMICI. Thank you, Ranking Member Keller. And next we have the Chairman of the Full Committee on Education Leader, Mr. Scott from Virginia you're recognized for five minutes for your questions.

Mr. SCOTT. Thank you. First, I'd like to ask Ms. Goss Graves, we've heard a lot of confusing things about the Paycheck Fairness Act. Can you tell me what the differences are in recovery now and what the differences in recovery and process would be if the bill would pass?

Ms. GOSS GRAVES. Right now, under the Equal Pay Act you are allowed to get back pay for 2 years. And in particular types of conduct, sometimes that amount can be doubled. If you're talking about a low-wage worker, what that means effectively is that the amount that they can recover under the Equal Pay Act might not actually cover their actual costs from experiencing pay discrimination.

Under Title VII of the Civil Rights Act, damages have been capped, and not adjusted at any point in time in over three decades. And so, what that actually means is that if someone is bringing a pay discrimination claim, their damages are arbitrarily limited. They don't actually match what they have experienced.

Mr. SCOTT. And how does the Paycheck Fairness Act fix that?

Ms. GOSS GRAVES. So, what the Paycheck Fairness Act would do is allow people to recover the full amount of their damages, the full amount that they are injured. And so, I just wanted to correct one thing. You know the use of the term unlimited doesn't actually apply.

The limit is actually your injury, so it is never unlimited.

Mr. SCOTT. And how is that compared to other forms of discrimination?

Ms. GOSS GRAVES. Well one of the differences is that if you were bringing a race-based claim, there is an alternative outside of the Civil Rights Act by being able to bring a claim under Section 1981.

And so right now there's this weird conundrum where for sex-based pay discrimination claims you have this sort of limit, and you don't have a current similar vehicle similar to 1981.

Mr. SCOTT. What's wrong with asking about salary history?

Ms. GOSS GRAVES. So, here's the thing about salary history. The reason, it's less about asking, but it's really how you're going to use it right? The reason why employers want to ask about salary history is because they want to match salaries. If you were making $100,000.00 in your last job, you should make $100,000.00 in your next job.

But the truth of the matter is we know that women start off making less from the earliest points in their career. So, setting your new salary on the salary you might have made at the last job is a way to guarantee that you never get out of the cycle of making unfair pay.

Mr. SCOTT. And we've heard about the employer having to prove that once you've shows the difference in salary, the employer has

to prove that there is a non-gender reason for the differential. It seems to me that an employee can't possibly know what's wrong with requiring the employer to show—after you show him the difference, the employer is the only one that knows why there's a difference.

Ms. GOSS GRAVES. I mean basically all of the salary information lies in the hands really of the employer. The employer knows why they're paying people doing the same thing different wages. What we want to do is put the incentive so that the employer pays people correctly the first time.

That's what we're trying to incentivize here. And I just wanted to correct one thing, because I don't want to confuse the committee, and I'm happy to give a longer written response. And that is so currently under the Equal Pay Act you were right, it's seniority. I was using experience as a shorthand.

The Paycheck Fairness Act makes very clear as examples around education, experience, and skill. I have yet to hear the example that is not an example that you wouldn't want to test and probe further, for paying people doing the same thing different wages.

And these ideas from employers really do have to be tested in some way.

Mr. SCOTT. Thank you. Ms. McCann have you heard anything about the POWADA that you wanted to respond to?

Ms. MCCANN. Yes, thank you. I think Ms. Olson's testimony ignores three important facts. One, that Congress has determined that any amount of discrimination is too much. And that the goal of civil rights protections is not more litigation, it's less discrimination.

And although she makes a lot of the fact of in a mixed motive case the victim does not receive back pay or reinstatement, she ignores the fact that the injunctive relief and declaratory relief that is available to a successful mixed motive Plaintiff goes a long way in deterring future violations.

And that there are two goals to every civil rights statute. One is compensation, but the other is deterring future violations. And what POWADA recognizes is that no age discrimination, no amount of discrimination should be tolerated. Thank you for the opportunity.

Mr. SCOTT. Thank you. Yield back.

Chairwoman BONAMICI. Thank you, Mr. Chairman. Next, we're going to recognize Mr. Thompson from Pennsylvania for five minutes for your questions.

Mr. THOMPSON. Chairwoman, thank you very much. Thank you, Ms. Olson, for being here today to you know discuss these issues. I would say it would have been nice to see a more balance of witnesses. Just for the record I agree with Ranking Member Keller on that. If we're going to pursue bipartisan solutions, we need to have everybody at the table, so.

But thank you Ms. Olson for being here today to discuss these important issues. As you know two Federal laws currently prohibit discrimination wages, and the terms and conditions of employment based on sex. Thus, equal pay for equal work is already required by Federal law.

Now I was reading your testimony, you mentioned how much time and effort businesses put in to determining workers various pay levels which they must do to recruit and retain high quality workers. All said, that's the responsibility, the duty of the employer.

So, my first question in your experience does it help a business succeed and thrive to pay a worker more or less depending on their gender?

Ms. OLSON. It hurts everyone. And that's why employers in my experience, not only don't do that, the vast majority don't, but they take, they have a deep commitment to ensuring that all workers are paid appropriately with respect to jobs and business related factors that relate to the work that they are doing.

There's absolutely no benefit. What are some of the deterrents to doing it besides litigation? Motivating your employees, ensuring that you have retention of your workers, and ensuring that the morale of workers who work together in teams more than they ever did, whether it's virtually or side by side, are able to do so productively, and in a way that fosters usually a joint or team effort.

So, there's absolutely no motivation to doing so, and there would be no reason to do so.

Mr. THOMPSON. So, you really touched on with your response also identifying the importance of offering appropriate compensation to all employees right, to be able to have that as much as qualified and trained, but reliable work force.

Ms. OLSON. Yes, it's absolutely correct Congressman. Without doing that you know this is a very mobile work force. People move from job to job more than they ever did in the history of the American workplace.

And today employers spend an enormous amount of effort to not just conduct pay audits, but to also review starting pay decisions and the impact of a hot job market on existing long-term employees, to make sure that there aren't inconsistencies that perhaps should be addressed.

Things that are differences in pay based on business or job-related factors, but nevertheless employers are saying I want to make sure that we've got this. They're also doing a lot on the information gap. A lot of the issue here relates to how do we capture, digitize, memorialize, pay decisions and factors to make sure they can be identified and explained?

The Paycheck Fairness Act goes far beyond that. What it is does is it says I want you to test every reason. I want you to tell me and prove that you had to pay that worker more for that extra experience. That you had to pay that worker more for that extra education, or for the seniority of another employer, or that you had to hire that employee because they told you they wouldn't take the job unless they were paid more than what you were offering.

And you've got to show the business necessity. You've got to not only show that, but you've got to show that you didn't have the ability to perhaps raise everybody's wages to that level. How does an employer do that and compete in the marketplace for workers?

It can't. You know, you heard some of the other witnesses today talk about employer need to test. How do you test when an applicant comes to you and says I understand you're offering, let's just

say $50,000.00 a year for this position? But my qualifications are higher. I'm making more today, and I have this special expertise.

How does an employer test that that meets a business necessity standard to pay that worker more than somebody who is a current employee? What's going to happen? That worker is not going to get the extra pay offered to them, everyone is going to suffer.

Mr. THOMPSON. Thank you, Ms. Olson. You're really focused on I think what the motivation incentives for employers really to compensate their employees well and how important that is. So, thank you very much. Madam Chair I yield back.

Chairwoman BONAMICI. Thank you, Mr. Thompson. Our next representative is Representative Hayes from Connecticut for five minutes for your questions.

Ms. HAYES. Thank you, Madam, Chair, and thank you for holding this very important hearing today. Madam Chair I'd like to submit a document from the Equal Rights Advocates in support of the Paycheck Fairness Act for the record.

Chairwoman BONAMICI. Without objection.

Ms. HAYES. Thank you. My questions today really speak to the Pregnant Workers Fairness Act. I've spoken at other hearings before about my time in the classroom during my pregnancy where I needed unscheduled bathroom breaks, which seems like a reasonable accommodation, but when you are in a building and you need another teacher, or another faculty member to come and relieve you so that you can go to the bathroom it becomes an unnecessary hardship.

I've seen so many of my colleagues in the profession suffer with urinary tract infections, or long-term urinary retention problems, and other complications caused by what seems like just an accommodation that people can reasonably—that employers can reasonably make.

So, this is something that we all have to be intentional about, and make sure that we are working to promote those kinds of practices. Because when you're in a building with 1,400 kids, it's not very easy to just walk out of your assigned post, or your classroom to use the bathroom.

My questions today are for Ms. Bakst. You know women across the country still face the impossible choice, risk your paycheck or your employment. You shouldn't have to take time off from work just because you need to be able to use the bathroom.

So, Ms. Bakst can you provide us with the economic consequences experienced by employees when they are denied a reasonable accommodation, or perhaps pushed out of a job prematurely because those accommodations cannot be met?

Ms. BAKST. Sorry yes, certainly. So you know it is, it's truly hard to believe that in 2021 that you know pregnant workers are routinely still being denied bathroom breaks and water bottles, and are forced to choose between maintaining a healthy pregnancy and earning a paycheck.

And what we've seen over and over and over again, the profound health and economic consequences of this decision. It seems so simple. Oh, it's just you know, this discreet period of time. It's not. It lasts, it spirals. We call—it snowballs into lasting devastating economic consequences for women.

It pushes too many women deeper into poverty because they are losing their paychecks in a moment that they, you know, so many women when they get pushed out, they say I tried to reapply for a job. Who is going to hire me?

Then, you know, they're a new mother and they've been detached from the work force and finding a job is incredibly, you know, they face heightened challenges. And so, these economic consequences force them to really risk their ability to support their families, put a you know, a roof over their head, put food on the table, have adequate supports that they need.

And all because they simply needed to maintain their health during their pregnancy. And this is—it's unacceptable, and as you said you know we've worked in almost 30 States. Similar laws are on the books in 30 States. It's been recognized as you know, a no-brainer essentially as this modest accommodation can go such a long way to help women stay healthy and attached to the work force.

Ms. HAYES. Thank you. I heard similar stories about that from women across my State. In one incident we had a firefighter who was placed on an unrequested, unpaid leave because of her pregnancy, despite her—she wanted to work. She tried to make every available, make suggestions, and try to work with the employer, and she was just denied and placed on an unrequested leave.

Also, in my district back in 2008, we had six low-wage black women who were working in a warehouse that suffered a miscarriage, despite asking for reasonable accommodations and providing the necessary, the required documentation from their medical provider.

So, these cases demonstrate for me that the current law is not sufficient to protect pregnant workers from harm. Ms. Bakst can you help us to understand why bringing a pregnancy related reasonable accommodation claim under the Americans With Disability Acts existing legal standard is insufficient for preventing pregnancy discrimination?

Ms. BAKST. Absolutely. Sorry. So absolutely. So, there are two main problems with the Americans Disability Act. This is an important law that guarantees reasonable accommodations for workers with disabilities. The problems here are first of all pregnancy is not recognized as a disability under the Americans With Disabilities Act.

So, for pregnant workers who are not disabled yet, right, who have a pregnancy with a health need to prevent complications, they're forced out. They have no luck. And the second is most pregnancy related complications are not recognized as ADA eligible accommodations.

Preeclampsia, high-risk——

Ms. HAYES. Ms. Bakst, I'm sorry. I want to continue but it looks like my time has run out, but you said something that from your words, from your mouth to God's ears, pregnancy is not a disability. With that Madam Chair I yield back.

Chairwoman BONAMICI. Thank you representative. And if Ms. Bakst could submit the rest of the answer in writing unless somebody asks. Next, we're going to go to Representative Stefanik from New York. You're recognized for five minutes for your questions.

Ms. STEFANIK. Thank you, chairwoman. Ms. Olson, you suggest providing employers incentives to engage in voluntary self-evaluations to proactively identify and address any pay disparities attributed to the sex of employees. How widespread are compensation self-evaluations, and are there reasons they are not more prevalent?

Ms. OLSON. Thank you for your question. They are becoming more widespread. They are not prevalent Congresswoman Stefanik, and one of the deterrents that employers have to engaging in them is the uncertain status that self-critical analyses have under the law in terms of discoverability, and that's one of the problems, and that's one of the issues.

And so yes, more and more employers engage in these audits. These audits are usually ones that require that decisions that are important to assist in analyzing not just pay, but also the jobs and whether the jobs should be compared, and then identifying relevant factors.

Ms. STEFANIK. So, let me ask you this. Let's look at a State that does have that at the State level. Massachusetts law encourages proactive self-evaluations by providing employers a safe harbor if they conduct good faith evaluations and take concrete steps to eliminate any pay disparities.

Do you believe that expanding this model will lead employers across the country to use self-evaluation and improve their compensation practices?

Ms. OLSON. The answer is simple and straightforward yes. It definitely will, and I can speak from experience in working with employers those that do it and would have a lot more certainty, and would do it even more robustly if they had that certainty in terms of the audits, and that proactive reason—additional reason to do them.

And those that aren't doing them now or aren't doing them as frequently would do them more often. There's no question about that, because the benefit would be so clear, and the outlines of any risks they're not having a risk of doing the audit in terms of privilege would be right in front of them and they could weigh it clearly and move forward with the audit, so absolutely.

Ms. STEFANIK. My next question is on strengthening the existing prohibition on sex-based discrimination. You made several recommendations to improve current law under the Equal Pay Act. One of those recommendations is to add a clear requirement that a pay differential must be business related which is consistent with the majority of U.S. Circuit Courts of Appeals have held.

How would this change strengthen the Equal Pay Act, and provide predictability and clarity for employers and workers?

Ms. OLSON. It would strengthen the Equal Pay Act and provide clarity by being written into the statute. As I said in my testimony, the majority of Courts of Appeals, but not all, already attach that requirement to the statutory language factor other than sex.

This would make it universal. It would make it so that this would not be something that people were litigating over, and this would provide clear definition because a factor other than sex, that is job or business related, is something that is a standard that employers clearly can understand and use, business necessity isn't.

Ms. STEFANIK. And then I want to ask about the wage history issue which is important. In your testimony you discuss various scenarios where H.R. 7's outright prohibition on considering a perspective employer's higher salary can actually function to disadvantage job applicants including women.

Do these same concerns exist if perspective employees are empowered to share their prior salary at any point during the hiring process and employers are permitted to act on this information when voluntarily provided?

Ms. OLSON. So that's a great question. So, the answer is it depends if the Equal Pay Act is not amended to include business necessity, then an employer can act on a voluntarily shared job expectation or wage expectation without concern.

But if that were appropriate under the Equal Pay Act as amended, but the employer still had to show business necessity and that you know it was not just a business necessity, but it was also the least impactful in terms of the opposite sex, I'm not sure that job expectations of an applicant can ever be considered at any stage of the process as the Paycheck Fairness Act is written.

Without business necessity yes. It absolutely can be.

Ms. STEFANIK. Thank you, Ms. Olson. My time is expired. Yield back.

Chairwoman BONAMICI. Thank you. And I now recognize Representative Stevens from Michigan for five minutes for your questions.

Ms. STEVENS. Thank you so much and thank you for this important hearing. There are about 4.2 million women between the ages of 19 and 25 who are covered as dependents on a parent's employer sponsored health plan. And my understanding is that insurance companies in the large group market and self-insured employer plans are currently exempt from Federal requirements that guarantee dependents have coverage of crucial health services such as labor, delivery, and maternity care.

Ms. GOSS GRAVES.do you think you could explain this loophole, and how it relates to the intersection between the Affordable Care Act and the Pregnancy Discrimination Act?

Ms. GOSS GRAVES. You know you are right that there is this terrible loophole. When a non-spouse dependent is denied maternity coverage on an employee's health plan, that has been held not to violate the Pregnancy Discrimination Act because as the theory goes it represents sex discrimination against the dependent, not against the employee.

And the Pregnancy Discrimination Act only protects employees from sex discrimination. It doesn't protect their dependents. And so you are correct that insurance companies, both in the large group market, and who are self-insured employer plans, are exempt from covering maternity care as an essential benefit, but they may be required to provide dependent maternity coverage under Section 1557 of the Affordable Care Act, which bans discrimination in healthcare programs and activities that receive Federal funds.

So that is for some piece, that might be through a range of legislation that have attempted to address this loophole on dependent coverage, and the gap is not acceptable for sure.

Ms. STEVENS. Yes. And then let's also just give you an opportunity if you don't mind to respond to some of the claims that Ms. Olson has made regarding the Paycheck Fairness Act for you Ms. Goss Graves.

Ms. GOSS GRAVES. Well I'd like to remind people that pay is one of those things where that is cloaked in a lot of secrecy. All of the information nearly is lying with the employer. And employees typically don't have a reason for knowing that they are making less at all, or certainly why they are making less.

And so, employers have all the information in addition to having the decisionmaking power. So, while I totally agree that the incentives should be that they want to pay people right the first time, and pay equally, there is lots of business case reasons for doing so. They just don't always do it.

And I wanted to get if I have a minute, to give a couple more examples of the types of things we see in fact, other than sex, that we are worried about. You know, you might have an employer arguing that they're paying someone more because they have potential, or because they see something in that man, or something else that is vague and not specific.

Those are the types of things that you really want to be sure are vetted and don't become just another proxy for sex. And there's a reason that the Paycheck Fairness Act lists very specifically things like education and experience because those are typical things that are totally fine to pay different wages for as long as they are actually themselves aren't sex-based reasons.

So, if you don't usually pay differently for experience, you shouldn't just because you're now in a certain situation dealing with a woman and you want to pay her. You know that's the only additional type of vetting that would be important.

Ms. STEVENS. Great thank you. And Madam Chair I'd also like to enter to the record a letter from the Network Lobby for Catholic Social Justice in support of the Pregnant Workers Fairness Act.

Chairwoman BONAMICI. Without objection.

Ms. STEVENS. Thank you. And with one minute remaining, Ms. Bakst I just wanted to quickly ask you why pregnant workers have struggled to get accommodations under the ADA?

Ms. BAKST. Yes again, I mean it's just pregnancy is not a disability. And pregnancy related at the ADA was expanded in 2008, the Americans With Disabilities Amendment Act, and there was a lot of you know, hope that more pregnant workers with complications would be covered under that law.

And you know many have been covered under that law, but too many have been left out because courts are saying your complications are not serious enough to warrant accommodations.

So, I mean crazy like hypos are core cases that women with severe bleeding you know, all sorts of health conditions, and courts are saying sorry you don't qualify for ADA coverage, and that's absurd.

Ms. STEVENS. Thank you so much and I yield back. Thanks Madam Chair.

Chairwoman BONAMICI. Thank you. I next recognize Representative from Iowa for five minutes for your questions.

Ms. MILLER-MEEKS. Thank you so much Madam Chairwoman. Thank you to all the panelists for being here. Ms. Olson my question is directed to you from my own personal experience. I'm currently a physician, but I've had you know numerous jobs as I paid myself through nursing school, my masters in education, collaborating that with the military.

I had two pregnancies, very healthy pregnancies thank goodness, which I did one during an internship, one during a residency, breastfed and pumped for both of those children up until about 18 months.

And so, in medicine there are differences in pay scale that has been brought up before between women and men, but when you look at the factors it's specialty hours and leave. And so, my question is there was a Harvard University Scholars published in 2018, a study on best bus and train operators working for the Massachusetts Bay Transportation Authority, and I think this was eluded to earlier.

All the employees in the study were covered by the same collective bargaining agreements, working under the same seniority system. The study found that this caused male operators, the wage difference excuse me, of 11 cents gap was found my male operators taking fewer unpaid hours and choosing to work more overtime.

And if briefly, if you can say in your experience working with issues related on compensation, are the Harvard studies' findings relevant to the debate on H.R. 7?

Ms. OLSON. Thank you for your question. And what I would say to that is there's no question that certain job related factors that relate specifically to experience and expertise, and some of the other factors that were discussed today, are related to differences in pay, and that those are factors that are considered because they're job or business related.

Other facts that aren't job or business related are not currently allowed under the Equal Pay Act and would not be and should not be part of compensation systems and in my experience they are not.

Ms. MILLER-MEEKS. And how would H.R. 7 how would that impact like bonuses or recruitment bonuses, or you know, recruiting and hiring somebody from another company, you know, if these stipulations are in place and paying somebody a higher wage each time that you're looking at bringing an employee on, or giving a bonus, you have to look at all these other factors and wages.

Ms. OLSON. The difficulty with H.R. 7 is it basically says look at the job they're hired to do. Pay everyone the same. Because if you differentiate based on hire or better qualifications or experience, or education, or something special about their background, or the fact that they tell you they will not come to your employment unless you pay them more than what you originally offered in your starting pay.

You're not going to be able to prove that that was a business necessity.

Ms. MILLER-MEEKS. Thank you so much.

Ms. OLSON. And courts don't serve as super personnel department to second guess every employer's decision with respect to pay. So, if I'm an employer, what am I going to do? Am I going to give

bonuses? Am I going to pay people differently? If I do so, I'm just going to let myself open to endless litigation at whose detriment? Those employees who actually have special skills, who actually have special expertise who bring something extra that is worth paying for.

Ms. MILLER-MEEKS. And to that end H.R. 7 directs the Department of Labor's Office of Federal Contract Compliance Programs to implement a survey of all non-construction Federal contractors to pay, collect pay data and other employment-related data, including hiring, termination and promotion data.

And given our previous question, should we also not have data on leave, unpaid or paid, family leave, hours worked overtime, loan repayment, length of service, seniority, and you can feel free to answer that. And if there's time Ms. Goss I would love to have your input also. And with that I'll yield my time after you have answered, thank you so much.

Ms. OLSON. I would just say very quickly that the kind of data that's being requested goes far beyond any of the—under H.R. 7, goes far beyond the Equal Pay Act, and its specific goals. It also was Stated that employers don't currently collect promotion data. Data of national origin. And in terms of your question to be able to really understand what are making the differences in pay?

Are they legitimate business-related or job-related factors? You can't really get that in the kind of two-page form that the government is talking about implementing in H.R. 7. It would be useless. It would have no utility. And that's what the EEOC found when it collected the 2017 and 2018 EEO one component to data.

Chairwoman BONAMICI. The time has expired, so I'm going to go next to Representative Leger Fernández for five minutes for your questions.

Ms. LEGER FERNÁNDEZ. Thank you Chairs Bonamici and Adams and thank you to the witnesses for joining us today. You know we're here today to talk about fairness or perhaps we should say a lack of fairness. And you know it strikes me that the testimony provided for legislators would you know, lawmakers must hear, which is how has the existing law failed to achieve its goals, and how can we fix those gaps, right? That's our job.

And I must admit the examples provided by the witnesses are compelling. And the data is compelling. Women carried the brunt of job losses during the pandemic, losing a net 5.4 million jobs. And we need to make it easier for women to get back to work, including pregnant women.

I liked the point that was made earlier that States are moving in the right direction, including my State of New Mexico, which passed the Pregnant Woman Accommodation Act with bipartisan support last year but all women in every State must have similar protection.

So, Ms. Bakst, explain again how the Pregnant Workers Fairness Act will ensure that Latina women especially don't have to choose between their health and job security.

Ms. BAKST. Yes thank you for the question. And as I pointed out earlier you know this is still disproportionately impacts women of color, and Latina women especially right. And you know we heard

earlier that the wage gap for Latina women is you know the most pronounced of any of the wage gaps that we have heard earlier.

And part of that I believe has to do with it's a multi, there are many reasons for the wage gap, but discrimination is part of that. And when pregnant women are pushed off the job because they have to be forced to choose between following doctor's orders and protecting their health, and risking their jobs, you know, they are going to suffer profound health, you know, and economic consequences.

Latino women are often the times of jobs that are congregated are often, put them in that position, right? These are jobs that are often less safe, you know, more physically demanding, and so the nature of those jobs require an affirmative accommodation protection to help them protect their paycheck and maintain their health.

Ms. LEGER FERNÁNDEZ. So, in some senses these are the essential workers that we're giving lots of thanks to these days, and what we're asking in this law is to give more than thanks, but actually respect and accommodation. Chair Bonamici I'd ask unanimous consent to submit two items into the record. The first is a letter from the National Partnership for Women and Families in support of all the bills before us. The second is testimony from Physicians for Reproductive Health in support of the Pregnant Workers Fairness Act.

Chairwoman BONAMICI. Without objection.

Ms. LEGER FERNÁNDEZ. OK. So, for every dollar paid to white men, Latino women earn only 55 cents, and Native American women earn only 60 cents right. They have the latest of the equal pay days in the year. Ms. Goss Graves, in your testimony you pointed out that 60 percent of workers in the private sector nationally are either forbidden, or strongly discouraged from discussing their pay with their colleagues.

You were talking about this a bit earlier, but can you explain a little bit more why that is the case, and what, why Congress must act to protect workers from retaliation in discussing their pay with their coworkers.

Ms. GOSS GRAVES. Well despite the fact that we have laws like the National Labors Relations Act, some employers just maintain policies that say that you can't talk about your wages to anyone, to your coworkers, and that you can't make inquiries even about wages.

And so, what that means is that employees are left in the dark. And it's a thing that I think isn't good for organizations, because I think you'll have some employees guessing about where they stand, assuming that they're being paid less because they are operating without any information.

So the Paycheck Fairness Act would prohibit these sorts of retaliatory bands where people are told, and sometimes made to sign documents that say you won't talk about your wages, and there will be a penalty if you do.

Ms. LEGER FERNÁNDEZ. So, the issue of full disclosure is good for everybody is what you're saying. I wanted to see if you wanted to take some time. We ran out of time to answer the question about data. We have a few seconds left.

Ms. GOSS GRAVES. Sure. Thank you for that. Because that's you know, sunshine is a good disinfectant, and that's one of the reasons to provide that data. It will make our civil rights enforcement agencies stronger. It will enable them to identify trends, sectors that seem like outliers, and sometimes employers that seem like outliers.

But it also I think will be important for employers. Sometimes employers might think they were doing the right thing, but actually doing an analysis, taking a look allows them to make a correction, the sort of corrections that I think Ms. Olson says her clients want to make.

Ms. LEGER FERNÁNDEZ. Thank you. I yield back.

Chairwoman BONAMICI. Thank you. I now recognize the Ranking Member of the full committee, Representative Foxx five minutes for your questions.

Ms. FOXX. Thank you, Madam, Chairwoman, and I thank the witnesses for their testimony on these important issues for workers around the country. Ms. Olson, from your experience studying the issue of compensation and advising clients, are employers diligent in fulfilling their legal responsibility not to pay different wages because of the sex of the employee?

And what steps do employers take to ensure they're not discriminating in this manner?

Ms. OLSON. Thank you for your question. Here's how I would answer it. The vast majority of employers that I work with, that I know others are working with on these issues through both general groups where we talk and share best practices, are all working with employers who have a deep commitment to equal pay.

And that commitment comes not just from the law, but from wanting to do the right thing for their employees, which is also good for their business. And the kinds of things that they're doing, which is a consistent engrained sort of practices throughout their workplace include education and training and development of managers, tools to assist managers, in ensuring that whether they're interviewing a new employee, or a potential employee, or whether they're doing a performance review which is going to relate to a merit increase potentially.

Those decisions are focused on legitimate business-related reasons, not any other reasons that would not be relevant. They're also building new career frameworks within their compensation system. They're also reviewing their job descriptions against job requisitions, against also job requirements to make sure there's accuracy and validity in terms of what's being done.

They're also including different stages of a review on a regular basis, individual manager decisions as well as overall compensation decisions in any year to make sure that in fact there aren't inequities that aren't able to be explained by a business-related factor other than sex.

Ms. FOXX. Thank you very much. Your experience is the same as mine. Ms. Olson H.R. 7 directs the EEOC to collect this employee pay day on many levels, including hiring and termination, et cetera. A similar data collection was mandated by the Obama Administration, which the EEOC later discontinued.

Do you agree that requiring this additional reporting of the employee pay day to the Federal Government will create large compliance costs with doubtful utility in combating pay discrimination?

Ms. OLSON. Thank you and the answer is I do. And I do based on the analysis that was done at the time of just the subset of the information that H.R. 7 would have employer collect. And just the subset of it. Just information on pay for example, the estimate was 700 million for employers to put in place for policies and practices, and changes to the HRIS system.

The EEOC itself says it had to invest over 5 million dollars in changing its own system to be able to accept the data, even after it was accepted in 2019, September 2019 for 2017 and 2018, after review of the data the EEOC determined that it really had no benefit or utility.

So collecting data for data sake in a very high-level, without getting into specific job titles, and job functions to be able to compare jobs that are actually equal, or substantially similar, and then also identifying business-related factors without doing that analysis, the data is costly, but useless.

Ms. FOXX. There's a difference between data and information. In 2013 Ms. Olson, the Supreme Court in a national decision said that in retaliation cases, lessening the causation standard could contribute to the filing of frivolous claims which would siphon resources from efforts by employers, administrative agencies to "combat workplace discrimination."

Do you agree with the Supreme Court's comment on lessening the causation standard in retaliation cases? And if so, how does this relate to the Protecting Older Workers Against Discrimination Act?

Ms. OLSON. The current standards that are present with respect to both retaliation under Title VII, as well as the Age Discrimination Employment Act, and I see my time is almost up, so if I could finish this sentence, is appropriate and has led, in my experience, to litigation that has been successful when it should be with respect to showing that employers used inappropriate factors in terms of their decisionmaking. I don't believe a change in the law is necessary or would be helpful to workers.

Ms. FOXX. Thank you very much. I can't see the time, but Madam Chair I'll assume that I'm out of time and yield back.

Chairwoman BONAMICI. That is correct. I now recognize Representative Jones from New York for five minutes for your questions.

Mr. JONES. Thank you, Madam Chair, and thanks, also to Chair Adams for both of your leaderships. The issues raised here today impact far too many people in this country. According to a study by the Center for American Progress, women are the primary sole, or co-bread winners in 64 percent of families.

I was raised by a single mom who worked long hours for low pay to provide for our family, so wage and gender issues hit especially close to home for me. When I hear about the gender and racial pay gap, I think about the hard-working women who, like my own mother when I was growing up, have to provide for their families.

In my district, in Westchester and Rockland Counties where it is extremely expensive to live, and where low wages are therefore

particularly burdensome on families, single mothers are the sole breadwinners in 13 percent of households. So, Ms. Goss Graves, some of my colleagues on the other side of the aisle insert that in seeking to correct the injustice of the gender wage gap, the Paycheck Fairness Act will actually harm business. Can you address this claim?

Ms. GOSS GRAVES. I actually think that Ms. Olson made the case for why paying people fairly is actually a business good. It is a thing that will help you retain your talented employees. It is a thing that will help you ensure you have more diverse rooms.

But not every employer is there. So, we can't you know, I think Congress can't craft laws for the best-minded employer that is going to always make the right business decisions. It has to craft laws that ensure that the incentives are there for people to be paid fairly the first time.

A really tough thing to accomplish in the area of pay because it is so secret, and because all of the information lies with the employer, so we can't be in a situation where it's just sort of trust us, we got this, we have to be in a situation where there is information that our civil rights enforcement agencies have, and where employees can have conversations about their own pay, something has to give so that it can be detected when unfairness is happening.

Mr. JONES. In short there's no defensible reason to maintain the status quo. Data shows that black women typically make only 63 percent, excuse me, 63 cents. Latinos only 55 cents, for every dollar paid to a white man. And it's clear to me that we need to strengthen the Equal Pay Act to ensure that women, and especially women of color are compensated fairly for their work.

Madam Chair, I ask unanimous consent to enter into the record a letter from the American Association of University Women urging support for the Paycheck Fairness Act.

Chairwoman BONAMICI. Without objection.

Mr. JONES. There's no excuse for discrimination of any kind in the workplace. That includes age discrimination, which is one of the most common, and sadly most accepted forms of discrimination in the workplace. This too is personal for me.

My grandmother had to work well past the age of retirement just to pay for the high cost of prescription drugs, and medical procedures not fully covered by Medicare, which by the way is why we need Medicare for all.

One of the jobs my grandmother took was as a food service worker in the East Ramapo Central School District, a job she worked after my grandfather had died of cancer. I shudder to think what would have happened had her perspective employer determined she was simply too elderly to take the job.

I represent parts of Westchester and Rockland Counties. According to the 2020 census data in my district over 171,000 of my constituents are seniors. And so, Ms. McCann when an individual brings a claim for multiple forms of employment discrimination such as gender, race and age, how do courts currently sort out the different standards of proofs and remedies in cases such as these?

And does the Protecting Older Workers Against Discrimination Act clarify and simply the adjudication of such claims?

Ms. MCCANN. Yes. Right now confusion reigns when someone brings a claim with multiple protective categories, so like an older woman like your grandmother, the courts have applied two causation standards.

And in fact some courts have gone so far to say they're not going to recognize intersectional claims because the very presence of the Title VII claim, the gender claim, means that age could not be a but for cause of the discrimination.

What POWADA would do would replace that confusion with uniformity because all of the statutes would have materially identical causations standard already, would now be subject to the same standard causation standard.

Mr. JONES. Thank you, Ms. McCann. Madam Chair I yield back.

Chairwoman BONAMICI. Thank you. I now recognize Representative Good from Virginia for five minutes for your questions.

Mr. GOOD. Thank you Chairman and thank you to all of our witnesses. You know I think that the four of these acts combine together, and it is unfortunate we have to consider them together, versus separately, but the acts would better be called the Trial Lawyer Fairness Acts, or Protecting Trial Lawyer Acts.

These bills purport to correct problems that are largely not existent. They purport to fix issues that have been corrected by laws that have been placed for decades. These alleged discriminations that we're hearing about were eradicated largely before I entered the workplace some 30 plus years ago.

The fact is that most employers, virtually all employers, pay the same amount for the same work, for all people when considering factors such as experience, skills, performance, and other objective job-related criteria.

And that's true because it's simply required in a competitive marketplace, and to try to retain the most talented work force for the organization to be as successful as it can be, and frankly it is the law now.

These bills seem to flow from a lack of understanding by our majority on the true practices that exist at virtually all businesses, and perhaps that's from a lack of business experience. I spent nearly 20 years in the corporate world, and working through these issues, and applying these issues in a fair, non-discriminatory way because I wanted the business and my employees to be as successful as possible.

Or worse yet, this flows from a deliberate intent to be dishonest in representing the facts, or just an outright hostility toward businesses and employers in general. It's been reported that at the close of 2020, 8 million small businesses remain closed today because of the extreme government efforts to crush the economy through these ridiculous lockdowns, shutdowns, and restrictions on businesses.

The NFIB has reported, in my home State of Virginia, 25 percent of businesses have closed. And according to Yelp they estimate that 60 percent of the businesses that have closed in 2020 are unlikely rather, to reopen ever again. So, my question for Ms. Olson, do you think that these bills that are proposed before us today, do you think that these will help these businesses to reopen?

Ms. OLSON. Thank you for your question. I appreciate it Representative Good. I don't believe that burdening employers with the unworkable, and unattainable requirements of the Paycheck Fairness Act will help workers in these businesses, or any businesses across America, and I strongly oppose it.

With respect——

Mr. GOOD. Excuse me, go ahead continue. No, you continue.

Ms. OLSON. With respect to POWADA I've described in my written testimony at length, and in an abbreviated form given my five minutes, in my verbal testimony as well, how POWADA is not what it represents itself to be. It is not a worker friendly statute. It is a trial lawyer friendly statute.

Under mixed motive cases it is unquestioned that a worker will not receive any injunctive relief that will help itself, or any monetary relief as a result of a mixed motive case. With respect to issues that have covered in terms of the Pregnant Workers Fairness Act as well as the PUMP Act, I've included my commentary with respect to those in my written testimony, and I would say that there is unquestioned support for employers to provide reasonable accommodations for pregnant workers, including nursing mothers.

There are issues with respect to those various statutes or bills that I've described, that I know these committees have worked together before on, and to fix certain issues, and I am hopeful that that will continue after today in terms of ensuring that both pregnant workers and nursing mothers have the opportunity to be sure to have reasonable accommodations in the workplace.

Mr. GOOD. Thank you. When these businesses are unable to operate, to reopen, to successfully operate, that discriminates against all workers and that eliminates wages for all workers in the business's ability to provide for the workers who can provide for their families.

At a time of high unemployment, global economic uncertainty, tightening Federal regulations, do we think that will stimulate the economy, create jobs, or lead to more growth, adding more regulation, more burdensome regulations for employers?

Ms. OLSON. It will not lead to more growth in either businesses or worker wages, and that's the problem with the Paycheck Fairness Act for example.

Mr. GOOD. Yes PFA, H.R. 7 that you're referring to, you know, it says it requires employers to show that pay differential for employees based on experience is a business necessity, and it's just really——

Chairwoman BONAMICI. Representative your time has expired.

Mr. GOOD. It's incredible to hear the majority talk about business necessity with the way that they treated businesses——

Chairwoman BONAMICI. Representative your time has expired.

Mr. GOOD. ——in lockdowns and in this hearing today. Thank you.

Chairwoman BONAMICI. I'm going to recognize Mr. Bowman from New York for five minutes for your questions.

Mr. BOWMAN. Thank you, Madam, Chair, and thank you to all the witnesses. Ms. Bakst, you discussed the impact that the PUMP Act could have for black mothers in particular. As you know that black mothers and pregnant women disproportionately remain in

the work force and face less than accommodating workplace environments.

In your estimation how much of the black maternal health crisis might be attributed to the lack of these necessary accommodations in the workplace?

Ms. BAKST. Thank you for the question. You know providing accommodations for more specifically, time and space to pump breast milk, you know, is one important tool to help black women, black mothers, stay healthy and attach to the work force, along with the Pregnant Worker Fairness Act which I mentioned earlier some of the health impacts, and the pronounced impacts that we heard from COVID about the likelihood, the higher risk of complications pregnant workers face, disproportionately black and Latino women as a result of not getting, of developing COVID.

So, these accommodations in the workplace are critically, critically important, especially now, to help them maintain their health and hang on to their paychecks.

Mr. BOWMAN. Thank you for that. Ms. McCann, you have Stated that the EEOC must do more to fight ageism and that ADEA has become a second-class civil rights law. Is it the case that ADEA provides less protection than other civil rights laws?

Ms. MCCANN. Thank you for the question. Well that certainly was not Congress's intent when it enacted the ADA, and modeled its substantive prohibition, directly on Title VII. In fact, Title VII substantive prohibitions were lifted in hoc verba as the Supreme Court said from Title VII.

But what we've seen is over the last couple decades Supreme Court cases like Gross and others have whittled away at the ADEA's protections and have focused on any small differences between the ADA and Title VII to weaken the ADA's protection to narrow, to expand its affections and narrow its protection.

Mr. BOWMAN. Thank you very much. Ms. Graves, Ms. Olson suggests that incentivizing employers to conduct self-audits would be enough to address amoral and economically damaging pay inequities. Why is this approach insufficient in your opinion?

Ms. GOSS GRAVES. Well you know so we've had equal pay laws for over five decades. It's not a new idea that you can't pay people unfair wages. What we are actually trying to do is ensure that people, ensure that our civil rights enforcement agencies have the sort of information that allow them to be effective.

So, it's an odd idea that you would have a safe harbor for an obligation that is over 50 years old, and the other real challenge is at the heart of our laws are the individuals who were being paid unfairly. So a safe harbor might allow an employer to do the right thing going forward, but for that individual who's not able to recover, that is a giant deal, especially when you're talking about women of color where the age gap is so large and so stark.

Mr. BOWMAN. Thank you very much. I yield back the rest of my time. Thank you.

Chairwoman BONAMICI. Thank you very much. And for everyone's awareness we have next Mr. Fitzgerald and then Mr. Yarmuth, and then unless other Members return, we will do closing Statements. I now recognize Representative Fitzgerald for five minutes for your questions.

Mr. FITZGERALD. Thank you, Madam Chair. Just real briefly, I know a lot of the questions have already been asked, but the one that—the area that really stands out to me is I mean this bill will kill the Christmas bonus. And the Christmas bonus is something that's determined in many different ways based on the employer. Often times it's kind of a consensus compensation, that's based on how the company does throughout the entire year.

And it looks like H.R. 7 would simply stop that practice dead in its tracks. And I'm just wondering if Ms. Olson would like to comment on that aspect of this bill.

Ms. OLSON. Yes. You're right, you know. Any employer is going to be concerned about making any differences in pay between employees based on objection and subjective business and job-related factors if H.R. 7 were the law.

Because once you do that, even if you could show it was a business necessity, which again I believe is an impossible burden, one that's undefined, one that employers are going to have to guess as to how to comply with. The employer would also have to show that they weren't able to give the highest amount of that Christmas bonus to all employees.

How is that not possible? And if an employer can't show that, that they wouldn't have gone bankrupt, what are they to do? It's going to eliminate the ability for employers to actually make differentiating payments to employees based on their individual contributions to the business, and that's not what the American economic system is about.

It's not about what job you have. It's about what job you have and what you bring to it.

Mr. FITZGERALD. Yes Madam Chair a lot of families really depend on that Christmas bonus, that end of the year bonus, and if this bill takes that off the shelf, I think it's—there's going to be a lot of people very upset. I yield back my time. Thank you.

Chairwoman BONAMICI. Thank you representative. I now recognize Representative Yarmuth for five minutes for your questions. Thank you for your patience.

Mr. YARMUTH. Thank you, Madam Chair. Thanks to all the witnesses for your testimony, and my colleagues, for your questions. Ms. Bakst, Kentucky has accommodations similar to those in the Pregnant Workers Fairness Act, and in the last Congress GLI, which is our Greater Louisville Inc., which is our Chamber of Commerce, testified in favor of this bill.

Are you familiar with their testimony? And could you expand on, if you are, why they felt this was such an important step forward for mothers, perspective mothers?

Ms. BAKST. Sure. Yes. So, there were a few reasons I recall she laid out in her testimony. The first being employee retention, right, that this is a tool especially now you know to keep women healthy and attached to the work force.

Clarity in the law right, that you know we have Supreme Court standard, Young versus UPS that requires, as I said earlier, pregnant workers to jump through hoops to provide tremendous confusion for employers.

We came together you know with a U.S. Chamber in good faith, and this is why the Chamber termed, and other business groups

are supportive of this bill, because it provides clarity in the law. And you know running a free legal help line, we help women in States with these laws, and we're able to avoid litigation and help them stay healthy and on the job.

And this is a preventative tool, and exactly how the law should work.

Mr. YARMOUTH. All right thank. And I think in our case we are right on the Ohio River, right across from Indiana. I think you said about 30 States now have these accommodations. I don't think Indiana had those accommodations, so we had workers going back and forth trying to deal with different laws and accommodations which is not easy.

Ms. BAKST. Yes. And for multi-State employers operating in Kentucky and Indiana, you need a clear Federal law, right? That's why we need a clear Federal law from employers.

Mr. YARMOUTH. And you know I think you know we talked so much about desirability of having bipartisanship that in the last Congress we had 100 Republicans who actually supported this legislation, so it seems that we have a golden opportunity to do something that is overwhelmingly bipartisan.

This community supports, the women's groups support, and I think it would be a very significant step forward. Ms. Goss Graves, I think your organization provided a lot of the data that we've been throwing around today on the disparity in wages between white men and black women, white women, Native women, and Latina women.

And if I'm correctly assessing it, it showed that of the gaps, so when we're talking about 60 percent, 60 cents on a dollar for Latino women to white men, almost 40 percent of that gap was basically unattributable to all of the things that we've been talking about, and Ms. Olson has been talking about with experience and the differences in occupations and so forth.

My question is, and it's kind of off the wall, so I apologize for that. You may not have the data. But do you have any indication. We know that black women, Latina women, often are disproportionately in lower wage jobs in the hospitality industry and so forth. Do you have any idea about how much of the wage gap would be corrected, or closed by a $15.00 national minimum wage?

Ms. GOSS GRAVES. You know I don't have that statistic offhand. What I can tell you though is we've done analyses of States that have higher minimum wages, including one fair wage, and have found that in those States the gap is smaller.

Mr. YARMUTH. I was hoping that would be your answer, and I think that as we move forward on discussing raising the minimum wage, that we take that into account, that this is one of the ways that we can help correct some of this wage gap that exists between men and women.

I have no further questions, so Madam Chair I yield back the balance of my time.

Chairwoman BONAMICI. Thank you representative Yarmuth. Next, we have Representative Cawthorn. You're recognized for five minutes for your questions.

Mr. CAWTHORN. Thank you, Madam Chair. It really does mean a lot. I appreciate everyone who is on this call. You know I think

it is absolutely imperative that we as Americans, that our employers and our government treat everyone with honor, dignity, and respect, treat them all fair, and under the law.

But I was—let me ask a question of Ms. Olson. Under the Equal Pay Act, does a Plaintiff have to prove discriminatory intent in order for her to win her case? If not, does this make the Equal Pay Act claims easier to prove, and do you have any other followup thoughts on that?

Ms. OLSON. You're right Representative. Under the Equal Pay Act, it is the only employment discrimination statute that does not require a showing of discriminatory intent. As a result, it's sometimes referred to as a strict liability statute. In addition, unlike the other statutes, under the Equal Pay Act the employer bears the burden, and not just production, but persuasion.

All the plaintiff has to show under the Equal Pay Act is that they're performing a job that is the same as somebody else and that they're paid differently. That's it. No other evidence. No other taint or suggestion of discrimination, just that they're paid differently, and then all the burden goes to the employer.

Mr. CAWTHORN. Well Ms. Olson thank you very much for your answer. Let me do one followup question on that. So, in my district I know I have a lot of companies who will reward high performing workers you know, with end of the year bonuses or maybe other incentives.

Do you believe that H.R. 7 would endanger these kinds of payments and rewards? And if that is the case, you know, how do these employers work to retain these high-level employees and encourage them to work harder than their coworkers?

Ms. OLSON. It absolutely would because any time an employer makes a payment to a worker, whether it's a bonus, it's an incentive, or it's an increase in pay, or some other benefit, that is due to let's just say to that particular individual's contributions that are extra, or that are better than another worker, and maybe it's because they're a better teammate.

Maybe because they showed leadership on a particular project. Those aren't quantifiable objective factors, and yet why would an employer risk all this litigation, and unkept punitive and compensatory damages and class actions to reward its employees for those good qualities that are exhibited in the workplace to help all workers and the business?

They risk litigation if they do that.

Mr. CAWTHORN. Well you know that's something, especially you know, with knowing with the Equal Pay Act, they really don't have to prove discriminatory intent or some of the litigation they would be facing. I know the district scare a lot of the employees in my district, so Ms. Olson I genuinely appreciate your expertise and your time. Thank you for coming out to our committee and thank you for enlightening myself on some of these issues.

So, everyone thank you very much and Madam Chairman I yield back the remainder of my time.

Chairwoman BONAMICI. Thank you and I see no other Members. So, we'll move on. I want to remind my colleagues that pursuant to committee practice, materials for submission to the hearing record must be submitted to the Committee Clerk within 14 days

following the last day of the hearing, so by close of business on April 1 of 2021, preferably in Microsoft Word format.

The materials submitted must address the subject matter of the subject matter of the hearing. Only a Member of the subcommittee, or subcommittees, or an invited witness may submit materials for inclusion into the hearing record. Documents are limited to 50 pages each.

Documents longer than 50 pages will be incorporated into the record via an internet link that you must provide to the Committee Clerk within the required timeframe, but please recognize that in the future that link may not work.

Pursuant to House rules and regulations, items for the record should be submitted to the Clerk electronically by emailing submissions to *edandlabor.hearings@mail.house.gov*. Member offices are encouraged to submit materials to the inbox before the hearing, or during the hearing at the time the Member makes the request.

Again, I want to thank all of our witnesses for their participation today. Members of the subcommittees may have some additional questions for you. We ask the witnesses to please respond to these questions in writing. The hearing record will be held open for 14 days to receive these responses, and I remind my colleagues that pursuant to committee practice, witness questions for the hearing must be submitted to the Majority Committee Staff or Committee Clerk within 7 days.

The questions submitted must address the subject matter of the hearing. So, I now want to recognize the distinguished Ranking Member of the Subcommittee on Workforce Protections, Mr. Keller for a closing Statement.

Mr. FULCHER. Madam Chair I think Mr. Keller has stepped out.

Chairwoman BONAMICI. OK. I don't see Mr. Keller, so I will recognize the chair of the Subcommittee on Workforce Protection, Dr. Adams for the purpose of making a closing Statement.

Chairwoman ADAMS. Thank you, Madam Chair. I also want to give my thanks again to our witnesses for joining us today. Today's hearing confirmed that women across the country continue to face discrimination in the workplace on multiple fronts. Women, particularly women of color, still face persistent gender-based wage discrimination even after 12 years of the Better Fair Pay Act, and 58 years of the Equal Pay Act.

And far too many nursing workers still do not have basic protections to ensure that they can take the time at work to pump in clean, private spaces. This discrimination has serious consequences for our entire economy, particularly as women are disproportionately pushed out of the work force during the pandemic.

Simply put, we cannot continue to rob nearly half of our Nation's work force of the wages they deserve, force women to work far more just to be paid fairly and penalize nursing workers. Congress has a moral responsibility to pass the Paycheck Fairness Act and the PUMP for Nursing Mothers Act, in addition to the Pregnant Workers Fairness Act, and the Protecting Older Workers Against Discrimination Act.

We've got to take action to ensure that basic workplace fairness for women and nursing workers and take meaningful steps to fi-

nally end gender-based workplace discrimination once and for all. Madam Chair I yield back and thank you very much.

Chairwoman BONAMICI. Thank you, Chair Adams. And I now recognize the distinguished Ranking Member of the Subcommittee on Civil Rights and Human Services Mr. Fulcher, for the purpose of making a closing Statement.

Mr. FULCHER. Thank you, Madam Chair, and to the witnesses for providing the testimony. I spent two years in the workplace, largely as someone who had a lot of employees, and so I always learn from these testimonies and I thank you for participating.

Just my brief takeaway. We've already got laws on the books that address discrimination in the workplace. Age Discrimination and Employment Act, Americans With Disabilities Act, The Rehabilitation Act, Civil Rights Act, and employment trends for older workers in America are up, both in terms of the employment rate and in terms of pay.

The winners here are the trial lawyers. And I know that my colleagues across the aisle really like the trial lawyers, and so do I. I like them too, just not quite enough to support legislation that otherwise is a solution in search of a problem. Madam Chair I yield.

Chairwoman BONAMICI. Thank you very much Ranking Member Fulcher. And I, hold on just one moment. There's just one issue we're trying to clarify. Hold briefly please. All right. Thank you for your patience.

I would now recognize myself for the purpose of making a closing Statement.

I also want to thank our witnesses for being here, for your compelling testimony today. Our discussions confirm that we are still a long way from eradicating discrimination in the workplace, particularly for women and older Americans, and the testimony established that the laws we have on the books are not working.

I do want to note that I request unanimous consent to enter a letter into the record from a coalition of stakeholders in support of the Pregnant Workers Fairness Act without objection. And I also request unanimous consent to enter a letter into the record from the business community in support of the Pregnant Workers Fairness Act, also without objection.

I also would like to note that during the opening Statement Ranking Member Fulcher you noted that a concern about only having one witness. I know we were talking about four bills today. I would like to place onto the record that the minority did not actually ask for a second witness, and had they done that we would have certainly considered that request.

So today we heard about how pregnant workers across the country continue to be denied access to reasonable workplace accommodations, despite more than four decades of Federal law providing equal treatment on the job.

We also heard how older workers face unreasonable obstacles that prevent them from holding employers accountable for age discrimination. It is passed time for Congress to take action to make sure that all workers can earn a living without fear of discrimination.

Our discussion today made clear that we must swiftly pass the Protective Older Workers Against Discrimination Act to restore protections against age discrimination for older workers. Put us back to where we were. Restore those protections, so people who are discriminated against can get relief. And we must pass the Pregnant Workers Fairness Act, so pregnant workers do not have to choose between healthy pregnancies and their wages.

These bills, along with the Paycheck Fairness Act and the PUMP for Nursing Mothers Act should not be partisan. They affect women and people of all parties and all backgrounds. Each of us, but disproportionately women of color, and Latin women we know that.

Each of us should agree, now more than ever, we must take these bold steps to protect our Nation's most vulnerable workers, and make sure that all workers can succeed on the job.

There being no further business, and I've already noted the possibility of additional questions, without objection the hearing now stands adjourned. Thank you again.

[Additional submissions by Chairwoman Bonamici follow:]

## Open Letter in Support of the Pregnant Workers Fairness Act From Leading Private-Sector Employers

March 15, 2021

Dear Members of Congress,

Women's labor force participation is critical to the strength of our companies, the growth of our economy and the financial security of most modern families. The private sector and our nation's elected leaders must work together to ensure that working women and families have the protections and opportunities they need to participate fully and equally in the workplace. Twenty-eight leading companies from across states and industries have come together in support of pregnant workers and their families by calling on Congress to pass H.R. 2694, the bipartisan Pregnant Workers Fairness Act, without delay.

More than 40 years ago, Congress passed the Pregnancy Discrimination Act of 1978, which made it illegal to discriminate against most working people on the basis of pregnancy, childbirth or related medical conditions. Since that time, 30 states and the District of Columbia now require certain employers to provide accommodations to pregnant employees at work. It's now time to clarify and strengthen existing federal protections for pregnant workers by passing the Pregnant Workers Fairness Act. This bill would ensure that pregnant workers who need reasonable accommodations can receive them and continue to do their jobs.

As a business community, we strive to create more equitable workplaces and better support pregnant workers and their families every day. We urge the passage of the Pregnant Workers Fairness Act as an important advancement toward ensuring the health, safety and productivity of our modern workforce – and the workforce of tomorrow.

*Signed*:

**Adobe** | San Jose, CA
**Amalgamated Bank** | New York, NY
**AnitaB.org** | Belmont, CA
**BASF Corporation** | Florham Park, NJ
**Care.com, Inc.** | Waltham, MA
**Chobani** | Norwich, NY
**Cigna Corp.** | Bloomfield, CT
**Dow** | Midland, MI
**Expedia Group** | Seattle, WA
**Facebook** | Menlo Park, CA
**Gap Inc.** | San Francisco, CA
**H&M USA** | New York, NY
**ICM Partners** | Los Angeles, CA
**J. Crew** | New York, NY
**Johnson & Johnson** | New Brunswick, NJ
**L'Oréal USA** | New York, NY
**Levi Strauss & Co.** | San Francisco, CA
**Madewell** | Long Island City, NY
**Mastercard** | Purchase, NY
**Microsoft Corporation** | Redmond, WA
**Navient, LLC.** | Wilmington, DE
**National Association of Manufacturers** | Washington, DC
**Patagonia** | Ventura, CA
**PayPal** | San Jose, CA
**Postmates** | San Francisco, CA

**Salesforce** | San Francisco, CA
**Society of Women Engineers** | Chicago, IL
**Spotify** | New York, NY
**Square, Inc.** | San Francisco, CA
**Sun Life** | Wellesley, MA
**U.S. Women's Chamber of Commerce** | Washington, DC

*The Sustainable Food Policy Alliance*:
**Danone North America** | White Plains, NY
**Mars, Incorporated** | McLean, VA
**Nestlé USA** | Arlington, VA
**Unilever United States** | Englewood Cliffs, NJ

March 15, 2021

**Re. Pregnant Workers Fairness Act**

Dear Member of Congress:

As organizations committed to promoting the health and economic security of our nation's families, we urge you to support the Pregnant Workers Fairness Act, a crucial maternal and infant health measure. This bipartisan legislation promotes healthy pregnancies and economic security for pregnant workers and their families and strengthens the economy.

In the last few decades, there has been a dramatic demographic shift in the workforce. Not only do women now make up almost half of the workforce, but there are more pregnant workers than ever before and they are working later into their pregnancies. The simple reality is that some pregnant workers—especially those in physically demanding jobs—will have a medical need for a temporary job-related accommodation in order to maintain a healthy pregnancy. Yet, too often, instead of providing pregnant workers with an accommodation, employers will fire or push them onto unpaid leave, depriving them of a paycheck and health insurance at a time when it may be most needed.

Additionally, discrimination affects pregnant workers across race and ethnicity, but women of color and immigrants may be at particular risk. Latinas, Black women and immigrant women are more likely to hold certain inflexible and physically demanding jobs that can present specific challenges for pregnant workers, such as cashiers, home health aides, food service workers, and cleaners, making reasonable accommodations on the job even more important, and loss of wages and health insurance due to pregnancy discrimination especially challenging. American families and the American economy depend on women's income: we cannot afford to force pregnant workers out of work.

In 2015, in *Young v. United Parcel Service*, the Supreme Court held that a failure to make accommodations for pregnant workers with medical needs will sometimes violate the Pregnancy Discrimination Act of 1978 (PDA). Yet, even after Young, pregnant workers are still not getting the accommodations they need to stay safe and healthy on the job and employers lack clarity as to their obligations under the law. The Pregnant Workers Fairness Act will provide a clear, predictable rule: employers must provide reasonable accommodations for limitations arising out of pregnancy, childbirth, or related medical conditions, unless this would pose an undue hardship.

The Pregnant Workers Fairness Act is modeled after the Americans with Disabilities Act (ADA) and offers employers and employees a familiar reasonable accommodation framework to follow. Under the ADA, workers with disabilities enjoy clear statutory protections and need not prove how other employees are treated in order to obtain necessary accommodations. Pregnant workers deserve the same clarity and streamlined process and should not have to ascertain how their employer treats others in order to understand their own accommodation rights, as the Supreme Court's ruling currently requires.

Evidence from states and cities that have adopted laws similar to the Pregnant Workers Fairness Act suggests that providing this clarity reduces lawsuits and, most importantly, helps ensure that workers can obtain necessary reasonable accommodations in a timely manner, which keeps pregnant workers healthy and earning an income when they need it most. Workers should not have to choose between providing for their family and maintaining a healthy pregnancy, and the Pregnant Workers Fairness Act would ensure that all those working for covered employers would be protected.

The need for the Pregnant Workers Fairness Act is recognized across ideological and partisan lines. Thirty states and D.C. have adopted pregnant worker fairness measures with broad, and often unanimous, bipartisan support. Twenty-five of those laws have passed within the last seven years. These states include: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Maine, Massachusetts, Minnesota, Nebraska, New Mexico, Nevada, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, West Virginia, Vermont, Virginia, and Washington. Lawmakers have concluded that accommodating pregnant workers who need it is a measured approach grounded in family values and basic fairness.

The Pregnant Workers Fairness Act is necessary because it promotes long-term economic security and workplace fairness. When accommodations allow pregnant workers to continue to work, they can maintain income and seniority, while forced leave sets new parents back with lost wages and missed advancement opportunities. When pregnant workers are fired, not only do they and their families lose critical income, but they must fight extra hard to re-enter a job market that is especially brutal on those who are pregnant and unemployed.

The Pregnant Workers Fairness Act is vital because it supports healthy pregnancies. The choice between risking a job and risking the health of a pregnancy is one no one should have to make. Pregnant workers who cannot perform some aspects of their usual duties without risking their own health or the health of their pregnancy, but whose families cannot afford to lose their income, may continue working under dangerous conditions. There are health consequences to pushing pregnant workers out of the workforce as well. Stress from job loss can increase the risk of having a premature baby and/or a baby with low birth weight. In addition, if workers are not forced to use their leave during pregnancy, they may have more leave available to take following childbirth, which in turn facilitates lactation, bonding with and caring for a new child, and recovering from childbirth.

For all of these reasons, we urge you to support the Pregnant Workers Fairness Act.

We also welcome the opportunity to provide you with additional information. For more details, please contact Dina Bakst (dbakst@abetterbalance.org), Emily Martin (emartin@nwlc.org), Vania Leveille (vleveille@aclu.org), or Michelle McGrain (mmcgrain@nationalpartnership.org).

Sincerely,

A Better Balance
American Civil Liberties Union
National Partnership for Women & Families
National Women's Law Center
1,000 Days
2020 Mom
9to5
ACTION OHIO Coalition For Battered Women
Advocates for Youth
AFL-CIO
African American Ministers In Action
Alaska Breastfeeding Coalition
Alianza Nacional de Campesinas
All-Options
American Academy of Pediatrics
American Association of University Women (AAUW)
American Association of University Women (AAUW) Indianapolis
American College of Obstetricians and Gynecologists
American Federation of State, County and Municipal Employees
American Federation of Teachers
Asian Pacific American Labor Alliance, AFL-CIO
Association of Farmworker Opportunity Programs
Association of Maternal & Child Health Programs
Association of State Public Health Nutritionists
Autistic Self Advocacy Network
Baby Cafe USA
Black Mamas Matter Alliance
Bazelon Center for Mental Health Law
Bloom, Baby! Birthing Services
Bread For the World
Breastfeeding Coalition of Delaware
Breastfeeding Family Friendly Communities
Breastfeeding Hawaii
BreastfeedLA
Building Pathways, Inc
California WIC Association
California Women's Law Center
Casa de Esperanza: National Latin@ Network for Healthy Families and Communities
Center for American Progress
Center for Law and Social Policy (CLASP)
Center for LGBTQ Economic Advancement & Research
Center for Parental Leave Leadership
Center for Public Justice
Center for Reproductive Rights
Chosen Vessels Midwifery Services
Church World Service

Clearinghouse on Women's Issues
CLUW
Coalition for Restaurant Safety & Health
Coalition of Labor Union Women (CLUW)
Coalition on Human Needs
Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces
Connecticut Women's Education and Legal Fund (CWEALF)
DC Dorothy Day Catholic Worker
Disciples Center for Public Witness
Economic Policy Institute
Equality Ohio
Equal Pay Today
Equal Rights Advocates
Every Texan
Every Mother, Inc.
Family Equality
Family Values @ Work
Farmworker Justice
Feminist Majority Foundation
First Focus Campaign for Children
Futures Without Violence
Gender Equality Law Center
Gender Justice
Grandmothers for Reproductive Rights (GRR!)
Health Care For America Now
Healthy Children Project, Inc.
Healthy and Free Tennessee
Healthy Mothers, Healthy Babies Coalition of Georgia
HealthyWomen
Hispanic Federation
Hoosier Action
Human Rights Watch
ICNA CSJ
In Our Own Voice: National Black Women's Reproductive Justice Agenda
Indiana Chapter of the American Academy of Pediatrics
Indiana Institute for Working Families
Indianapolis Urban League
Institute for Women's Policy Research
Interfaith Workers Justice
Justice for Migrant Women
Kansas Action for Children
Kansas Breastfeeding Coalition
KWH Law Center for Social Justice and Change
La Leche League Alliance
La Leche League USA
LatinoJustice PRLDEF

LCLAA
Legal Aid at Work
Legal Momentum, The Women's Legal Defense and Education Fund
Legal Voice
Mabel Wadsworth Center
Maine Women's Lobby
Mana, A National Latina Organization
March of Dimes
Maternal Mental Health Leadership Alliance
MCCOY (Marion County Commission on Youth)
Methodist Federation for Social Action
Michigan Breastfeeding Network
Michigan League for Public Policy
Midwives Alliance of Hawaii
Minus 9 to 5
Mississippi Black Women's Roundtable
Mom Congress
MomsRising
Monroe County NOW
Mother Hubbard's Cupboard
MS Black Women's Roundtable & MS Women's Economic Security Initiative
NARAL Pro-Choice America
National Advocacy Center of the Sisters of the Good Shepherd
National Asian Pacific American Women's Forum (NAPAWF)
National Association of Pediatric Nurse Practitioners
National Association of Social Workers
National Association of Social Workers NH Chapter
National Advocates for Pregnant Women
National Birth Equity Collaborative
National Center for Law and Economic Justice
National Center for Lesbian Rights
National Coalition for the Homeless
National Coalition of 100 Black Women, Inc. Central Ohio Chapter
National Coalition Against Domestic Violence
National Consumers League
National Council for Occupational Safety and Health (National COSH)
National Council of Jewish Women
National Council of Jewish Women Cleveland
National Council of Jewish Women (NCJW), Atlanta Section
National Domestic Workers Alliance
National Education Association
National Employment Law Project
National Employment Lawyers Association
National Health Law Program
National Network to End Domestic Violence
National Organization for Women

National WIC Association
National Women's Health Network
NETWORK Lobby for Catholic Social Justice
New Jersey Breastfeeding Coalition
New Jersey Citizen Action
New Jersey Time to Care Coalition
New Mexico Breastfeeding Task Force
New Working Majority
North Carolina Justice Center
Northwest Arkansas Breastfeeding Coalition
Nurse-Family Partnership
Nutrition First
Ohio Alliance to End Sexual Violence
Ohio Coalition for Labor Union Women
Ohio Domestic Violence Network
Ohio Federation of Teachers
Ohio Religious Coalition for Reproductive Choice
Ohio Women's Alliance
Partnership for America's Children
Peirce Consulting LLC
Philadelphia Coalition of Labor Union Women Philly CLUW
Philadelphia NOW Education Fund
Philaposh
Physicians for Reproductive Health
Planned Parenthood Federation of America
PowHer New York
Pray First Mission Ministries
Pretty Mama Breastfeeding, LLC
Prevent Child Abuse NC
Public Advocacy for Kids (PAK)
RESULTS
RESULTS DC/MD
Shriver Center on Poverty Law
SisterReach
Solutions for Breastfeeding
Speaking of Birth
Southwest Women's Law Center
The Leadership Conference on Civil and Human Rights
The Little Timmy Project
The National Domestic Violence Hotline
The Ohio Women's Public Policy Network
The Women and Girls Foundation of Southwest Pennsylvania
The Women's Law Center of Maryland
The Zonta Club of Greater Queens
TIME'S UP Now
U.S. Breastfeeding Committee

Ujima Inc: The National Center on Violence Against Women in the Black Community
UltraViolet
Union for Reform Judaism
United Church of Christ Justice and Witness Ministries
United Electrical, Radio and Machine Workers of America (UE)
United Food and Commercial Workers International Union (UFCW)
United Spinal Association
United State of Women
United Steelworkers
United Today, Stronger Tomorrow
Universal Health Care Action Network of Ohio
VA NOW, Inc.
Virginia Breastfeeding Advisory Committee
Virginia Breastfeeding Coalition
Voices for Progress
Wabanaki Women's Coalition
We All Rise
William E. Morris Institute for Justice (Arizona)
Women and Girls Foundation of Southwest Pennsylvania
Women Employed
Women of Reform Judaism
Women's Fund of Greater Chattanooga
Women's Fund of Rhode Island
Women's Fund of Rhode Island
Women's Law Project
Women's March
Women's Media Center
Women's Rights and Empowerment Network
Women4Change
Workplace Fairness
Workplace Justice Project at Loyola Law Clinic
Worksafe
WV Breastfeeding Alliance
WV Perinatal Partnership, Inc.
YWCA Dayton
YWCA Greater Cincinnati
YWCA Mahoning Valley
YWCA McLean County
YWCA Northwestern Illinois
YWCA USA
YWCA of the University of Illinois
ZERO TO THREE

March 31, 2021

House Committee on Education & Labor
Subcommittee on Civil Rights and Human Services
Subcommittee on Workforce Protections
2176 Rayburn House Office Building
Washington, DC 20515-6100

Re: March 18, 2021 Joint Hearing on Fighting for Fairness:
Examining Legislation to Confront Workplace Discrimination

Chairs Adams and Bonamici, Ranking Members Fulcher and Keller, and Members of the Committee, Working IDEAL appreciates the opportunity to provide this submission for the record following the March 18, 2021 Joint Hearing on Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination.

Working IDEAL advises employers on building inclusive workplaces, recruiting diverse talent, and ensuring fair pay. In providing this submission, we draw upon decades of experience in the field of equal employment opportunity, with a focus on issues surrounding equal pay and pregnancy discrimination.

We are currently with Working IDEAL, but previously served as senior advisors at the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) and the Equal Employment Opportunity Commission (EEOC). In those roles, we advised on the enforcement of anti-discrimination laws, including pay equity requirements, and the development of the 2016 pay data reporting requirements. In those roles as well as in our current roles with Working IDEAL, we also have contributed to the development of legislation including the Paycheck Fairness Act, the Pregnant Workers Fairness Act, the 2010 Break Time for Nursing Mothers Law, the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act or "Be Heard," and have advised on federal regulations and state legislative proposals on equal pay.

We offer this submission in support of much needed legislation to promote equal pay and pay data collection, accommodations for pregnant workers, breaks for nursing mothers, and equal opportunity for older workers. We also write to clarify the record regarding misleading statements made during the hearing about prior experience with pay data collection and the gaps in legal protections. We urge Congress to pass the Paycheck Fairness Act, the Pregnant Workers Fairness Act, the Pump for Nursing Mothers Act, and the Protecting Older Workers Act.

**Paycheck Fairness Act**

***Pay discrimination remains a persistent problem.***

Pay inequality based on gender, race, ethnicity, and other protected characteristics stubbornly persists in America despite federal nondiscrimination in employment laws and equal pay laws, including the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, and Executive Order 11246, which prohibit such discrimination.

According to the most recent data, female full-time, year-round workers make just 82 cents for every dollar earned by men.[1] This results in a pay gap of $10,157 each year.[2]

The pay gap for women of color is particularly concerning. Latinas are typically paid just 55 cents for every dollar paid to white, non-Hispanic men.[3] The median annual pay for a Latina in the United States who holds a full-time, year-round job is $36,110, while the median annual pay for a white, non-Hispanic man who holds a full-time, year-round job is $65,208 – a difference of $29,098 per year.[4]

Black women are typically paid just 63 cents for every dollar paid to white, non-Hispanic men.[5] The median annual pay for a Black woman in the United States who holds a full-time, year-round job is $41,098, and the difference compared to median pay for white, non-Hispanic men amounts $24,110 per year.[6]

According to the Bureau of Labor Statistics, women's median weekly earnings are lower than men's median weekly earnings in the vast majority of occupations.[7] These gaps persist despite the fact that the Equal Pay Act has been in place for over fifty years. Discrimination in pay, hiring, or promotions continues to be a significant problem for working women.[8]

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[1] U.S. Census Bureau, Current Population Survey: PINC-05. Work Experience-People 15 Years Old and Over, by Total Money Earnings, Age, Race, Hispanic Origin, Sex, and Disability Status: 2018, available at https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-05.html.

[2] National Partnership for Women & Families, The Paycheck Fairness Act (Mar. 2021), available at https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/the-paycheck-fairness-act.pdf.

[3] National Partnership for Women & Families, Quantifying America's Gender Wage Gap by Race/Ethnicity (March 2021), citing U.S. Census Bureau (2020) Current Population Survey, Annual Social and Economic (ASEC) Supplement: Table PINC-05: Work Experience in 2019 – People 15 Years Old and Over by Total Money Earnings in 2019, Age, Race, Hispanic Origin, Sex, and Disability Status. Retrieved 18 March 2021, from https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-05.html (Unpublished calculation based on the median annual pay for all women and men who worked full time, year-round in 2019), available at https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/quantifying-americas-gender-wage-gap.pdf.

[4] Id.

[5] Id.

[6] Id.

[7] U.S. Bureau of Labor Statistics (2021) Current Population Survey: Household Data Annual Averages Table 39. Median weekly earnings of full-time wage and salary workers by detailed occupation and sex, available at https://www.bls.gov/cps/cpsaat39.htm.

[8] Institute for Women's Policy Research, Ending Sex and Race Discrimination in the Workplace: Legal Interventions that Push the Envelope, available at http://referenceiwpr.wpengine.com/wp-content/uploads/wpallimport/files/iwpr-export/publications/C379.pdf.

Despite this troubling data, Camille Olson of Seyfarth Shaw testified at the hearing that the Paycheck Fairness Act is "a solution in search of a problem." By contrast, the Paycheck Fairness Act offers effective solutions to significant pay discrimination that costs women thousands of dollars every year. Over a career, women's total estimated earnings loss compared with men is $700,000 for a high school graduate, $1.2 million for a college graduate, and $2 million for a professional school graduate.[9]

Ms. Olson asserted that current laws provide sufficient protections and that workers who face pay discrimination can seek a remedy in court under existing laws. However, the PFA offers meaningful mechanisms to prevent and address pay discrimination without requiring workers to resort to costly, drawn out litigation to achieve equal pay. The PFA also closes loopholes in current law that prevent workers who are underpaid due to discrimination from obtaining a full and fair opportunity to make their case.

***The PFA provides important protections to prevent and address pay discrimination.***

The primary goal of the PFA is to prevent pay discrimination from happening in the first place. The legislation incorporates a number of preventative measures, including prohibiting retaliation for discussing pay, reliance on prior salary, and pay data reporting.

Certain members of Congress and Ms. Olson suggest misleadingly that the PFA is simply intended to line the pockets of trial lawyers. However, this mischaracterizes the important preventative provisions of the legislation, as well as the provisions that would merely bring equal pay protections and legal remedies in line with other civil rights laws.

***The PFA prohibits retaliation against workers who discuss pay.***

Pay discrimination remains a persistent problem that has proven difficult to address because of a culture of secrecy surrounding pay. All too often, workers have no idea they are paid less than others doing the same job. Even when employees learn of pay discrimination, they are often silenced by a fear of retaliation. If a woman is not able to talk to coworkers about pay, she will have no way of learning that she is paid less than a similarly situated male colleague.

The PFA would prohibit pay secrecy policies that allow pay discrimination to proliferate. The PFA addresses this problem by prohibiting employers from retaliating against employees who discuss their pay with colleagues. While workers already enjoy some legal protection to inquire about or share information regarding pay, the PFA addresses gaps in that coverage. The experience of these earlier changes in law shows that banning pay secrecy is not harmful to employers and provides important rights and protections for workers.

***The PFA prohibits discrimination resulting from consideration of prior salary.***

The PFA also seeks to prevent pay discrimination by prohibiting employers from screening job applicants based on their salary history or requiring salary history during the interview and hiring process. When employers make compensation decisions based on an employee's prior salary, they create a risk of pay discrimination and make it harder to achieve pay equity over the long term. Just because someone

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[9] American Association of University Women, "Where We Stand: Equal Pay," available at https://www.aauw.org/resources/policy/position-equal-pay/#:~:text=Research%20indicates%20that%20the%20gender,of%20what%20men%20were%20paid.

previously worked for lower pay for another employer does not permit a current employer to pay them less than a similarly qualified person doing substantially the same job -- especially when that tends to underpay women and people of color. Salary history screens have other problematic effects. They lead to lower pay for someone who moves from a nonprofit or small business to a larger private firm. They also risk screening out good job candidates based on the incorrect assumption that they would not accept the job offer. The law requires equal pay for equal work, and consideration of prior salary in a previous job should not interfere with those rights.

***The PFA provides for valuable pay data reporting in a manner that balances the benefit with the burden on employers.***

The PFA also seeks to prevent and address pay discrimination by requiring employers to report pay data. In 2016, the EEOC implemented pay data reporting for employers with 100 or more employees, after a notice-and-comment period, public hearings, and extensive input from stakeholders. Consistent with recommendations from the business community, the pay data collection built on existing reporting requirements by revising the EEO-1 form, which has been used to collect employee demographic information for over 50 years. To comply with this reporting requirement, employers and consultants developed systems to collect and report data. This reporting was required for the years 2017 and 2018 until the Trump Administration ended the collection.

At the hearing, Ms. Olson suggested that the EEOC determined that the pay data collection did not serve a valuable purpose or had limited utility. Ms. Olson suggested that the reporting was "costly" and "useless." However, during the Trump Administration, the EEOC did not undertake an impartial, unbiased study of the cost of reporting or the value or utility of the data that was collected prior to terminating the data collection. Instead, the EEOC inappropriately reached a foregone conclusion to terminate pay data collection, without the benefit of public input. In fact, a study of the data that had been collected is currently underway at the National Academy of Sciences.

With regard to the cost and burden to employers to prepare the report, it is important to note that the collection sought to balance the important goals of collecting valuable data while also limiting the burden on employers. However, many in the business community seek to argue both sides of the coin. They argue that reporting is "useless" if it does not collect more granular data. But they also argue that employers should not be required to report detailed data, because that would be too costly and burdensome.

As Ms. Olson admitted, the report is "just a two-page form." As such, the burden on employers is limited. However, contrary to Ms. Olson's suggestion, the information reported is valuable in identifying disparities in pay by sex and race, broken down into the job categories set out in the EEO-1 form. Many of the assertions made about the pay data collected also could be made about the demographic data that has been collected for over 50 years. However, there is no question that such data reporting serves valuable preventative and enforcement purposes.

As Working IDEAL stated in comments to the EEOC,[10] pay data collection enhances voluntary compliance with equal pay laws, because it creates a formal mechanism to institutionalize the regular collection and

[10] Working IDEAL, Comment Letter on Notice of Information Collection—Request for New Control Number of a Currently Approved Collection: Employer Information Report (EEO-1) Component 1; Revision of Existing Approval

review of compensation data.[11] In requiring pay data collection, EEOC and OFCCP intended to motivate employers to improve or establish systems and practices to collect and review compensation data. Covered employers would compile a report of their pay data by demographics at least at a summary level every year. By formalizing and institutionalizing pay data reporting, collecting pay data makes it more likely that employers will identify and address pay equity on their own. The efforts of EEOC and OFCCP to foster employers' self-analysis of compensation data is grounded in research that suggests that metrics and accountability are particularly effective in improving EEO and diversity outcomes. Further, collection of pay data incentivizes employers and contractors to adopt, implement, and examine the results of regular self-analysis programs. Thus, as employers ready their reports, they have the opportunity to independently find—and resolve—any pay equity issues without the need for EEOC or OFCCP enforcement action.

Collecting pay data also enhances enforcement of equal pay protections. Pay data collection is also critical for effective enforcement of the law for many of the same reasons that employers are already required to report demographic data. The pay data will provide EEOC and OFCCP with an important internal resource for analysis of industries and regions, and also for investigators who use the EEO-1 along with other data sources as they begin to assess allegations of discrimination. The method of collecting pay data was carefully designed to serve these and other important purposes, while limiting the reporting burden for employers.

***The PFA will not interfere with the ability of employers to award bonuses.***

Some members of Congress suggested that the PFA would mark the end of employers' ability to award bonuses. However, nothing in the PFA would prevent employers from providing bonuses, provided that they do not discriminate on the basis of sex. Nothing in the PFA would prevent employers from offering bonuses to reward strong performance. Similarly, nothing in the PFA would prevent employers from offering bonuses to all employees based on legitimate criteria. As under current law, employers would be prohibited from compensating employees, including through bonuses, in a discriminatory manner.

**Pregnant Workers Fairness Act**

Despite the longstanding protections of the Pregnancy Discrimination Act, thousands of pregnancy discrimination charges are filed with the EEOC and state-level fair employment practice agencies each year.[12] Too often, pregnant workers are forced out of their jobs and denied simple accommodations – such as sitting instead of standing or carrying a water bottle – that would enable them to continue working and supporting their families. The Pregnant Workers Fairness Act would help end this form of

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for EEO-1 Component 2 (Nov. 12, 2019), available at https://www.regulations.gov/comment/EEOC-2019-0003-6794.

[11] See 81 Fed. Reg. at 45,491 ("The EEOC's publication of aggregated pay data, in conjunction with the employer's preparation of the EEO–1 report itself, may be useful tools for employers to engage in voluntary self-assessment of pay practices.").

[12] National Partnership for Women & Families, By the Numbers: Women Continue to Face Pregnancy Discrimination in the Workplace (Oct. 2016), available at http://www.nationalpartnership.org/our-work/resources/workplace/pregnancydiscrimination/by-the-numbers-women-continue-to-face-pregnancy-discrimination-in-the-workplace.pdf.

pregnancy discrimination, promote healthy pregnancies, and protect the economic security of pregnant women and their families.[13]

The Pregnant Workers Fairness Act would make clear that employers must provide reasonable accommodations for limitations arising out of pregnancy, childbirth, or related medical conditions, unless doing so would pose an undue hardship. The law would also make clear that pregnant workers can request such accommodations without fear of retaliation.

Ninety-five percent of voters say it is reasonable for employers to provide minor accommodations to pregnant workers.[14] Thirty-one states, including the District of Columbia and four cities have passed laws requiring some employers to provide reasonable accommodations to pregnant workers.[15] Many of these laws have passed with bipartisan or unanimous support. A federal law would protect workers nationwide. Congress should pass the Pregnant Workers Fairness Act.

**Pump for Nursing Mothers Act**

Congress should also pass the bipartisan PUMP (Providing Urgent Maternal Protections) for Nursing Mothers Act, which will increase critical protections for nursing parents. The legislation will extend rights to pump breastmilk at work to millions of employees who are not already covered by the Fair Labor Standards Act.[16] Working women who choose to breastfeed should have the right to the time and space they need to do so, without risking their economic security.[17]

**Protecting Older Workers Act**

Finally, Congress should enact the Protecting Older Workers Act to fight age discrimination and restore protections that were narrowed by the Supreme Court's decision in *Gross v. FBL Financial Services Inc.*[18] In Gross, the Supreme Court held that in order to prove illegal bias, older workers have to show that their age was *a decisive factor* in the employer's decision to discipline, fire or not hire them. That standard poses a much higher bar than the courts require for other forms of discrimination, such as those based on race, sex, national origin, or religion. The Protecting Older Workers Act would make clear

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[13] National Partnership for Women & Families, The Pregnant Workers Fairness Act (Feb. 2021), available at https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/fact-sheet-pwfa.pdf.

[14] Center for American Progress, Survey on Pregnancy Discrimination Memo (Nov. 2014), available at https://cdn.americanprogress.org/wp-content/uploads/2014/11/YoungPollingMemo.pdf.

[15] National Partnership for Women & Families, Reasonable Accommodations for Pregnant Workers: State and Local Laws (Sept. 2020) available at http://www.nationalpartnership.org/ourwork/resources/workplace/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf

[16] A Better Balance, The PUMP Act Would Extend Protections to Millions of Nursing Parents (Jan. 9, 2020), available at https://www.abetterbalance.org/the-pump-act-would-extend-protections-to-millions-of-nursing-parents/#:~:text=A%20Better%20Balance%20applauds%20the,to%20pump%20breastmilk%20at%20work.

[17] Id.

[18] 557 U.S. 167 (2009).

that victims of age discrimination do not have to satisfy a higher standard in order to prove their case by demonstrating that age was a *critical* reason for the employer's action.[19]

For these reasons, we urge Congress to pass the Paycheck Fairness Act, the Pregnant Workers Fairness Act, the Pump for Nursing Mothers Act, and the Protecting Older Workers Act.

Signed,

Pamela Coukos
Co-Founder and CEO, Working IDEAL

Sarah Crawford
Senior Advisor, Working IDEAL

[19] AARP, Legislation Introduced to Better Protect Older Workers (Feb. 13, 2019), available at https://www.aarp.org/politics-society/advocacy/info-2019/bills-protect-older-workers.html.

**Pamela Coukos**

Pamela Coukos, J.D., PhD, is the CEO and co-founder of Working IDEAL where she advises companies and organizations on gender and racial equity, pay equity, diversity and inclusion, and affirmative action An advisor and expert with more than 20 years of experience in equality law, policy and research, Pam served as a Senior Advisor at the U.S. Department of Labor's Office of Federal Contract Compliance Programs, where she provided strategic guidance on the agency's enforcement and outreach programs and led the development of new investigative guidelines to assess federal contractor pay systems and practices for potential sex and race discrimination. She also served as a technical subject matter expert for the agency's proposals regarding collecting contractor pay data, which were eventually merged with the EEOC's pay data collection. Her career spans civil rights litigation, research, policy analysis, teaching and training, and advocacy – and the government, private and nonprofit sectors. She holds a law degree from Harvard and a doctorate in sociolegal studies from the University of California at Berkeley.

**Sarah Crawford**

Sarah Crawford has over two decades of experience as a litigator, advocate, and advisor in the field of equal employment opportunity. As a senior advisor with Working IDEAL and the principal of Crawford Consulting, Sarah provides advice to ensure compliance, training customized to meet the needs of clients, and research to promote sound policies and practices that work. Sarah served as a senior attorney advisor to Chair Jenny R. Yang of the U.S. Equal Employment Opportunity Commission (EEOC), providing counsel regarding the full range of employment discrimination laws enforced by the Commission. At the EEOC, Sarah provided advice regarding the development of the changes to the EEO-1 Report to collect pay data. She also directed the Workplace Fairness Program at the National Partnership for Women & Families, where she handled issues surrounding fair pay, pregnancy discrimination, sexual harassment, equal opportunity, and other matters that impact working women and their families. Sarah served as senior counsel for the Employment Discrimination Project of the Lawyers' Committee for Civil Rights under Law and has worked as an attorney at the U.S. Department of Labor, in the Civil Rights Division of the Solicitor's Office.

[Additional submissions by Chairwoman Adams follow:]

WORKLIFE LAW
UNIVERSITY OF CALIFORNIA HASTINGS COLLEGE OF THE LAW

Written Statement of Liz Morris, Deputy Director of the Center for WorkLife Law
Before the Subcommittee on Civil Rights and Human Services and
Subcommittee on Workforce Protections, United States House of Representatives
Joint Hearing: Fighting for Fairness:
Examining Legislation to Confront Workplace Discrimination
March 15, 2021

Dear Chairs Bonamici and Adams and Ranking Members Fulcher and Keller:

The Center for WorkLife Law enthusiastically supports the "Providing Urgent Maternal Protections for Nursing Mothers Act" or "PUMP for Nursing Mothers Act." This bill would advance maternal and infant health and economic stability by ensuring working mothers don't have to choose between earning an income and breastfeeding.

The Center for WorkLife Law is a research and advocacy organization that seeks to advance gender, racial, and class equity in employment and education. WorkLife Law's 2018 report *Exposed: Discrimination Against Breastfeeding Workers* found lactating employees face significant obstacles at work.[1] Breastfeeding workers leaking milk have been denied permission to take pumping breaks; they have been fired just for asking; and refused privacy, forcing them to pump milk with their breasts exposed to coworkers, clients, and the public in physically unsafe conditions.[2] Workers who do not receive the break time and private space they need can face serious health consequences, including illness and painful infections, diminished milk supply, and weaning earlier than doctors recommend.[3] Many breastfeeding workers also suffer devastating *economic* consequences when they are fired or forced to resign following a request for lactation accommodations.[4]

The shocking toll of breastfeeding discrimination on the lives of workers is captured, in their own words, in the attached excerpt from the Center for WorkLife Law's *Exposed* report.

The 2010 Break Time for Nursing Mothers law was enacted to ensure breastfeeding workers have access to the most basic workplace supports needed by employees who are away from their nursing babies all day: reasonable break time and private space for pumping milk. Despite its clear purpose, the law has two

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[1] Morris L, Lee J, & Williams J, Exposed: Discrimination Against Breastfeeding Workers (January 1, 2019), Center for WorkLife Law, UC Hastings Law; available at https://www.pregnantatwork.org/wp-content/uploads/WLL-Breastfeeding-Discrimination-Report.pdf (hereinafter "*Exposed*").
[2] *Id.* at 4.
[3] *Id.*
[4] *Id.*

major—and unintentional—shortcomings that have prevented the law from realizing its full potential:

- Nearly 9 million women workers of childbearing age are not covered by the law. Excluded workers range from kindergarten teachers to registered nurses to farmworkers.[5]

- Even for employees who are covered, technicalities make the Break Time for Nursing Mothers law practically unenforceable, even in cases where an employee is fired for requesting breaks. Noncompliance is widespread.[6]

The PUMP Act would address both of these critical shortcomings by expanding coverage to all workers who need the law's protections and ensuring remedies are available to employees whose rights have been violated, thereby encouraging widespread employer compliance.

**Breastfeeding Parents Need Reasonable Break Time and Private Space to Pump during the Workday**

In light of overwhelming evidence of health benefits for babies and mothers, breast milk as a child's first food is universally recommended by all relevant major American medical associations.[7] Yet, despite this medical advice, the health benefits, and a high national breastfeeding initiation rate, a large majority of American mothers, and particularly women of color, do not meet the breastfeeding goals set by themselves[8] or the medical community.[9] One major obstacle to meeting breastfeeding goals is that many mothers have to choose between nursing their babies and keeping their jobs when they are denied basic break time and space accommodations.[10]

These accommodations are necessary because nursing parents are constantly producing milk. When a nursing parent is away from their child, they have to express milk on roughly the same schedule as their child nurses.[11] If their employment situation prevents them from regularly expressing milk, serious health consequences may follow. Once milk fills the breast, it must be removed (either through nursing, pumping, or by hand) to avoid excessive build up and painful pressure. This breast engorgement can lead to mastitis, an inflammation of the breast tissue that may involve an infection, abscess, pain, fever, and

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[5] *Id.* at 22-26.
[6] *Id.* at 32-33.
[7] Am. Acad. of Pediatrics, Policy Statement, Breastfeeding and the Use of Human Milk, 129 PEDIATRICS e827, 32 (2012), available at http://pediatrics.aappublications.org/content/pediatrics/ early/2012/02/22/peds.2011-3552.full.pdf; Am. Acad. Fam. Physicians, Policy Statement, Breastfeeding (2012), http://www.aafp.org/about/policies/all/breastfeeding.html; Am. Acad. Of Fam. Physicians, Policy Statement, Breastfeeding (1988, 2017 COD); Am. Coll. of Obstetricians and Gynecologists, ACOG COMMITTEE Opinion #756 Optimizing Support for Breastfeeding as Part of Obstetric Practice; Am. Pub. Health Ass'n. A Call to Action on Breastfeeding: A Fundamental Public Health Issue. Policy No. 200714 (2007) https://www.apha.org/policies-and-advocacy/public-health-policystatements/policy-database/2014/07/29/13/23/a-call-to-actionon-breastfeeding-a-fundamental-public-health-issue; See also World Health Organization, Factsheet: Infant and young child feeding (2018) http://www.who.int/en/news-room/fact-sheets/detail/infant-andyoung-child-feeding (recommending breastfeeding for two years).
[8] Six in ten mothers stop breastfeeding earlier than the intended. Odom EC et al., Reasons for Earlier Than Desired Cessation of Breastfeeding. PEDIATRICS. 131(3), e726-32 (Mar. 2013).
[9] CDC, Breastfeeding Report Card (2020), available at https://www.cdc.gov/breastfeeding/data/reportcard.htm.
[10] *Exposed* at 7.
[11] *See* U.S. Dep't of Labor, Wage & Hour Div., Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80075 (Dec. 21, 2010).

illness.[12] The condition may require hospitalization and, in some cases, surgical intervention. Inability to express milk can also negatively impact future milk production, because the body produces breast milk in response to milk removal on a demand and supply basis.[13] Nursing parents who aren't able to pump as needed typically suffer a drop in their milk supply, leaving them unable to supply enough milk for their infant, and they may ultimately be unable to breastfeed.[14]

Half of all women in one national survey reported that their employment impacted their breastfeeding-related decisions, and a third said that their employment posed a challenge to breastfeeding.[15] Breastfeeding rates tell the same story. Workplace accommodations for breastfeeding significantly predict breastfeeding duration.[16] Women who receive appropriate break time and private space for pumping breast milk are over twice as likely to be breastfeeding at six months, even after controlling for sociodemographic factors.[17]

But despite the 2010 Break Time for Nursing Mothers law requiring employers nationwide to provide reasonable break time and private space for pumping breast milk, three out of every five mothers work for employers who do not provide these basic accommodations.[18] Low-income workers face the greatest barriers. They are only half as likely as middle-income workers and one-third as likely as high-income workers to be provided sufficient break time and private space. Married women are four times more likely to receive break time and private space than single mothers.[19] Perhaps not surprisingly, low-income and single mothers are less likely to initiate breastfeeding and to breastfeed for as long as medically recommended.[20] Barriers to breastfeeding that break down along race and class lines serve to reinforce other problematic racial and economic health disparities.

Breastfeeding workers whose employers refuse to support their basic physical needs face severe consequences. Many lose their jobs, are forced to stop breastfeeding, or jeopardize their health or the health of their child.[21]

**The PUMP Act Would Enable the 2010 Nursing Mothers Law to Finally Deliver on Its Promise**

The decade-old Break Time for Nursing Mothers law was a landmark step toward achieving equity for mothers and nursing parents. But despite its significant gains, the law has fallen short of its promise due to two major shortcomings: (1) major gaps in coverage have excluded millions from its protections; and (2) the lack of practical means of enforcing the law has led to widespread noncompliance. The PUMP Act offers a simple solution to effectively address both shortcomings, and would thereby promote the health and economic security of workers and their families.

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[12] Lisa Amir. & The Academy of Breastfeeding Medicine Protocol Committee, ABM Clinical Protocol #4: Mastisis, BREASTFEEDING MEDICINE, 9 (5), 239, 239 (Revised March 2014).
[13] Mayo Clinic, Mastisis, https://www.mayoclinic.org/diseases-conditions/ mastitis/symptoms-causes/syc-20374829.
[14] Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80075.
[15] Katy B. Kozhimannil et al., Access to Workplace Accommodations to Support Breastfeeding after Passage of the Affordable Care Act, 26 WOMEN'S HEALTH ISSUES, 6 (2016), https://www.ncbi.nlm.nih.gov/ pmc/articles/PMC4690749/pdf/nihms715360.pdf.
[16] *Id.* at 5.
[17] *Id.* at 6.
[18] *Id.* at 3.
[19] *Id.*
[20] Forste R & Hoffmann JP, Are U.S. Mothers Meeting the Healthy People 2010 Breastfeeding Targets for Initiation, Duration, and Exclusivity? The 2003 and 2004 National Immunization Surveys. J OF HUM. LACT. 24(3):278-88 (Aug 2008).
[21] *Exposed* at 11.

The PUMP Act Would Close the Existing Coverage Gap That Excludes Millions of Workers

Nearly 9 million women of childbearing age are currently excluded from the protections of the Break Time for Nursing Mothers Law, meaning they have no clear federal right to receive break time and private space to pump milk during the workday.[22] This exclusion was unintentional at the time the law was enacted.[23]

Congress added the Break Time for Nursing Mothers language to the Fair Labor Standards Act (FLSA) by amending section 7 of that law, which generally requires employers to pay overtime compensation for long work hours.[24] Due to its placement in section 7, the Break Time for Nursing Mothers provision is subject to other sections of the FLSA that were originally designed to regulate employers with regard to payment of overtime—not the provision of pumping breaks.

One such section involves employee "exemptions." Under the FLSA there are numerous categories of workers who are not entitled to receive overtime compensation, regardless of the number of hours they work in a week.[25] These employees are said to be "exempt" from overtime. However, because of the Nursing Mothers law's placement within the overtime section, these workers have also been made exempt from the breastfeeding protections and have no workplace lactation rights under the FLSA.[26]

When the Nursing Mothers law was passed, it was intended to cover all workers.[27] The exclusions are the unintended byproduct of the statutory placement. The resulting coverage gap is considerable and impacts employees in a wide range of occupations, including many of those working in the top two pink-collar occupations: nursing and teaching.[28] The PUMP Act would simply correct this unintentional exclusion to bring *all* workers whose employers are covered by the FLSA under the law's protection.

The PUMP Act Would Deter Employers from Violating the Existing Break Time and Space Requirements

Even when clear violations occur, the Break Time for Nursing Mothers provision cannot be counted on to deliver justice in a court of law. Because employers cannot be held accountable for intentional legal violations, noncompliance has been widespread.[29] One federal judge astutely observed: "An employer faced with a request to allow an employee to take breaks to breastfeed may simply fire the employee rather than attempt to accommodate the request for breaks."[30] And indeed, the Center for WorkLife Law has heard from too many workers whose employers have done exactly that.

Again, this is another consequence of the break time provision's placement within the FLSA's overtime section. The FLSA provides that employers who violate the overtime section are liable to employees "in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may

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[22] *Exposed* at 26.
[23] See United States Breast Feeding Committee, Supporting Working Moms Act (SWMA), http://www.usbreastfeeding.org/swma.
[24] 29 U.S.C. § 207(r).
[25] 29 U.S.C. § 213.
[26] *Exposed* at 25-26.
[27] See United States Breast Feeding Committee, Supporting Working Moms Act (SWMA), http://www.usbreastfeeding.org/swma.
[28] *Exposed* at 25.
[29] *Exposed* at 32.
[30] Hicks v. City of Tuscaloosa, No. 7:13-cv-02063-TMP, 2015 U.S. Dist. LEXIS 141649, at *104 (N.D. Ala. Oct. 19, 2015).

be."[31] This makes sense in the context of wage violations. But unpaid wages is a meaningless remedy for an employee who has been terminated, forced to resign or take unpaid leave because of breastfeeding discrimination. As one judge put it, "there does not appear to be a manner of enforcing the express breast milk provisions."[32]

Even when the law has undoubtedly been broken, judges' hands are tied. As one judge expressed in the case of an EMT who was fired simply for *asking* that she be given break time and space: "While the Court is sympathetic to Plaintiff's argument that this renders [the Nursing Mothers law] ineffective, there is no support from the case law or DOL [Department of Labor]" to provide a remedy.[33]

The Nursing Mothers law's weak enforcement mechanism explains why it has been so frequently ignored. Despite that law, 60% of women reported in years following the law that their employer still did not provide access to break time and space.[34] One study that examined eight different types of breastfeeding-support laws found that the single most impactful law that increased breastfeeding rates at six months postpartum was a workplace pumping law with an enforcement mechanism. Children in states that passed enforceable laws were over 3 times more likely to ever breastfeed and over 2 times more likely to breastfeed for at least six months as a result.[35]

A recent analysis by the Center for WorkLife Law found that, although enforceable laws increase breastfeeding rates, litigation rates involving enforceable break time and space laws are extremely low in states where private rights of action exist. We believe this is because employers preemptively comply with such laws to avoid the risk of litigation. Complying with break time and space requirements is simple, and creative solutions exist in all industries.[36] As described by the U.S. Department of Health and Human Services, employers that support breastfeeding with affordable solutions realize cost savings from increased loyalty and retention, reduced sick time, and decreased health care and insurance costs.[37]

The PUMP for Nursing Mothers Act would encourage widespread employer compliance by allowing employees who have been fired or harmed in violation of their right to reasonable break time and space to pursue "legal or equitable relief," a remedy that has long been available to employees facing other forms of retaliation under the FLSA.

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The PUMP for Nursing Mothers Act would ensure that all breastfeeding employees have the full protection of the law and ability to meet their basic needs while away from their nursing babies during the

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[31] 29 U.S.C. § 216(b).
[32] Salz v. Casey's Marketing Co., No. 11-CV-3055-DEO, 2012 U.S. Dist. LEXIS 100399, at *7 (N.D. Iowa July 19, 2012).
[33] Mayer v. Prof'l Ambulance, LLC, 211 F. Supp. 3d 408, 415 (D.R.I. 2016).
[34] Kozhimannil, supra note 16, at 2.
[35] Smith-Gagen et. al., The Association of State Law to Breastfeeding Practices in the U.S., MATERN CHILD HEALTH J. 18(9):2034-43 (Nov. 2014), note 4.
[36] See U.S. Dep't of Health and Human Serv., Office on Women's Health, Lactation break time and space in all industries, https://www. womenshealth.gov/supporting-nursing-moms-work/lactation-breaktime-and-space-all-industries.
[37] U.S. Dep't of Health and Human Serv., Maternal Childcare Bureau, The Business Case for Breastfeeding (2008), https://www.womenshealth.gov/files/documents/bcfb_ business-case-for-breastfeeding-for-business-managers.pdf.

workday: reasonable break time and private space to express milk without fear of retaliation. It is a simple solution that promotes maternal and child health, as well as the economic security of women and families.

Sincerely,

Liz Morris

Deputy Director, Center for WorkLife Law

NETWORK LOBBY FOR CATHOLIC SOCIAL JUSTICE

Civil Rights and Human Services Subcommittee
Workforce Protections Subcommittee
House Education and Labor Committee
2176 Rayburn House Office Building
Washington, DC 20515

**NETWORK Lobby for Catholic Social Justice Supports**
**The Paycheck Fairness Act**

Dear Chairwoman Bonamici, Ranking Member Fulcher, Chairwoman Adams, and Ranking Member Keller,

Our mission at NETWORK Lobby for Catholic Social Justice is to educate, organize, and advocate for economic and social transformation. For almost 50 years, we have been guided by Catholic Social Teaching, which tells us to place the needs of people at the socioeconomic margins at the center of our advocacy. Founded by women religious in the 1970s, we continue their legacy today by building a just society that ensures all people have what they need to live dignified lives. We are proud to have over 100,000 supporters across the country who share our passion for justice.

At NETWORK Lobby, we know that just and equal pay is necessary to recognize the dignity of work. Almost six decades after the landmark Equal Pay Act was signed into law the gender and racial pay gap persists. We proudly support the **Paycheck Fairness Act (HR 7)** because it eliminates loopholes in existing legislation, helps break harmful patterns of pay discrimination, and strengthens workplace protections for women.

This comprehensive legislation achieves necessary victories for working women across the country. For employees, the Paycheck Fairness Act would protect against retaliation for discussing salaries with colleagues and require employers to prove that pay disparities exist for legitimate, job-related reasons. It would prohibit employers from screening job applicants based on their salary history or requiring salary history during the hiring process. Among other solutions, it provides plaintiffs who file sex-based wage discrimination claims under the Equal Pay Act with the same remedies available to plaintiffs who file race or ethnicity based wage discrimination claims under the Civil Rights Act.

For employers, the Paycheck Fairness Act would recognize excellence in pay practices and provide assistance to businesses of all sizes that need help with their equal pay practices.

Additionally, the Paycheck Fairness Act would help ensure the Department of Labor (DOL) uses a full range of investigatory tools to uncover wage discrimination. It

directs the Equal Employment Opportunity Commission to conduct a survey of available wage information to assist federal agencies in enforcing wage discrimination laws and creating a system to collect wage data. Finally, it instructs the DOL to conduct studies and review available research and data to provide information on how to identify, correct and eliminate illegal wage disparities.

While we have described the provisions of this legislation, what is at the core of HR 7 is equal pay for equal work. Gender and racial wage gaps are actively hurting families across this country every day. On average, women who work full-time and year-round are paid only 82 cents for every dollar paid to men, resulting in a gap of $10,157 each year.

This discrimination is worse for women of color. Latinas are typically paid 55 cents, Native American women 60 cents, Black women 63 cents, and Asian American and Pacific Islander women are paid as little as 52 cents for every dollar a white man earns.

Women are essential to the workforce and their family's ability to make ends meet. In just over half of U.S. households with children, mothers are the primary or sole breadwinners. As a group, the wage gap costs women who are employed full time in the United States more than $956 billion every year. This is inexcusable and inexplicable to working families across the country who struggle each month to make ends meet.

There are some who in opposition to the Paycheck Fairness Act who say that this legislation places to high a burden on employers and businesses. They say it is too difficult to prove that women are being paid less because of a factor other than their gender. To those vocalizing this position let me be clear: women, especially women of color, have been carrying a devastating burden for decades. Equal pay cannot be up for debate. Women have been economically exploited and treated as second-class citizens since the inception of this country. Widespread wage discrimination continues that legacy today. The choice could not be more clear. The Paycheck Fairness Act takes a necessary step towards ending systemic wage theft and discriminatory practices against women.

We strongly urge you to support the Paycheck Fairness Act.

Sincerely,

Gina Kelley
Government Relations Associate
NETWORK Lobby for Catholic Social Justice

cc: Chairman Scott and Ranking Member Foxx

NETWORK
NETWORK LOBBY FOR CATHOLIC SOCIAL JUSTICE

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March 18, 2021

Dear Civil Rights and Human Services Subcommittee and Workforce Protections Subcommittee:

We, the undersigned organizations, urge you to support the Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act. The PUMP for Nursing Mothers Act would protect breastfeeding employees across the nation by strengthening the existing Break Time for Nursing Mothers law and has bipartisan support.

The Break Time for Nursing Mothers law (Break Time law), passed in 2010, provided critical protections to ensure that employees would have reasonable break time and a private place to pump breast milk. Unfortunately, the placement of the law within the part of the Fair Labor Standards Act (FLSA) that sets minimum wages and overtime resulted in 9 million women — nearly one in four women of childbearing age — being unintentionally excluded from coverage and as such they have no clear right to break time and space to pump breast milk. Those left unprotected include teachers, software engineers, and many nurses, among others.

Without these protections, breastfeeding employees face serious health consequences, including risk of painful illness and infection, diminished milk supply, or inability to continue breastfeeding. According to a report from the University of California's Center for WorkLife Law,[i] the consequences of this coverage gap also include harassment at work, reduced wages, and job loss.

Breastfeeding mothers who return to work should not have to struggle to find time and space to express milk, risking their supply and thereby their ultimate breastfeeding success. The PUMP for Nursing Mothers Act would strengthen the 2010 Break Time law by closing the coverage gap, providing employers clarity on when pumping time must be paid and when it may be unpaid, and providing remedies for nursing mothers.

Breastfeeding is a proven primary prevention strategy, building a foundation for life-long health and wellness, and adapting over time to meet the changing needs of the growing child. The evidence for the value of breastfeeding to children's and women's health is scientific, solid, and continually being reaffirmed by new research. Breastfeeding is proven to prevent a wide range of illnesses and conditions. Compared with formula-fed children, those who are breastfed have a reduced risk of ear, skin, stomach, and respiratory infections; diarrhea; sudden infant death syndrome; and necrotizing enterocolitis.[ii] In the longer term, breastfed children have a reduced risk of obesity, type 1 and 2 diabetes, asthma, and childhood leukemia. Women who breastfed their children have a reduced long-term risk of diabetes, cardiovascular disease, and breast and ovarian cancers.[iii]

More than half of mothers return to the paid labor force before their children are three months old, with as many as one in four returning within just two weeks of giving birth. Many of these mothers choose to continue breastfeeding well after their return to work to meet standard health guidelines—and those employees need to express (or pump) breast milk on a regular schedule.

Businesses of all sizes and in every industry have found simple, cost-effective ways to meet the needs of their breastfeeding employees as well as their business. The HHS Office on Women's Health hosts the *Supporting Nursing Moms at Work: Employer Solutions* resource,[iv] which provides a critical link between the need for workplace support for breastfeeding families and the need for implementation guidance for their employers.

The online resource provides a user-friendly tool that employers can easily navigate to identify and implement industry-specific solutions to providing time and space accommodations.

According to the HHS *Business Case for Breastfeeding,* employers that provide lactation support see an impressive return on investment (almost 3:1), including lower health care costs, absenteeism, and turnover, and improved morale, job satisfaction, and productivity.[v] It is easier to provide temporary, scheduled breaks for milk expression than to cover the missed work shifts of an employee who is absent because either they or their baby is sick.

While 84% of babies are breastfed at birth, only 25% of U.S. infants are still exclusively breastfed at six months of age.[vi] Obstacles, especially workplace barriers, can make it difficult to fit breastfeeding into many parents' lives. But research clearly shows that employed mothers with access to workplace support are less likely to stop breastfeeding early.

The Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act is a common-sense and important step toward eliminating the barriers to breastfeeding and ensuring all families have the opportunity to reach their personal breastfeeding goals.

Sincerely,

**CO-SIGNERS**

**International, National, & Tribal Organizations:**
1,000 Days
2020 Mom
A Better Balance
Academy of Nutrition and Dietetics
Alimentacion Segura Infantil
American Academy of Family Physicians
American Association of University Women
American Civil Liberties Union
American Public Health Association
Association of Maternal & Child Health Programs
Association of State Public Health Nutritionists
Baby Cafe USA
Baby-Friendly USA, Inc.
Birthing Miracles Pregnancy Services LLC
Black Breastfeeding Caucus
Breastfeeding Family Friendly Communities
Breastfeeding USA
Bright Future Lactation Resource Centre Ltd.
Center for Health Equity, Education, and Research
Center for WorkLife Law
Dancing For Birth, LLC
Every Mother, Inc.
HealthConnect One
Healthy Children Project, Inc.
International Board of Lactation Consultant Examiners
International Childbirth Education Association
Lactation Training Lab
La Leche League Alliance
La Leche League USA
Mom2Mom Global
Mom Congress
MomsRising
National Association of Pediatric Nurse Practitioners
Native Breastfeeding Council
pumpspotting
The Institute for the Advancement of Breastfeeding and Lactation Education
U.S. Breastfeeding Committee

**Regional, State, & Local Organizations:**
Alabama Breastfeeding Committee
Alaska Breastfeeding Coalition
API Breastfeeding Task Force
Baby And Me LC

Baby Cafe Bakersfield
Breastfeeding Coalition of Palm Beach County
Breastfeeding Coalition of Washington
Breastfeeding Hawaii
Breastfeeding Task Force of Greater Los Angeles
Bronx Breastfeeding Coalition
Centro Pediatrico de Lactancia y Crianza
Constellation Consulting, LLC
Courthouse Lactation Space Task Force of the Florida Association for Women Lawyers
Geelo Wellness
Indiana Breastfeeding Coalition
Justice for Migrant Women
Kansas Breastfeeding Coalition
Maryland Breastfeeding Coalition
Metropolitan Hospital
Michigan Breastfeeding Network
Mothers' Milk Bank Northeast
New Hampshire Breastfeeding Task Force
New Jersey Breastfeeding Coalition
Nurture.
Nutrition First
NYC Breastfeeding Leadership Council, Inc.
Ohio Breastfeeding Alliance
Solutions for Breastfeeding
West Virginia Breastfeeding Alliance
WIC Nutrition, Sonoma County Indian Health Project, Inc.
Wisconsin Breastfeeding Coalition
Women Employed
Women's Law Project
Virginia Breastfeeding Advisory Committee

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[i] *EXPOSED: Discrimination Against Breastfeeding Workers*. Center for WorkLife Law; 2019. https://www.pregnantatwork.org/breastfeeding-report-fullpage/. Accessed March 12, 2021.

[ii] Systematic Review of Breastfeeding Programs and Policies, Breastfeeding Uptake, and Maternal Health Outcomes in Developed Countries | Effective Health Care Program. Effectivehealthcare.ahrq.gov. https://effectivehealthcare.ahrq.gov/products/breastfeeding/research-protocol. Published 2020. Accessed January 22, 2020.

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[iv] Supporting Nursing Moms at Work. womenshealth.gov. https://www.womenshealth.gov/supporting-nursing-moms-work. Published 2016. Accessed March 12, 2021.

[v] Business Case for Breastfeeding | Womenshealth.gov. womenshealth.gov. https://www.womenshealth.gov/breastfeeding/breastfeeding-home-work-and-public/breastfeeding-and-going-back-work/business-case. Accessed January 22, 2020.

[vi] Results: Breastfeeding Rates | Breastfeeding | CDC. Cdc.gov. https://www.cdc.gov/breastfeeding/data/nis_data/results.html. Published 2019. Accessed January 22, 2020.

**Co-Sponsor and Support Swift Passage of the Paycheck Fairness Act**

February 3, 2021

Dear Member of Congress:

As members of a broad coalition of organizations that promote economic opportunity for women and vigorous enforcement of antidiscrimination laws, we strongly urge you to co-sponsor and push for swift passage of the Paycheck Fairness Act as a top priority of the 117th Congress. Despite federal and state equal pay laws, gender pay gaps persist, and earnings lost to these gaps are exacerbating the financial effects of COVID-19, falling particularly heavily on women of color and the families who depend on their income. This legislation offers a much needed update to the Equal Pay Act of 1963 by providing new tools to battle pervasive pay gaps and to challenge discrimination.

The COVID-19 pandemic and systemic racism have exposed how the work performed primarily by women, and particularly Black and brown women, has long been and continues to be undervalued and underpaid, even as the rest of the country is newly recognizing the essential nature of this work. Black women, Latinas, and other women of color are especially likely to be on the front lines of the crisis, risking their lives in jobs in health care, child care, and grocery stores; they are also being paid less than their male counterparts. At the same time, women in this country lost more than 5 million jobs in 2020; indeed, women accounted for 100% of the jobs lost in December 2020. The unemployment rate for Black women and Latinas remains exceptionally high. These high jobless numbers threaten to exacerbate gender wage gaps when women regain employment. We cannot build back an economy that works for everyone without ensuring that all women can work with equality, safety, and dignity, starting with pay equity.

There is no more fitting way to begin this session than by making real, concrete progress in ensuring all women receive fair pay. The Paycheck Fairness Act updates and strengthens the Equal Pay Act of 1963 to ensure that it provides robust protection against sex-based pay discrimination. Among other provisions, this comprehensive bill bars retaliation against workers who voluntarily discuss or disclose their wages. It closes loopholes that have allowed employers to pay women less than men for the same work without any important business justification related to the job. It ensures women can receive the same robust remedies for sex-based pay discrimination that are currently available to those subjected to discrimination based on race and ethnicity. It prohibits employers from relying on salary history in determining future pay, so that pay discrimination does not follow women from job to job. And it also provides much needed training and technical assistance, as well as data collection and research.

Women are increasingly the primary or co-breadwinner in their families and cannot afford to be shortchanged any longer. Women working full-time, year-round are typically paid only 82 cents for every dollar paid to men. But for every dollar paid to their white, non-Hispanic male counterparts, Black women only make 63 cents, Native women only 60 cents, and Latinas only 55 cents. While Asian American and Pacific Islander (AAPI) women make 87 cents for every dollar paid to white, non-Hispanic men, women in many AAPI communities experience drastically wider pay gaps. Furthermore, moms are paid less than dads. And even when controlling for factors, such as education and experience, the pay gaps persist and start early in women's careers and contribute to a wealth gap that follows them throughout their lifetimes. These pay gaps can be addressed only if workers have the legal tools necessary to challenge discrimination and employers are provided with effective incentives and technical assistance to comply with the law.

We recently commemorated the twelfth anniversary of the enactment of the Lilly Ledbetter Fair Pay Act. That vital law rectified the Supreme Court's harmful decision in *Ledbetter v. Goodyear Tire & Rubber Company*. The law helps to ensure that individuals subjected to unlawful compensation discrimination are able to have their day in court and effectively assert their rights under federal antidiscrimination laws. But the Lilly Ledbetter Fair Pay Act, critical as it is, is only one step on the path to ensuring women receive equal pay for equal work. It's time to take the next step toward achieving equal pay. We urge you to prioritize the Paycheck Fairness Act in the 117th

Congress by co-sponsoring and urging swift passage of this legislation, taking up the cause of Lilly Ledbetter and all those who have fought for equal pay.

If you have any questions, please do not hesitate to contact Kate Nielson, Director of Public Policy & Legal Advocacy at the American Association of University Women at 202.728.7617 or nielsonk@aauw.org, or Emily Martin, Vice President for Education & Workplace Justice at the National Women's Law Center at 202.588.5180 or emartin@nwlc.org.

Sincerely,

9to5
A Better Balance
AFCPE (Association for Financial Counseling & Planning Education)
All-Options
American Association of University Women (AAUW)
- AAUW of Alabama
- AAUW of Alaska (AAUW Fairbanks (AK) Branch)
- AAUW of Arizona
- AAUW of Arkansas
- AAUW of California
- AAUW of Colorado
- AAUW of Connecticut
- AAUW of Delaware
- AAUW of District of Columbia (AAUW Washington (DC) Branch, AAUW Capitol Hill (DC) Branch)
- AAUW of Florida
- AAUW of Georgia
- AAUW of Hawaii
- AAUW of Idaho
- AAUW of Illinois
- AAUW of Indiana
- AAUW of Iowa
- AAUW of Kansas
- AAUW of Kentucky
- AAUW of Louisiana
- AAUW of Maine
- AAUW of Maryland
- AAUW of Massachusetts
- AAUW of Michigan
- AAUW of Minnesota
- AAUW of Mississippi
- AAUW of Missouri
- AAUW of Montana
- AAUW of Nebraska
- AAUW of Nevada
- AAUW of New Hampshire
- AAUW of New Jersey
- AAUW of New Mexico
- AAUW of New York
- AAUW of North Carolina
- AAUW of North Dakota
- AAUW of Ohio
- AAUW of Oklahoma
- AAUW of Oregon
- AAUW of Pennsylvania

AAUW of Puerto Rico
AAUW of Rhode Island
AAUW of South Carolina
AAUW of South Dakota
AAUW of Tennessee
AAUW of Texas
AAUW of Utah
AAUW of Vermont
AAUW of Virginia
AAUW of Washington
AAUW of West Virginia
AAUW of Wisconsin
AAUW of Wyoming
American Federation of Labor-Congress of Industrial Unions (AFL-CIO)
American Federation of State, County and Municipal Employees
American Federation of Teachers
AnitaB.org
Association of Flight Attendants-CWA
Bend the Arc Jewish Action
California Women's Law Center
Catalyst
Center for American Progress
Center for Law and Social Policy (CLASP)
Center for LGBTQ Economic Advancement & Research
Clearinghouse on Women's Issues
Coalition of Labor Union Women
Philadelphia Coalition of Labor Union Women
Community Health Councils
Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces
Connecticut Women's Education and Legal Fund (CWEALF)
Disciples Center for Public Witness
Equal Pay Today
Equal Rights Advocates
Every Texan
Family Forward Oregon
Family Values @ Work
Feminist Majority Foundation
Futures Without Violence
Gender Justice
Holy Spirit Missionary Sisters, USA-JPIC
In Our Own Voice: National Black Women's Reproductive Justice Agenda
Indiana Institute for Working Families
Institute for Women's Policy Research
Justice for Migrant Women
KWH Law Center for Social Justice and Change
Labor Council for Latin American Advancement
Leadership Conference on Civil and Human Rights
League of Women Voters of the United States
Legal Aid at Work
Legal Momentum, The Women's Legal Defense and Education Fund
Legal Voice
MANA, A National Latina Organization
Methodist Federation for Social Action
Mi Familila Vota

Michigan League for Public Policy
MomsRising
NAACP
National Advocacy Center of the Sisters of the Good Shepherd
National Asian Pacific American Women's Forum (NAPAWF)
National Association of Social Workers
National Center for Law and Economic Justice
National Committee on Pay Equity
National Council of Jewish Women
National Domestic Violence Hotline
National Education Association
National Employment Law Project
National Employment Lawyers Association
    National Employment Lawyers Association – Eastern Pennsylvania
    National Employment Lawyers Association – Georgia
National Network to End Domestic Violence
National Organization for Women
    Florida NOW
    Illinois NOW
    Indiana NOW
    Jacksonville NOW
    Kanawha Valley NOW
    Maryland NOW
    Monroe County NOW
    Montana NOW
    Northwest Indiana NOW
    South Jersey NOW-Alice Paul chapter
National Partnership for Women & Families
National WIC Association
National Women's Law Center
National Women's Political Caucus
Native Women Lead
NETWORK Lobby for Catholic Social Justice
New Jersey Citizen Action
NewsGuild-CWA
New York Women's Foundation
North Carolina Justice Center
People For the American Way
PowHer New York
Prosperity Now
Reinventure Capital
Restaurant Opportunities Centers (ROC) United
Service Employees International Union
Shriver Center on Poverty Law
TIME'S UP Now
U.S. Women's Chamber of Commerce
Union for Reform Judaism
United State of Women
WNY Women's Foundation
Women and Girls Foundation of Southwest Pennsylvania
Women Employed
Women of Reform Judaism
Women's Fund of Rhode Island
Women's Fund of the Greater Cincinnati Foundation

Women's Law Project
Women's Media Center
Women's Rights and Empowerment Network
YWCA USA
- YWCA Allentown
- YWCA Arizona Metropolitan Phoenix
- YWCA Billings
- YWCA Butler
- YWCA Central Alabama
- YWCA Central Indiana
- YWCA Central Maine
- YWCA Central Virginia
- YWCA Dayton
- YWCA Duluth
- YWCA Elgin
- YWCA Genesee County
- YWCA Greater Austin
- YWCA Greater Baton Rouge
- YWCA Greater Cincinnati
- YWCA Greater Cleveland
- YWCA Greater Portland
- YWCA Greenwich
- YWCA Hartford Region
- YWCA Kalamazoo
- YWCA Kauai
- YWCA Kitsap County
- YWCA Knoxville and the Tennessee Valley
- YWCA Lower Cape Fear
- YWCA McLean County
- YWCA Metro Detroit - Interim House
- YWCA National Capital Area
- YWCA New Hampshire
- YWCA North Central Indiana
- YWCA Northern New Jersey
- YWCA Oahu
- YWCA Pierce County
- YWCA Princeton
- YWCA QUINCY
- YWCA Sauk Valley
- YWCA Seattle|King|Snohomish
- YWCA South Hampton Roads
- YWCA Southeastern Massachusetts
- YWCA Southern Arizona
- YWCA University of Illinois
- YWCA Utah
- YWCA Western New York
- YWCA Wheeling
- YWCA Yakima

Zonta USA Caucus

Written Statement of Nikia Sankofa
Executive Director of the U.S. Breastfeeding Committee
Before the Subcommittee on Civil Rights and Human Services
and Subcommittee on Workforce Protections, United States House of Representatives
Joint Hearing: *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination*
March 18, 2021

Dear Chairs Bonamici and Adams and Ranking Members Fulcher and Keller:

The U.S. Breastfeeding Committee (USBC) submits this letter to the House Civil Rights and Human Services Subcommittee and Workforce Protections Subcommittee for the record of the joint hearing, "Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination" in full support of the **Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act**.

The USBC is a coalition of more than 100 national nonprofits, breastfeeding coalitions, community-based organizations, and federal agency partners that support a shared mission to drive collaborative efforts for policy and practices that create a landscape of breastfeeding support across the United States. We are committed to ensuring that all families in the U.S. have the support, resources, and accommodations to achieve their breastfeeding goals in the communities where they live, learn, work, and play.

We know that the vast majority of people become parents during their lifetime, and their needs and the needs of their infants are neither surprising nor difficult to meet if we plan appropriately. A simple and common-sense policy solution to address ongoing workplace barriers and inequities is within the reach of this committee: the Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act, which strengthens the existing Break Time for Nursing Mothers law and has bipartisan and bicameral support.

**Human Milk: A Proven Prevention Strategy**
Breastfeeding is a primary prevention strategy that builds a foundation for life-long health and wellness, adapting over time to meet the changing needs of the growing child.[i] The evidence for the value of human milk feeding to overall health is scientific, robust, and continually being reaffirmed by new research.[ii]

Human milk feeding is proven to reduce the risk of a range of illnesses and conditions for infants and mothers.[iii] Compared with commercial milk formula fed children, breastfed infants have a reduced risk of ear, skin, stomach, and respiratory infections; diarrhea; sudden infant death syndrome; and necrotizing enterocolitis. In the longer term, breastfed children have a reduced risk of obesity, type 1 and 2 diabetes, asthma, and childhood leukemia.[iv] Women who breastfed their children have a reduced long-term risk of type 2 diabetes, cardiovascular disease, and breast and ovarian cancers.[v] The American Academy of Pediatrics recommends infants be exclusively breastfed for about 6 months with continued breastfeeding while introducing complementary foods for at least 1 year.[vi]

**Barriers to Success**
The great majority of pregnant women and new parents want to breastfeed, but significant barriers in the community, health care, and employment settings can impede breastfeeding success.[vii] In 2017, the national breastfeeding initiation rate among infants was 84.1%, representing a 13.8% increase from 2001. However, by six months of age, only 25.6% of U.S. infants exclusively breastfeed. Despite overall

increases in breastfeeding initiation and duration, deep racial, geographic, and socioeconomic disparities in breastfeeding rates persist. Compared to national averages, only 73.7% of Black infants and 80.7% of Native American infants are ever breastfed, contributing to inequalities in maternal and infant health outcomes. Furthermore, a distressing 60 percent of mothers report that they did not breastfeed for as long as they intended.[viii]

Structural and environmental barriers can make it difficult or impossible for families to establish an adequate milk supply to sustain human milk feeding at medically recommended levels.[ix] For many families, rather than being a matter of personal choice, infant feeding practice is informed by circumstance.

The U.S. is one of only three countries that does not guarantee paid leave for new mothers.[x] Only 19 percent of the workforce has any paid family leave through an employer.[xi] The Family and Medical Leave Act provides for unpaid leave, but about 40 percent of the workforce is not eligible.[xii] Many parents return to work quickly after birth, before a strong breastfeeding relationship is established because they cannot afford to take unpaid leave or because they do not qualify for federal legal protections. More than half of mothers enter or return to the labor force before their children turn one year old,[xiii] with as many as one in four women returning within just two weeks of giving birth.[xiv]

When back at work or school, many discover that they are unable to pump breast milk as frequently as necessary or they have no choice but to pump in an unsanitary or unsafe location, such as a bathroom or room without a locked door. Economically-marginalized women and non-white women are more likely to return to work earlier than their more affluent white counterparts.[xv] Without necessary accommodations, they are too often unable to produce enough milk for a caregiver to feed their child during separations and may not be able to maintain their milk supply.

> "*I didn't have an easy time pumping when I went back to work. My employer didn't have a room for me to pump and I had to do it in the bathroom. I felt rushed and uncomfortable. The only reason I didn't give up breastfeeding was that I only worked part-time so it was only a few days a week that I had to put up with this. I cherish being able to breastfeed my children and we must do better supporting women.*" ~ Krystal, New York

Making matters worse, the COVID-19 pandemic created a host of challenges for breastfeeding employees. While businesses adapted to the pandemic, many nursing mothers did not feel safe going to work or were no longer able to access the lactation accommodations they needed. Across the nation, childcare centers were closed or extremely limited, leaving many without childcare.

> "*I have been disappointed with my [employer] healthcare facility returning from maternity leave. I am pumping and have an immune deficiency. I expressed my concerns before I returned and asked for a clean space to pump. Despite my efforts, I have not been provided a proper lactation area. My personal safety was compromised as I was pumping in the next room to a suspected COVID patient. They turned the lactation area into an isolation area without telling me. Returning to work has its many challenges and I feel with the addition of COVID, there is additional pressure*." ~ Andria, California

Breastfeeding families throughout the United States are facing barriers that make it difficult or impossible to start or continue breastfeeding – but it does not have to be this way. Public health

initiatives, including legal and policy interventions and approaches designed to enable more infants to breastfeed, have the potential to markedly improve population health.

**Current Laws and Simple Accommodations Across Industries**

The Break Time for Nursing Mothers law (Break Time law), passed in 2010, provides critical protections to ensure that employees have reasonable break time and a safe, private place to pump breast milk.[xvi] All the same strategies that businesses use for any other type of break time, such as rest breaks, meal breaks, or medical breaks can be utilized to support breastfeeding employees.

A lactating employee must pump about as often as the baby usually eats. This means that employees will need to pump their milk about every 3 hours. According to the HHS *Business Case for Breastfeeding* it usually takes around 15-20 minutes to pump breast milk, plus the time it takes to travel to the pumping space, set up and clean supplies, and store the pumped milk.[xvii] The space provided must be completely private so that no one can see inside the space and no one is able to enter the space while it is being used. To be functional, the pumping space simply needs to be furnished with seating and a flat surface such as a desk, small table, or shelf for the breast pump.

Businesses of all sizes and in every industry have found simple, cost-effective ways to meet the needs of their breastfeeding employees as well as their business. The Department of Health and Human Services (HHS) Office on Women's Health hosts the Supporting Nursing Moms at Work resource,[xix] which provides a critical link between the need for workplace support for breastfeeding families and the need for implementation guidance for their employers. The online resource provides a user-friendly tool that employers can use to identify and implement industry-specific solutions to providing time and space accommodations that work from farm fields to grocery stores, and restaurants to offices. These examples are already helping employers and employees identify practical solutions that work for their industry and for their workspace so that they are in compliance with the Break Time for Nursing Mothers law.

> "*I was able to pump at work until both of my children were 12 months old. That allowed me to continue breastfeeding when I was with them and then past a year as well as my milk was established. The support from my husband and coworkers, space to pump at work, & time to pump at work were all key to our successful journey! As a nurse & mama, I want to give my babies the best start to life and breastfeeding is proven to be that. Breast milk replacements have a place but I have known plenty of women who have had to use them because they didn't have support or time in the work place to express milk. We all can play a part to ensure mamas get time to pump & feel supported to breastfeed.*" ~ Kari, Iowa

Providing staff coverage when employees are taking a pumping break can be handled in a variety of ways. In many businesses, workers cover for one another or the supervisor or manager may provide coverage when an employee needs to be away from the workstation. Some businesses employ designated floaters to provide coverage when an employee is taking a break or will adjust an employee's work schedule to accommodate their needs.

In office buildings, many businesses use a small existing office, or use cubicle partitions to create a lactation space. Other businesses have converted closets and storage spaces to create permanent milk expression areas, with the only expenses being cleaning fees and the cost of seating and a flat surface. Health care facilities often use a patient or exam room and retail stores often use fitting rooms. Businesses in the same shopping mall or plaza may create a shared space that is available to employees

in all of the businesses. In outdoor worksites, pop up tents or the cab of a construction vehicle are used to meet the needs of breastfeeding employees.

In many workplaces, there is no unused space. In that case, the employer could instead provide access to a space normally used for other things, like a manager's office or a storage area. Alternatively, if more than one breastfeeding employee will need the space, mothers can develop a room-use schedule or the employer can install privacy curtains or dividers so that the room can be used by more than one person at a time. To put it simply, if the space is available each time the breastfeeding employee needs it, the employer is meeting the requirements of the law. If there are no breastfeeding employees, the employer does not need to maintain a space.

**Gaps in Current Law and Impact on Families**

Unfortunately, the placement of the Break Time law within section 7(r) of the Fair Labor Standards Act (FLSA) resulted in 9 million women[xx] — nearly one in four women of childbearing age — being excluded from coverage. Those left unprotected include teachers, software engineers, and many nurses, among others.

In addition, little recourse is available for employees who are covered by the Break Time law to ensure they can use their rights. Section 7(r) of the FLSA does not specify any penalties if an employer is found to have violated the break time for nursing mothers requirements. This means that in most instances, an employee may only bring an action for unpaid minimum wages or unpaid overtime compensation and an additional equal amount in liquidated damages. According to the Request for Information on the Break Time for Nursing Mothers provision, which includes the Department of Labor's preliminary interpretations of the law, "Because employers are not required to compensate employees for break time to express breast milk, in most circumstances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks."[xxi]

> *"We need real change, real legislation, and real support on every level. I know too many mothers that have given up breastfeeding simply because it's too difficult to juggle all of their other responsibilities."* ~ Sarah, Pennsylvania

Without these protections, breastfeeding employees face serious health consequences, including risk of painful illness and infection, diminished milk supply, or inability to continue breastfeeding. According to a report from the University of California's Center for WorkLife Law, the consequences of this coverage gap also include harassment at work, reduced wages, and job loss, putting some new mothers in the position of risking their family's economic security by attempting to continue breastfeeding and working.[xxii]

> *"As a salaried employee, my employer was not required to allow me to pump at work. I am thankful that they did... It is absurd to me that those laws that protect a woman's right to express breast milk at work do not protect salaried mothers. Are the babies born to salaried mothers any less entitled to be exclusively breastfed than the babies born to mothers who make hourly wages?"* ~ Jillian

Accommodating breastfeeding employees has not been the norm, but the tide is turning. The Society for Human Resources Management Employee Benefits Survey found that in 2009, only 25 percent of surveyed businesses had an onsite lactation room. In 2018, that number had nearly doubled to 49 percent.[xxiii]

**A Bipartisan Solution to Simplify Existing Law: the PUMP for Nursing Mothers Act**
A policy solution with bipartisan support, the PUMP Act would support breastfeeding employees while clarifying implementation for employers across the nation. The bill would strengthen the 2010 Break Time law by closing the coverage gap, providing employers clarity on when pumping time must be paid and when it may be unpaid, and providing remedies for nursing mothers that are available for other violations of the FLSA.

The Break Time for Nursing Mothers provision is written with language that provides immense flexibility and does not require the construction of a permanent, dedicated lactation space. The PUMP for Nursing Mothers Act would maintain this flexibility. More than half of all states have enacted legislation that impacts breastfeeding employees.[xxiv] For many of these states, the PUMP for Nursing Mothers Act would have little to no impact on employer requirements.

> "*I barely made it to 7 months breastfeeding my 2nd born son as a dental hygienist while my employer provided no time in between patients for me to do so. I made it over a year with my 1st born because I had support from work. Breastfeeding laws that cover ALL employers are a critical part of making breastfeeding the 'norm' rather than the exception in the US and are vital for those that do not work for large businesses*." ~ Candice, Pennsylvania

Over the past decade we have learned how to make breastfeeding and employment work, but the significant coverage gaps in the Break Time for Nursing Mothers law mean that workplace breastfeeding accommodation implementation is radically inconsistent. Employees of the same company and in the same building frequently do not have access to the same accommodations, and to figure out who must be accommodated can be complicated for businesses. The employees that fall between the cracks are left to choose between breastfeeding and their paycheck. That is why the PUMP for Nursing Mothers Act represents the next critical step toward bringing federal legislation into alignment with the needs of our nation's families and their employers.

Thank you for your consideration,

Nikia Sankofa
Executive Director
U.S. Breastfeeding Committee

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[Additional submission by Mr. Bowman follow:]

CCD
CONSORTIUM FOR CITIZENS WITH DISABILITIES

June 10, 2019

The Honorable Bobby Scott
Chair, Education and Labor Committee
2176 Rayburn House Office Bldg.
Washington, DC 20515

Hon. Virginia Foxx
Ranking Member, Education and Labor Committee
2462 Rayburn House Office Bldg.
Washington, DC 20515

Dear Chairman Scott and Ranking Member Foxx:

As co-chairs of the Consortium for Citizens with Disabilities (CCD) Rights Task Force, we write to express our strong support for the Protecting Older Workers Against Discrimination Act (POWADA) (H.R. 1230) and the Transformation to Competitive Employment Act (H.R. 873). CCD is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, integration, and inclusion of children and adults with disabilities in all aspects of society.

POWADA would correct a Supreme Court decision, *Gross v. FBL Financial Services, Inc.*, that narrowly interpreted the Age Discrimination in Employment Act to require that unlawful discrimination be the "but-for" cause of an employer's conduct in order to be actionable. Some courts have also applied this but-for cause requirement to claims of disability-based employment discrimination under the Americans with Disabilities Act (ADA), making it harder for people with disabilities to prevail on workplace discrimination claims.

POWADA is an important opportunity to restore workplace rights for people with disabilities. People with disabilities have the lowest employment rates of any group tracked by the Bureau of Labor Statistics, and their labor force participation rate has consistently been less than half of that of people without disabilities. Attitudinal barriers among employers are among the top reasons for these low rates. It is critically important to address barriers to employment for people with disabilities, and POWADA would help do that.

We also support the Transformation to Competitive Employment Act, which was discussed along with POWADA in your May 21, 2019 hearing on Eliminating Barriers to Employment. This bill would provide incentives to assist providers of subminimum wage employment for people with disabilities to transform the services that they provide to focus instead on competitive integrated employment, and would make grants available to state agencies to collaborate in developing the services needed to support the individuals served by these providers to secure and maintain competitive integrated employment.

The Transformation to Competitive Employment Act represents an important step toward ending the practice of paying subminimum wages to employees with disabilities under Section 14(c) of the Fair Labor Standards Act and expanding the supported employment services needed to ensure that people with disabilities who are served in subminimum wage sheltered workshops to receive the services they need to secure and maintain competitive integrated employment. This bill is another important measure that would bring needed expansion of real employment opportunities for people with disabilities.

We stand ready to work with you to help secure passage of H.R. 1230 and H.R. 873, both of which are important steps to address barriers to full and meaningful employment of people with disabilities.

Sincerely,

Jennifer Mathis
Bazelon Center for Mental Health Law

Mark Richert
National Disability Institute

Samantha Crane
Autistic Self-Advocacy Network

Heather Ansley
Paralyzed Veterans of America

Kelly Buckland
National Council on Independent Living

Co-Chairs
CCD Rights Task Force

[Additional submission by Ms. Foxx follow:]

Littler | Workplace Policy Institute

**Littler Mendelson, P.C.**
815 Connecticut Avenue, NW
Suite 400
Washington, DC 20006

March 31, 2021

The Honorable Suzanne Bonamici, Chair
The Honorable Russ Fulcher, Ranking Member
Subcommittee on Civil Rights and Human Services

The Honorable Alma S. Adams, Chair
The Honorable Fred Keller, Ranking Member
Subcommittee on Workforce Protections

U.S. House Committee on Education and Labor
2176 Rayburn HOB
Washington, DC 20515

**Re: H.R. 5592, the Providing Urgent Maternal Protections for Nursing Mothers ("PUMP") Act**

Dear Chairs Bonamici and Adams, and Ranking Members Fulcher and Keller:

Littler's Workplace Policy Institute (WPI) respectfully submits these comments for the record regarding H.R. 5592, the Providing Urgent Maternal Protections for Nursing Mothers ("PUMP") Act, which was the subject of a joint hearing of the Subcommittee on Civil Rights and Human Services, and the Subcommittee on Workforce Protections, on March 18, 2021.

By way of background, WPI facilitates the employer community's engagement in legislative and regulatory developments that affect their workplaces and business strategies. WPI harnesses the deep subject matter expertise of Littler, the largest law firm in the world with a practice devoted exclusively to the representation of employers in employment and labor law matters. Littler's clients range from new and emerging businesses to Fortune 100 companies throughout the country and around the world. We offer our views so that the Subcommittees may have the benefit of our and our clients' experiences as they consider this legislation.

**Statutory Background**

The 2010 Patient Protection and Affordable Care Act amended the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) to require employers to provide:

(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

(B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

29 U.S.C. § 207(r)(1). The Act provides that employers are not required to compensate an employee for "reasonable break time" for any "work time spent for such purpose." *Id.* § 207(r)(2).[1] The Act exempts employers with fewer than 50 employees where the requirement would impose an undue hardship. *Id.* § 207(r)(3). The Act does not preempt state laws that provide greater protections. *Id.* § 207(r)(4). Notably, these requirements were added to section 207 of the FLSA (the overtime rule). As a result:

1. They were subject to the exemptions applicable to the other requirements of the overtime rule found in sections 213 and 214; and

2. The remedies were unclear. Under section 216, an employer that violates section 207 is liable to the employee in the amount of their unpaid overtime compensation and liquidated damages. 29 U.S.C. § 216(b). These remedies did not connect logically to any violation of section 207(r), and many courts rejected section 207(r) claims for lack of a remedy where the plaintiff did not experience unpaid wages.

**H.R. 5592**

H.R. 5592, the "PUMP for Nursing Mothers Act," would amend the FLSA to: (a) clarify when lactation time may be considered compensable hours worked; (b) provide that exempt employees would nonetheless be subject to the requirements of section 207(r); and (c) provide a remedy for violations of the Act.

**A. When Time May Be Considered Compensable Hours Worked**

H.R. 5592 would clarify when the time may be compensable hours worked. Specifically, the Act would amend the FLSA to provide that:

> **(A) Subject to subparagraph (B), an** ~~**An**~~ employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any ~~work time spent~~ **time spent during the work day** for such purpose**, unless otherwise required by Federal, State, or local law**.
>
> **(B) In the case of an employee who is compensated on an hourly basis, the employer shall compensate the employee for reasonable break time under**

[1] Generally speaking, when employers offer short breaks (which the DOL describes as those "usually lasting about 5 to 20 minutes") to their employees, federal law considers such breaks as compensable hours worked. Thus, section 207(r)(2) provides an exception to the general rule regarding the compensability of short breaks where the purpose of the break is to express breast milk. As discussed below, H.R. 5592 arguably eliminates this exception.

**paragraph (1) if the employee is not entirely relieved from duty during the break.**

The foregoing changes would be effective on the date of enactment.

Some of the revisions (changing "work time spent" to "time spent during the work day" and the addition of subparagraph (B)) appear intended as a technical correction to clarify that a lactation break is only non-compensable if the employee is actually relieved from duty during the break. The remaining change (adding "unless otherwise required by Federal, State, or local law") may at first appear to simply reflect the "no preemption" concepts of section 207(r)(4). If this proposed language is merely to avoid preemption, then it is surplusage and not necessary, due to already-existing section 207(r)(4), and we recommend that it be stricken in the interest of clarity.

The inclusion of the word "Federal" may be much more significant. It would arguably convert all "short" lactation breaks (including those less than 20 minutes) into compensable hours worked. *See* 29 C.F.R. § 785.18 ("Rest periods of short duration, running from 5 minutes to about 20 minutes ... must be counted as hours worked."). It may be that many employers already treat all lactation breaks as compensable hours worked; however, for employers that require employees to "clock out" for lactation breaks (or that only permit a certain number of paid lactation breaks per day), this could be a significant change.

**B. Elimination of the Exemptions in Sections 213 and 214**

H.R. 5592 would eliminate the exemptions to section 207(r), effective 120 days from enactment.[2] In that light it is important to note that that the Act does not only require employers to provide the employee *time* to express breast milk, but also to provide "a *place*, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public." 29 U.S.C. § 207(r)(1)(B) (emphasis added). While the *place* requirement may not present an undue burden with respect to certain "exempt" employees (such as those employed in an executive, administrative, or professional capacity), the exemptions of section 213 and 214 (which would no longer apply to the lactation provision) extend much more broadly, including employees who are employed in settings where the *place* requirement may be more difficult to satisfy, including in certain seasonal amusement or recreational establishments, certain agricultural employees, domestic service employees, those subject to the Motor Carrier Act exemption or Railway Labor Act exemption, and those whose services are performed in a foreign country.

To be sure, the list of exemptions in sections 213 and 214 is long and complex, and it is not repeated here. It includes, for example, certain employees engaged in the "making of wreaths" or the "ginning of cotton" or the "processing of sugar beets ... into sugar (other than refined sugar) or syrup." Suffice it to say that there are many industries and employers that may

[2] This is a function of Section 2(a) of the legislation, which repeatedly adds "except section 7(r)" to various spots in sections 213 and 214, which provide exemptions to the requirements of section 207. Section 3(a) would make these changes effective 120 days after enactment.

have employees currently exempt from the *time* and *place* requirements of section 207(r), that may find it difficult to comply with H.R. 5592 (at least with respect to the *place* requirement).

If the PUMP Act is advanced through the legislative process, we recommend that Congress make clear via statutory text or legislative history how an employer may comply with these requirements where employees are on duty in environments that do not lend themselves to provision of a private space.

**C. Remedies**

H.R. 5592 would amend section 216(b) to provide a remedy for violations of the lactation requirements (beginning 120 days from enactment), by explicitly providing that any employer that violates the provisions of section 207(r) "shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 7(r) . . . , including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages."[3] These are the same remedies available for violation of the anti-retaliation provision of the FLSA, which has been interpreted to allow damages for emotional distress, among other remedies.

We are deeply concerned that this amendment could be significant in terms of incentivizing new claims due to the financial pressures associated with the newly available remedies. We are equally concerned that creating this private right of action will extend to even the most technical violations of section 7(r), even where an alleged violation results in no tangible or economic injury. We believe the current administrative scheme, under which the Department of Labor is empowered to investigate alleged violations and impose penalties for repeated or willful violation of that section, is an adequate and more effective means of enforcement.

* * *

We thank you for the opportunity to provide these comments to the Subcommittees, and trust that they are helpful to you. Please do not hesitate to contact the author if we may provide additional information.

Respectfully submitted,

LITTLER MENDELSON, P.C.
WORKPLACE POLICY INSTITUTE

By: James A. Paretti, Jr.
Shareholder
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[3] This is the accomplished by way of Section 2(b), which adds a reference to "7(r)" to an existing provision addressing remedies for violations of the anti-retaliation provision found in section 215(a)(3).

[Additional submission by Ms. Hayes follow:]


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San Francisco, CA 94105
Phone: 415.621.0672

**www.EqualRights.org**

March 15, 2021

**RE: Support Swift Passage of the Paycheck Fairness Act**

Dear Representative,

On behalf of Equal Rights Advocates, I write in strong support of the Paycheck Fairness Act, which would provide critical updates to the Equal Pay Act of 1963 to better address the persistent gender pay gap that continues to place women – particular women of color - and their families at an economic disadvantage.

Equal Rights Advocates (ERA) is a national, non-profit legal organization based in San Francisco, California, whose mission is to protect and expand economic and educational access and opportunities for women and girls. We have a long history of working to address pay discrimination and to close the gender wage gap. We have litigated numerous cases relating to pay discrimination and regularly provide information and resources to employees who contact our free legal information helpline regarding unlawful gender and race-based pay disparities.

We have also led numerous bills at the local, state and national level to ensure economic and gender justice for women and families. Most recently, ERA has co-sponsored SB 973 (Jackson, 2020) which requires California employers with 100 employees or more to submit an annual pay data report to the California Department of Fair Employment and Housing outlining the compensation and hours worked of its employees by gender, race, ethnicity, and job category. This allows state agencies to more efficiently identify patterns of wage disparities and encourages employers to analyze their own pay practices to ensure they are fair and lawful. Additionally, ERA co-sponsored the California Fair Pay Act, SB 358, (Jackson, 2016) which amended and strengthened our state's Equal Pay Act to prohibit employer secrecy rules and clarify that workers must be paid equally to coworkers of another sex who perform substantially similar work, unless the employer proves that the disparity was due to a legitimate, job-related, bona fide factor not based on or derived from sex. We also cosponsored AB 168 (Eggman, 2017) which prohibits California employers from inquiring about prior salary and requires them to provide the pay scale for a position in question upon reasonable request and AB 2282 (Eggman, 2018) which clarified that prior salary cannot be used on its own, or in combination with a lawful factor, to justify a wage differential under the California Equal Pay Act. Finally, ERA chairs Equal Pay Today, a national collaboration of organizations working at the local, state, and federal level to close the gender wage gap.

Today in the United States, despite the passage of previous equal pay legislation, including the critically important Lily Ledbetter Fair Pay Act, the gender pay gap remains pervasive. Women, even those who work full-time and year round, still only earn 82 cents to every dollar earned by white non-Hispanic men.[1] This gives rise to a nationwide pay gap of $956 billion every year.[2] For women of color, the pay gap is even larger. For

[1] *The Wage Gap: The Who, How, Why, and What to Do* (National Women's Law Center, Oct. 2020), https://nwlc.org/wp-content/uploads/2019/09/Wage-Gap-Who-how.pdf.
[2] *Americas Women and Wage Gap* (National Partnership for Women and Families, Sept. 2020), https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/americas-women-and-the-wage-gap.pdf

every dollar earned by a non-Hispanic white man, Latina women earn only 55 cents, Native American women only 60 cents, Black women only 63 cents, and Asian American Pacific Islander women, just 85 cents.[3] These large pay gaps, although of varying sizes across demographics of women, prove harmful to the economic security of women and families across the country. The negative economic consequences of these gender pay gaps are especially pronounced as "mothers are primary or sole breadwinners in half of U.S. households with children."[4] Of these female-headed households, one-quarter of them fall below the poverty line.[5]

As it stands, the gender and race pay gaps are closing at a glacial pace. At current rates, the gender wage gap will not close until 2059. For women of color, the picture is even bleaker. It will not be until 2124 that black women receive equal pay to white men and not until 2233 that Latinas receive the same.[6] Now is the time for action.

The Paycheck Fairness Act is an important step in accelerating the closing of the gender pay gap. Among many provisions, the Paycheck Fairness Act would bar retaliation for discussing or disclosing wages. According to the Institute for Women's Policy Research, across the country, about half of workers were prohibited or strongly discouraged from disclosing their wages to other employees.[7] Yet, when an individual is unable to discuss wages with other employees, it becomes exceedingly difficult to determine if one is making less than one's colleagues. By ending the practice of pay secrecy, the Paycheck Fairness Act would make it harder for employers to keep pervasive practices of pay discrimination hidden.

In addition, the Paycheck Fairness Act would also prohibit employers from relying on salary history when setting the wages of their employees. This provision is critical as the practice of relying on prior salary can lead to a single act of pay discrimination following a woman throughout her career. One year out of college, women are already earning 7 percent less than their male colleagues, even after controlling for factors such as college major, occupation, or hours worked.[8] If a woman's prior salary is used by future employers, the gender pay gap will continue to persist as a depressed past salary continues to be used to determine future wages. Prohibiting employer reliance on salary history will help stop the perpetuation of unequal pay.

Another crucial provision in this version of the Paycheck Fairness Act is the pay data collection requirement. As mentioned above, ERA fought for pay data collection at the state level in California and secured this via SB 973 (Jackson, 2020). The need to ensure equal pay is now more apparent than ever during the current COVID-19 health and economic crisis, which has exposed the lasting harm of unequal pay and other contributors to economic security on women, and in particular, women of color. Pay data collection helps uncover pay discrimination, which is a major contributor to the overall gender and race-based wage gaps. It also promotes voluntary compliance with equal pay and anti-discrimination laws by employers.

The Paycheck Fairness Act would also close loopholes that allow employers to pay women less without a legitimate business justification and would provide the same robust remedies for sex-based pay discrimination as race and ethnicity-based discrimination. It would also support salary negotiation skills training programs to

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[3] *The Wage Gap: The Who, How, Why, and What to Do* (National Women's Law Center, Oct. 2020), https://nwlc.org/wp-content/uploads/2019/09/Wage-Gap-Who-how.pdf.
[4] *The Paycheck Fairness Act* (National Partnership for Women & Families, January 2019), http://www.nationalpartnership.org/our-work/resources/workplace/fair-pay/the-paycheck-fairness-act.pdf.
[5] *Id.*
[6] "Last Decade Saw Slowest Progress on Closing the Gender Wage Gap in Nearly 40 Years (Institute for Women's Policy Research, March 2018), https://iwpr.org/last-decade-slowest-progress-wage-gap/.
[7] "Pay Secrecy and Wage Discrimination" (Institute for Women's Policy Research, January 2014), https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Q016%20(1).pdf.
[8] Christianne Corbett and Catherine Hill, "Graduating to a Pay Gap: The Earnings of Women and Men One Year after College Graduation" (American Association of University Women, October 2012), https://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-collegegraduation.pdf.

give women the tools to advocate for higher wages. Salary negotiation workshops have been shown to be highly effective. For example, in a study conducted following the free salary negotiation workshops put on by the city of Boston, the Center for Women in Politics and Public Policy at the University of Massachusetts Boston found that nearly half of the women who were interviewed had either successfully negotiated a pay raise or starting salary that brought them either to or above the market rate following the training.[9]

As the bill states, these continuing pay disparities have devastating impacts on women, especially women of color. Over the course of the COVID-19 pandemic, researchers have found this to be even more true. Since last February, 2.4 million women have exited the workforce, or, been pushed out of the workforce, highlighting a dramatic regress for gender equity.[10] More and more women are forced to stay home in order to care for children and loved ones while men continue to work. Before the pandemic, "women did, on average, three times more unpaid care work than men, and this responsibility has heightened since the pandemic given school and childcare closures, and increased care needs for elderly relatives."[11] Women who are able to remain in the workforce, however, are still paid less than their male colleagues, especially Black women and women of color. COVID-19 has exacerbated these long-standing gender and racial inequities.[12] Now, more than ever, elected officials must recognize these disparate impacts and deliver solutions to American women.

Without continued efforts to provide women with the tools to uncover and challenge pay discrimination and provisions to keep employers from perpetuating persistent inequalities, the gender pay gap will not close. The Paycheck Fairness Act is an important step on the path towards a future where women can stand on equal economic footing to their male counterparts.

For these reasons, we are proud to support the Paycheck Fairness Act and call for its swift passage of the Paycheck Fairness Act as a top priority of the 117th Congress.

If you have any additional questions, please do not hesitate to contact me at (415) 575-2394, or jstender@equalrights.org.

Jessica Stender
Senior Counsel, Workplace Justice & Public Policy

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[9] Jecynta Azong, Ann Bookman, and Christa Kelleher, "Gaining Ground on Equal Pay: Empowering Boston's Women Through Salary Negotiation Workshops, A Report on Year One of AAUW Work Smart in Boston" (Center for Women in Politics and Public Policy, September 2017), https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1055&context=cwppp_pubs.

[10] Daniella Silva and Leticia Miranda, "About 275,000 women left workforce in January in 'critical' pandemic trend, experts say," (CNBC, February 2021), https://www.nbcnews.com/news/us-news/about-275-000-women-left-workforce-january-critical-pandemic-trend-n1256942.

[11] OECD, "Equal Pay International Coalition calls to prioritize pay equity in COVID-19 recovery with support from Megan Rapinoe," https://www.oecd.org/newsroom/equal-pay-international-coalition-calls-to-prioritize-pay-equity-in-covid-19-recovery-with-support-from-megan-rapinoe.htm.

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[Additional submission by Mr. Jones follow:]

AAUW
empowering women since 1881

March 15, 2021

The Honorable Bobby Scott, Chairman
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20512

The Honorable Virginia Foxx, Ranking Member
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20512

Dear Chairman Scott and Ranking Member Foxx:

On behalf of the more than 170,000 members and supporters of the American Association of University Women (AAUW), I urge you to push for swift passage of the bipartisan Paycheck Fairness Act (H.R. 7) as a top priority of the 117th Congress. Despite federal and state equal pay laws, gender pay gaps persist. The Paycheck Fairness Act offers a much needed update to the Equal Pay Act of 1963 by providing new tools to battle these pervasive pay gaps and to challenge discrimination.

The dual crises of a global pandemic and systemic racism have laid bare the economic disparities in our country. While we all struggle to survive, we are relying heavily on the work performed by essential workers who are disproportionately Black and brown women.[1] Yet their work has long been and continues to be undervalued and underpaid. At the same time, in 2020, American women lost more than 5 million jobs. The most recent jobs report shows women account for 100% of the jobs lost in December – all 140,000 of them – and women of color made up an overwhelming share of those jobs.[2] This massive job loss coupled with the consistent undervaluing of women's work compounds over time and results in significant lost earnings. As a result, women do not have a financial cushion to help weather the current economic crisis or the ability to build wealth, all of which contribute to racial and gender wealth gaps that create barriers to families' economic prosperity. We cannot build back our economy without immediately addressing these realities. And women and their families cannot afford to wait any longer for change.

We must appropriately respond to the crises we are currently experiencing than by making real, concrete progress in ensuring all women receive fair pay. While the gap has narrowed since passage of the Equal Pay Act of 1963, progress has largely stalled in recent years. Data from the U.S. Census Bureau once again revealed that women working full-time, year-round are typically paid only 82 cents for every dollar paid to men.[3] The pay gaps are even wider for women of color. Black women and Latinas make, respectively, 63 and 55 cents on the dollar as compared to non-Hispanic, white men.[4] Action is required now: at the current rate, the overall pay gap between men's and women's earnings will not close until 2093 and it will take significantly longer for women of color to reach parity.[5]

Research indicates that the gender pay gap develops very early in women's careers. Controlling for factors known to affect earnings, such as education and training, marital status, and hours worked, research finds that college-educated women still earn seven percent less than men just one year out of college.[6] Over time, the gap compounds and widens, impacting women's social security and retirement. Ensuring that women have equal pay would have a dramatic impact on families and the economy.

According to a report from the Institute for Women's Policy Research (IWPR), the poverty rate for all working women would be cut in half, falling from 8.0 percent to 3.8 percent if women were paid the same as comparable men.[7] The same study indicates that the U.S. economy would have produced an additional $512.6 billion in income if women had received equal pay for equal work.[8] This is why I urge you to pass this important bill.

The Paycheck Fairness Act would update and strengthen the Equal Pay Act of 1963 to ensure that it provides effective protection against sex-based pay discrimination in today's workplace.
The bill takes several important steps, including:

- **Guaranteeing Non-Retaliation:** The bill prohibits retaliation against workers for discussing or disclosing wages. Without the non-retaliation provisions of the Paycheck Fairness Act, many women will continue to be silenced in the workplace—that is, prohibited from talking about wages with coworkers without the fear of being fired. This is an issue that keeps women—like it kept Lilly Ledbetter—from learning of the pay discrimination against them.
- **Prohibiting Reliance on Prior Salary History:** The bill prohibits employers from relying on salary history in determining future pay, so that prior discrimination doesn't follow workers from job to job.
- **Requiring Job-Relatedness:** The bill closes loopholes that allow employers to pay women less than men for the same work without a business necessity that is related to the job.
- **Equalizing Remedies:** The bill ensures women can receive the same robust remedies for sex-based pay discrimination that are currently available to those subjected to discrimination based on race and ethnicity.
- **Providing Additional Assistance and Resources:** The bill also provides technical assistance to businesses, requires wage data collection, and supports salary negotiation skills training programs to give women the tools to advocate for higher wages.

The pay gap is persistent and can only be addressed if women are armed with the tools necessary to challenge discrimination against them, and employers are provided with effective incentives and technical assistance to comply with the law. I urge you to take a critical step towards pay equity by supporting and calling for swift passage of the Paycheck Fairness Act (H.R. 7). Please do not hesitate to contact me at 202.728.7617 or nielsonk@aauw.org, or Leticia Bustillos, Federal Policy Manager, at 202.785.7732 or bustillosl@aauw.org, if you have any questions.

Sincerely,

Kate Nielson
Senior Director of Public Policy, Legal Advocacy & Research

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[1] "When Hard Work is Not Enough: Women in Low-Paid Jobs" (National Women's Law Center, April 2020), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/04/Women-in-Low-Paid-Jobs-report_pp04-FINAL-4.2.pdf.
[2] "American Women Lost More Than 5 Million Jobs In 2020" (Forbes, January 12, 2021), https://www.forbes.com/sites/maggiemcgrath/2021/01/12/american-women-lost-more-than-5-million-jobs-in-2020/?__twitter_impression=true&s=09&sh=4cf53e102857.
[3] "The Simple Truth about the Gender Pay Gap" (American Association of University Women, Fall 2020), https://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/.
[4] *Id.*
[5] *Id.*
[6] "Graduating to a Pay Gap: The Earnings of Women and Men One Year after College Graduation" (American Association of University Women, October 2012), https://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf.
[7] Jessica Milli *et al*., "The Impact of Equal Pay on Poverty and the Economy" (Institute for Women's Policy Research, April 2017), https://iwpr.org/wp-content/uploads/2017/04/C455.pdf.
[8] *Id.*

[Additional submissions by Ms. Leger Fernández follow:]

national partnership for women & families
Because actions speak louder than words.

March 18, 2021

The Honorable Alma S. Adams
Chair, Subcommittee on Workforce Protections
Committee on Education and Labor
United States House of Representatives

The Honorable Fred Keller
Ranking Member, Subcommittee on Workforce Protections
Committee on Education and Labor
United States House of Representatives

The Honorable Suzanne Bonamici
Chair, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
United States House of Representatives

The Honorable Russ Fulcher
Ranking Member, Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
United States House of Representatives

Dear Chairs Adams and Bonamici and Ranking Members Keller and Fulcher,

The National Partnership for Women & Families is a non-profit, non-partisan advocacy organization committed to improving the lives of women and families by achieving equity for all women. Since our creation as the Women's Legal Defense Fund in 1971, we have fought for every significant federal advance for equal opportunity in the workplace, including the Pregnancy Discrimination Act of 1978 and the Family and Medical Leave Act of 1993 (FMLA). **We write in strong support of H.R. 7, the Paycheck Fairness Act;, H.R. 1065, the Pregnant Workers Fairness Act; the Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act; and the Protecting Older Workers Against Discrimination Act (POWADA).** As we celebrate Women's History Month, these critical bills will help our nation build back an economy that works for everyone by ensuring that all women can work with equality, safety, health and dignity.

The impact of the coronavirus pandemic has fallen heavily on women of color particularly, and all women generally. Women are especially likely to be essential workers. Still, they are also bearing the brunt of job losses while shouldering increased caregiving responsibilities that have pushed millions of women out of the workforce entirely. These bills will help protect women's economic security at a time when they need it most.

**Paycheck Fairness Act**

Women and workers from communities of color continue to face significant pay disparities in the United States. On average, women working full time and year-round are paid only 82 cents for every dollar paid to men, and the wage gap is widest for women of color. Among women who hold full-time, year-round jobs in the United States, Black women are typically paid 63 cents, Native American women 60 cents and Latinas just 55 cents for every dollar

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paid to white, non-Hispanic men. White, non-Hispanic women are paid 79 cents.[1] Asian American and Pacific Islander (AAPI) women who work full time, year-round are paid as little as 52 cents for every dollar paid to white, non-Hispanic men, as Burmese women are. Asian American women overall are paid just 87 cents for every dollar paid to white, non-Hispanic men.[2] The wage gap persists across different industries, occupations and education levels and exists in nearly every congressional district.

These troubling statistics underscore the need to update our nation's equal pay laws. The Paycheck Fairness Act would make it safe for workers to discuss their wages with each other. Employers can currently mask compensation discrimination with pay secrecy policies that forbid employees from discussing pay and benefits. Secrecy and the threat of retaliation leave workers unable to learn about and challenge pay disparities. In a survey of private-sector workers, over 62 percent of women and 60 percent of men reported that their employers discourage or prohibit discussing wage and salary information. The Paycheck Fairness Act would make pay secrecy policies illegal.

The Paycheck Fairness Act would also prohibit employers from screening job applicants based on their salary history or requiring salary history during the interview process. Women are typically paid lower wages than men even in their first jobs. Salary disparities that begin early in a woman's career can follow her from job to job when employers are permitted to base a new hire's salary on her prior earnings. People should be paid fairly for the job they are being hired to do.

The bill would also make it more difficult for employers to justify pay discrimination. Workers in the same company who do the same job and have the same amount of experience, education and training should be paid the same. Currently, however, employers are able to explain away differences in pay too easily by relying on a catch-all defense in the Equal Pay Act. The Paycheck Fairness Act would close that loophole and require employers to prove that any differences in pay are not sex-based, are job-related concerning the position in question, and are consistent with business necessity and account for the entire difference in compensation. Employees claiming pay discrimination would also have new opportunities to prove that the employer's defense is the pretext.

In addition to these critical provisions, the Paycheck Fairness Act would also allow workers alleging pay discrimination within the same company to file class-action suits; would change the remedies of the Equal Pay Act to treat gender-based pay discrimination claims the same as other civil rights violations that result in unfair pay; would recognize companies that want to do better; and would improve fair pay enforcement, data collection and disclosure.

Closing the gender and racial wage gap is a crucial measure to take in response to COVID-19. Throughout the pandemic, women and people of color have disproportionately experienced the adverse effects of the public health and economic crisis. Women and people of color have been on the front lines working in our most essential occupations, but forces like wage inequality have kept them underpaid and undervalued. The Paycheck Fairness Act would ensure that workers are given the support needed to ensure pay equity during this time of crisis.

**Pregnant Workers Fairness Act**

More than 40 years ago, Congress passed the Pregnancy Discrimination Act of 1978, outlawing discrimination on the basis of pregnancy, childbirth or related medical conditions. Yet, pregnancy discrimination is still widespread and impacts pregnant workers across industry, race, ethnicity and jurisdiction. Nearly 31,000 pregnancy discrimination charges were filed with the U.S. Equal Employment Opportunity Commission (EEOC) and state-level fair employment practice agencies between 2010 and 2015,[3] and the reality of pregnancy discrimination is likely much worse than illustrated by EEOC charges.[4] As a result of this discrimination, too many pregnant workers must choose between their paychecks and a healthy pregnancy. That is not a choice anyone should have to make.

The Pregnant Workers Fairness Act would create a clear policy standard requiring employers to provide reasonable accommodations to pregnant workers. Support for a law like the Pregnant Workers Fairness Act is nearly universal and bipartisan. Eighty-nine perfect of voters favor this bill, including 69 percent of voters who strongly favor it.[5] Thirty-five leading private sector employers and employer associations have also endorsed the Pregnant Workers Fairness Act in an open letter to Congress.

More than 85 percent of women will become mothers at some point in their working lives.[6] And sometimes, an accommodation is needed in order for a pregnant worker to continue performing their job safely. These accommodations are often small changes to their work environment, such as additional bathroom breaks, a stool to sit on or the ability to have a water bottle at their work station. Although minor, these accommodations allow pregnant workers to stay in the workforce safely and continue to provide for themselves and their families. When pregnant workers are fired, demoted or forced into unpaid leave, they and their families lose critical income. They may struggle to re-enter a job market that is particularly harsh for people who are currently or were recently pregnant.

Pregnancy discrimination affects women across race and ethnicity, but women of color and immigrants are at particular risk. They are disproportionately likely to work in jobs and industries where accommodations during pregnancy are not often provided (such as working as home health aides, food service workers, package handlers and cleaners).[7] Black women are much more likely than white women to file pregnancy discrimination charges;[8] they are also at a higher risk for pregnancy-related complications like pre-term labor, preeclampsia and hypertensive disorders,[9] making reasonable accommodations on the job even more important, and loss of wages and health insurance due to pregnancy discrimination especially challenging.

To date, thirty-one states, including the District of Columbia and four cities, have passed laws requiring employers to provide reasonable accommodations to pregnant workers.[10] But the ability to maintain a healthy pregnancy and keep a job should not depend on where a pregnant person works. Women are a crucial part of the workforce, and their participation matters for the growth of our economy and the stability and wellbeing of families nationwide.

The COVID-19 pandemic has exacerbated the problematic working conditions of pregnant workers. Pregnant people are at a higher risk of falling ill from COVID-19 and experiencing

complications, and thus require increased protection against the virus. However, since the beginning of the pandemic, pregnant workers have experienced increased workplace discrimination by being denied accommodations and leave. The Pregnant Workers Fairness Act would ensure that pregnant workers have access to the accommodations they need in order to have a safe workplace experience.

**PUMP for Nursing Mothers Act**

Once pregnant workers return to the workplace after giving birth, many will need the ability to pump breastmilk during the workday. While the Affordable Care Act requires employers to provide reasonable break time and a private, non-bathroom space for certain breastfeeding employees to pump, persistent coverage gaps exist. Roughly one in four women of childbearing age are not covered by current law. Since breastfeeding is associated with a host of improved health outcomes,[11] expanding these protections to the 9 million workers currently excluded from the Break Time for Nursing Mothers law is essential to support mothers in the workplace. In addition to closing the coverage gap, the PUMP Act will also clarify for employers when pumping time must be paid and when it may be unpaid, and extend the remedies available for other violations of the Fair Labor Standards Act to nursing employees, ensuring that working parents' rights are protected.

**Protecting Older Workers Against Discrimination Act (POWADA)**

The American workforce is aging drastically. According to projections from the Bureau of Labor Statistics, 41 million workers will be age 55 or older in 2024.[12] As the workforce continues to skew older, age discrimination in the workforce will become a more significant issue, especially for older women workers, who are even more likely to experience discrimination than older men and who face a severe deficiency in retirement savings due to a lifetime of wage discrimination. In 2009, the Supreme Court weakened protections against age discrimination for older workers with a ruling that would force them to prove that age was a "decisive factor" in an employer's disciplinary or dismissal decision, a much higher standard than previously required. A 2013 Supreme Court decision applied this same standard to other forms of discrimination under Title VII of the Civil Rights Act. POWADA is critical to restoring the earlier standard and protecting workers' rights to challenge all forms of discrimination on the basis of age, sex, race, religion, national origin or disability.

**Conclusion**

All four of these bills – the Pregnant Workers Fairness Act, the Paycheck Fairness Act, the PUMP for Nursing Mothers Act, and the Protecting Older Workers Against Discrimination Act – would strengthen existing federal protections, ensure more equitable workplaces and allow women to remain in the workforce and maintain their economic stability at all phases of life. **It is time to clarify and strengthen existing federal protections for women in the workforce by passing the Pregnant Workers Fairness Act, the Paycheck Fairness Act, the PUMP for Nursing Mothers Act, and the Protecting Older Workers Against Discrimination Act.**

cc: The Honorable Robert C. "Bobby" Scott, Chair, Committee on Education & Labor
The Honorable Virginia Foxx, Ranking Member, Committee on Education & Labor

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[1] National Partnership for Women & Families. (2020, September). *America's Women and the Wage Gap.* Retrieved 12 March 2021, from https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/americas-women-and-the-wage-gap.pdf

[2] National Partnership for Women & Families. (2021, March). *Asian American and Pacific Islander Women and the Wage Gap.* Retrieved 12 March 2021, from https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/asian-women-and-the-wage-gap.pdf

[3] National Partnership for Women & Families. (2016, October). *By the Numbers: Women Continue to Face Pregnancy Discrimination in the Workplace.* Retrieved 12 March 2021, from http://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/by-the-numbers-women-continue-to-face-pregnancy-discrimination-in-the-workplace.pdf

[4] National Partnership for Women & Families. (2014, January). *Listening to Mothers: The Experiences of Expecting and New Mothers in the Workplace.* Retrieved 12 March 2021, from http://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf

[5] The Tarrance Group. (2020, February). *Key findings from a national survey of voters* [Memo]. Retrieved 12 March 2021, from https://www.aclu.org/sites/default/files/field_document/pwfa_survey_memo_2-20-20_1_1_2.pdf

[6] U.S. Census Bureau. (2017, May). *Fertility of Women in the United States: 2016, Table 6, Completed Fertility for Women age 40 to 50 Years Old – Selected Characteristics: June 2016.* Retrieved 12 March 2021, from https://www.census.gov/data/tables/2016/demo/fertility/women-fertility.html#par_list_62 (Unpublished calculation. The reported percentage of women who had become mothers by age 40 to 44 as of 2014 is 85.6 percent.)

[7] National Latina Institute for Reproductive Health and National Women's Law Center. (2014, May). *Accommodating Pregnancy On the Job: The Stakes for Women of Color and Immigrant Women*. Retrieved 12 March 2021, from https://www.nwlc.org/wp-content/uploads/2015/08/the_stakes_for_woc_final.pdf

[8] See Note 3.

[9] Creanga, A. A., Bateman, B. T., Kuklina, E. V., & Callaghan, W. M. (2014, May). Racial and ethnic disparities in severe maternal morbidity: a multistate analysis, 2008-2010. *American Journal of Obstetrics & Gynecology, 210*(5), 435.e1–435.e8. Retrieved 12 March 2021, from http://www.ajog.org/article/S0002-9378(13)02153-4/fulltext

[10] For a list, see: National Partnership for Women & Families. (2020, September). *Reasonable Accommodations for Pregnant Workers: State and Local Laws.* Retrieved 12 March 2021, from http://www.nationalpartnership.org/our-work/resources/workplace/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf

[11] Office on Women's Health (2019, March). *Making the decision to breastfeed.* Retrieved 10 March 2021, from https://www.womenshealth.gov/breastfeeding/making-decision-breastfeed

[12] Bureau of Labor Statistics, (2017, May). *Older workers: Labor force trends and career options.* Retrieved 10 March 2021, from https://www.bls.gov/careeroutlook/2017/article/older-workers.htm

The National Partnership for Women & Families is a nonprofit, nonpartisan advocacy group dedicated to promoting fairness in the workplace, reproductive health and rights, access to quality, affordable health care and policies that help all people meet the dual demands of work and family. More information is available at NationalPartnership.org.

**Testimony in Support of the Pregnant Workers Fairness Act (H.R. 1065)**
Civil Rights and Human Services Subcommittee
Workforce Protections Subcommittee
House Education and Labor Committee
March 18, 2021

Physicians for Reproductive Health (PRH) unites the medical community and concerned supporters. Together, we work to improve access to comprehensive reproductive health care, especially to meet the health needs of those who face the most barriers to care. Physicians for Reproductive Health supports the Pregnant Workers Fairness Act and urges Congress to strengthen protections for pregnant workers and advance this critical legislation.

Currently, thirty-one states, the District of Columbia, and four cities have laws that require reasonable accommodations for pregnant workers as a means to strengthen a narrow interpretation of the Pregnancy Discrimination Act of 1978.[1] No person should have to choose between a healthy pregnancy and their economic stability or that of their family and this protection should not depend on a person's zip code.

As health care providers we know that federal protections for pregnant workers need to be strengthened as discrimination and harassment against them persists. Healthcare providers see the consequences when patients are not provided these necessary protections in the form of poorer health outcomes for the individual and their families. Our patients share with us that they feel discomfort and even fear of their employers' reactions to simple, no-cost or low-cost recommendations or temporary adjustments to their work settings or activities in order to sustain a healthy pregnancy. These medically necessary accommodations can include simple measures such as permitting more frequent bathroom and hydration breaks, lifting restrictions, or access to a seat and decreasing time spent standing.

Unfortunately, too many pregnant workers face barriers to medical accommodations in the workplace. The denial of temporary adjustments, threats of job loss, or forced unpaid leave can have critical, long-lasting, and even severe effects on pregnant workers and their pregnancies. One of the basic conditions of a healthy pregnancy is early and consistent prenatal care. Loss of employment and health benefits impact family resources, threatening the ability of patients to access vital health care when they need it the most.

Today, women[2] make up about half of the workforce and pregnant people are continuing to work out of necessity into later stages of their pregnancies.[3] This is directly correlated to the need to prepare for increased expenses and financial security when parental leave for a growing family is not consistently offered. The absence of legislation like the Pregnant Workers Fairness Act disproportionately impacts pregnant people with low-incomes and migrant workers

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[1] Reasonable Accommodations for Pregnant Workers: State and Local Laws, National Partnership for Women and Families, Sept 2020 (available at https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf).
[2] It is important to note that not all pregnant people identify as women.
[3] The Pregnant Workers Fairness Act: Making Room for Pregnancy on the Job, National Women's Law Center, July 2019 (available at https://nwlc-ciw49tixgw5ibab.stackpathdns.com/wp-content/uploads/2018/10/PWFA-Making-Room-for-Pregnancy-2019-v1.pdf).

who are more likely to work in arduous settings. These are the same communities that are also most at risk of experiencing increased maternal mortality.[4]

These basic accommodations are even more critical during the pandemic. A study published in the American Journal of Obstetrics and Gynecology on Feb 16, 2021 found that the COVID-19 infection rate in pregnant people was seventy percent higher than similarly aged adults. During this time, an accommodation could be as simple as working in a non-COVID wing of a hospital or providing additional personal protective equipment. A lack of basic accommodations during pregnancy puts patients in an impossible situation – continue working without accommodations or put their health at risk.

As public health professionals, we understand the importance of reasonable workplace accommodations to ensure that people can continue to care for their families and have safe and healthy pregnancies and are not forced to choose between their health and a paycheck. PRH urges support of the Pregnant Workers Fairness Act.

[4] Pregnancy Mortality Surveillance System, Centers for Disease Control and Prevention (available at https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-mortality-surveillance-system.htm?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Freproductivehealth%2Fmaternalinfanthealth%2Fpmss.html#how).

[Additional submission by Ms. Stevens follow:]

NETWORK LOBBY FOR CATHOLIC SOCIAL JUSTICE

Civil Rights and Human Services Subcommittee
Workforce Protections Subcommittee
House Education and Labor Committee
2176 Rayburn House Office Building
Washington, DC 20515

**NETWORK Lobby for Catholic Social Justice Supports**
**The Pregnant Workers Fairness Act**

March 18, 2021

Dear Chairwoman Bonamici, Ranking Member Fulcher, Chairwoman Adams, and Ranking Member Keller,

Our mission at NETWORK Lobby for Catholic Social Justice is to educate, organize, and advocate for economic and social transformation. For almost 50 years, we have been guided by Catholic Social Teaching, which tells us to place the needs of people at the socioeconomic margins at the center of our advocacy. Founded by women religious in the 1970s, we continue their legacy today by building a just society that ensures all people have what they need to live dignified lives. We are proud to have over 100,000 supporters across the country who share our passion for justice.

At NETWORK Lobby, we recognize that the basis for a dignified way of life begins with opportunity and inclusivity in the workplace. We are proud to support the **Pregnant Workers Fairness Act** because it modernizes current law and closes the gaps in protections afforded to pregnant workers. This legislation would open doors for gainfully employed women who choose to bring new life into the world.

Despite current protections for pregnant workers from workplace discrimination included in the Pregnancy Discrimination Act of 1978 (PDA), over 37,000 pregnancy discrimination charges have been filed between 2010 and 2020 with the U.S Equal Employment Opportunity Commission (EEOC). This demonstrates the gaps in protections afforded to pregnant workers under current law. Pregnant workers are routinely denied basic, temporary accommodations to ensure a healthy pregnancy. These accommodations are often as simple as a stool to sit on, a break from lifting heavy boxes, schedule changes, and protection from hazardous or dangerous conditions. These accommodations are especially important for women in jobs requiring physical activity or exposure to hazardous conditions. In lieu of reasonable accommodations at the workplace, many pregnant workers face undue pressures to take a leave of absence, which may jeopardize their livelihood.

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This common sense, bipartisan legislation promotes healthy pregnancies, economic security for pregnant women and their families, and is faithful to Catholic Social Justice. Our faith calls us to respect the dignity of all women who are nurturing the life of persons created in God's image. The pastoral letter, *Economic Justice for All: Catholic Social Teaching and the U.S Economy*, states clearly that, "human work has a special dignity and is a key to achieving justice in society." To create a just world for working women, we must recognize the dignity of labor.

The reality of persistent discrimination in the workplace and the lack of clarity around employer obligations calls for new legislation to provide straightforward guidance for both employers and pregnant workers. Support for pregnancies means support for pregnant workers.

We strongly urge you to support the Pregnant Workers Fairness Act.

Sincerely,

Gina Kelley

Government Relations Associate

NETWORK Lobby for Catholic Social Justice

cc: Chairman Scott and Ranking Member Foxx

NETWORK LOBBY FOR CATHOLIC SOCIAL JUSTICE

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[Questions submitted for the record and the responses by Ms. Bakst follow:]



April 1, 2021

Dina Bakst, J.D.
Co-Founder and Co-President
A Better Balance
225 Central Park West, Apartment 1605
New York, NY 10024

Dear Ms. Bakst,

I would like to thank you for testifying at the March 18, 2021 Subcommittees on Civil Rights and Human Services and Workforce Protections joint hearing entitled "*Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination.*"

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Thursday, April 8, 2021, for inclusion in the official hearing record. Your responses should be sent to Eunice Ikene of the Committee staff. She can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

**ROBERT C. "BOBBY" SCOTT**
Chairman

Enclosure

Civil Rights and Human Services and Workforce Protections Joint Subcommittee Hearing
***"Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination"***
Thursday, March 18, 2021
10:15 a.m. (Eastern Time)

**Representative Ilhan Omar (D – MN)**

1. Ms. Bakst, I'm sure you have seen the many articles documenting egregious abuses by Amazon and other industry giants against their pregnant workers. I wanted to share briefly one story I saw just last year in October where VICE News found that a few workers in an Oklahoma City Amazon Fulfillment Center were forced to choose between risking miscarriages or forgoing pay or even losing their jobs. Could you explain how the Pregnant Workers Fairness Act would help protect women from such glaring abuses, and especially in the cases of powerful corporations like Amazon, how these workers could seek better civil action and other legal remedies under this bill?

a better balance
the work and family legal center

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The Honorable Robert C. "Bobby" Scott
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515-6100

April 1, 2021

Dear Chairman Scott:

Enclosed please find my responses to questions submitted by Committee members following the March 18, 2021 hearing, "*Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination*."

Thank you for your time and attention to this critical issue.

Sincerely,

Dina Bakst

Dina Bakst
Co-Founder & Co-President

Enclosure

**Question from Representative Ilhan Omar (D – MN) :**

**1. Ms. Bakst, I'm sure you have seen the many articles documenting egregious abuses by Amazon and other industry giants against their pregnant workers. I wanted to share briefly one story I saw just last year in October where VICE News found that a few workers in an Oklahoma City Amazon Fulfillment Center were forced to choose between risking miscarriages or forgoing pay or even losing their jobs. Could you explain how the Pregnant Workers Fairness Act would help protect women from such glaring abuses, and especially in the cases of powerful corporations like Amazon, how these workers could seek better civil action and other legal remedies under this bill?**

The Pregnant Workers Fairness Act will provide greater protection to pregnant workers, disproportionately women of color in low-wage jobs, because it provides an affirmative right to reasonable accommodations. This will ensure that employers can no longer get away with forcing pregnant workers onto unpaid leave or firing them simply because they require a medically-necessary reasonable accommodation. This protection is crucial to ensure that pregnant workers receive the timely, modest accommodations they need to prevent health complications, continue safely working, and stay economically secure.[1]

As your question has highlighted, these protections are especially important to women working in low-wage and physically demanding jobs at Amazon and elsewhere, which are predominantly occupied by women and people of color. Nearly 68 percent of Amazon line workers (non-managers) identify as non-white, and nearly half (45 percent) are women.[2] The physical risks to these workers are significant, as recent reports indicate that the rate of serious injuries among Amazon workers is more than twice the industry standard.[3] The VICE article cited in the question features A Better Balance client Michelle Posey, and we are dedicated to continuing to investigate these issues at Amazon and other major employers.

Clear federal law will ensure employers like Amazon cannot flout the law or hide behind unclear law. Having a clear federal law will *require* employers to engage in the interactive process with workers, as they are required to do for workers in need of disability accommodations under the Americans with Disabilities Act, so they cannot reflexively force them out or deny workers reasonable accommodations.

Not only will the Pregnant Workers Fairness Act put in place a clear federal framework for workers to receive accommodations but it also includes robust anti-retaliation protections and in

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[1] For a full explanantion of the legal need for, and health and economic benefits of, the Pregnant Workers Fairness Act see *See Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination: Hearing Before the Subcomms. on Civil Rights and Human Services and Workforce Protections of the H. Comm. on Ed. & Lab.*, 117th Cong. (2021), https://edlabor.house.gov/hearings/fighting-for-fairness-examining-legislation-to-confront-workplace-discrimination (testimony of Dina Bakst).

[2] *Our workforce data*, AMAZON.COM, https://www.aboutamazon.com/news/workplace/our-workforce-data (last visited April 1, 2021).

[3] Annie Palmer, *Amazon downplayed rising injury rates at its warehouses, investigation finds*, CNBC.COM (Sept. 29, 2020, 2:35 pm), https://www.cnbc.com/2020/09/29/amazon-reportedly-downplayed-rising-injury-rates-at-its-warehouses.html.

general, provides the same remedies as are available under Title VII. Anti-retaliation protections, in particular, are critical for workers, ensuring that they cannot be punished simply for asking for accommodations, especially those facing powerful corporations with little bargaining power. Simply put, the Pregnant Workers Fairness Act would put a stop to these egregious practices, advancing justice particularly for the country's most vulnerable and marginalized workers.

[Questions submitted for the record and the responses by Ms. Goss Graves follow:]



April 1, 2021

Fatima Goss Graves, J.D.
President and CEO
National Women's Law Center
11 Dupont Circle, Suite 800
Washington, D.C. 20036

Dear Ms. Goss Graves,

I would like to thank you for testifying at the March 18, 2021 Subcommittees on Civil Rights and Human Services and Workforce Protections joint hearing entitled "*Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination.*"

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Thursday, April 8, 2021, for inclusion in the official hearing record. Your responses should be sent to Eunice Ikene of the Committee staff. She can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

**ROBERT C. "BOBBY" SCOTT**
Chairman

Enclosure

Civil Rights and Human Services and Workforce Protections Joint Subcommittee Hearing
***"Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination"***
Thursday, March 18, 2021
10:15 a.m. (Eastern Time)

**Chairman Robert C. "Bobby" Scott (D – VA)**

1. Ms. Goss Graves, at the hearing, you discussed how not having adequate pay data inhibits EEOC's enforcement capabilities. On January 7, 2021 EEOC issued a Conciliation Rule. Under Section 706 of Title VII of *the Civil Rights Act of 1964*, Congress instructed that after the EEOC finds reasonable cause for a charge, "the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."
    a. What does this rule do, and how would this also impact the ability of workers seeking relief to secure a timely result from EEOC's enforcement activities?
    b. What actions should Congress consider taking with regards to this rule?
    c. Should Congress consider passing a Congressional Review Act Resolution of Disapproval with respect to this rule?

**Representative Alma S. Adams (D – NC)**

1. Ms. Goss Graves, during the hearing we heard the assertion that H.R. 7 would prevent employers from differentiating pay between different employees on the basis of experience, education, hours worked, overtime hours worked, and even eliminate employers' ability to provide holiday bonuses. Can you discuss why that is not the case?
2. Ms. Goss Graves, in her written testimony, Ms. Olson urged the Committee to consider policies that would provide legal safe harbors for "encouraging employers to perform compensation audits" How do such safe harbors prohibit relief for workers who have experienced gender pay discrimination?
3. Ms. Goss Graves, in her written testimony, Ms. Olson asserted that under H.R. 7, "market forces would effectively be excluded from consideration when an employer sets an individual's pay rates unless an employer is able to prove a negative – that the market rate used was not derived or influenced by a sex-based differential in pay." Can you respond to this assertion?
4. Ms. Goss Graves, how would raising the federal minimum wage to $15 an hour impact the gender pay gap?

**Representative Ilhan Omar (D – MN)**

1. I was proud to see reporting provisions included again in the Paycheck Fairness Act to improve the collection of pay data. Ms. Goss Graves, can you explain the need for pay data reporting and how it would benefit both workers and employers? How would this data assist the missions of federal enforcement agencies like the equal Employment Opportunity Commission and Department of Labor? Additionally, I wanted to give you an opportunity to discuss the pandemic's economic and health effects on women of color. There was a recent University of Minnesota study that stressed the dual vulnerability

faced by women of color in my state – they are at a greater risk of COVID exposure and a greater likelihood of layoffs. The researchers concluded that discrimination is at least one of the most constant factors contributing to worsened economic and health outcomes for women of color during the COVID-19 pandemic. Ms. Goss Graves, could you tell us how the gender pay gap is compounded by the racial gap for women of color, and how these gaps affect women's individual income and lifetime earnings? How has this pandemic widened these gaps?

NATIONAL WOMEN'S LAW CENTER
Justice for Her. Justice for All.

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**Civil Rights and Human Services and Workforce Protections Joint Subcommittee Hearing**
**"Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination"**
**Thursday, March 18, 2021 10:15 a.m. (Eastern Time)**

**Responses to Questions For the Record**

**Fatima Goss Graves**
**President and CEO, National Women's Law Center**
**April 8, 2021**

Chairman Robert C. "Bobby" Scott (D – VA)

1.Ms. Goss Graves, at the hearing, you discussed how not having adequate pay data inhibits EEOC's enforcement capabilities. On January 7, 2021 EEOC issued a Conciliation Rule. Under Section 706 of Title VII of the Civil Rights Act of 1964, Congress instructed that after the EEOC finds reasonable cause for a charge, "the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."

***a. What does this rule do, and how would this also impact the ability of workers seeking relief to secure a timely result from EEOC's enforcement activities?***

The Equal Employment Opportunity Commission's ("EEOC'") final rule, effective February 16, 2021, made several changes to the process by which the EEOC tries to settle a charge of workplace discrimination—known as conciliation. When an individual files a charge of discrimination against their employer with the EEOC, the agency collects information and conducts an investigation. If the EEOC finds "reasonable cause" to believe employment discrimination has occurred, the parties are invited to participate in the conciliation process, which seeks to settle or resolve the charges of discrimination informally and confidentially, in lieu of filing a lawsuit.[1] The EEOC is statutorily mandated to attempt resolution of charges through "informal methods of conference, conciliation, persuasion" before considering or proceeding with litigation,[2] and may only pursue litigation if conciliation has failed.[3]

Instead of ensuring that discrimination charges are resolved fairly, the EEOC's final rule imposes several new obligations and disclosures that significantly weight the conciliation process in favor of employers, increase the likelihood of harm to working people and delayed justice, will divert scarce EEOC staff time and resources away from investigating discrimination, and contravene controlling Supreme Court

[1] 42 U.S.C. 2000e–5(f)(1).
[2] *Mach Mining, LLC v. EEOC*, 575 U.S. 480 (2015) (quoting 42 U.S.C. § 2000e–5(b)).
[3] 42 U.S.C. § 2000e–5(f)(1).

precedent.[4] The pandemic and its economic repercussions already are disproportionately impacting women, people of color, and other historically marginalized communities—including a heightened risk of job loss, health and safety hazards, and discrimination based on sex, race, age, and disability—all while making concrete the ways in which the country is depending on the work performed largely by women and people of color. The final rule will only deepen the barriers working people face coming forward to report discrimination and obtaining justice and affect the EEOC's ability to address discrimination.

Under the final EEOC conciliation rule, once an employer agrees to conciliate, the EEOC must provide the employer (but not the charging individuals or complainants) with the following information: (1) a written summary of the known facts and non-privileged information that the EEOC relied upon to reach its determination that discrimination had occurred, including identifying information for the complainant(s), unless anonymity is requested; (2) a summary of the Commission's legal basis for finding reasonable cause that discrimination occurred, including an explanation as to how the law was applied to the facts; (3) the basis for any relief sought, including the calculations underlying the initial conciliation proposal; and (4) identification of a systemic, class, or pattern or practice designation.[5] The final rule also clarifies that the EEOC must allow an employer a minimum of 14 calendar days to respond to this information, and the information provided to employers will be made available to any aggrieved individual, but only upon request.[6]

The changes in the final rule sought to make the conciliation process more attractive to employers—who had purportedly expressed skepticism regarding the transparency and efficacy of the conciliation process[7]—but in a manner that imposes several significant and time-consuming requirements on the EEOC and has the practical effect of further stacking the deck against victims of discrimination in the workplace. For example, the EEOC must provide to employers written summaries detailing the legal basis for the findings and any relief sought, and identifying the aggrieved parties, requiring deep involvement from the EEOC's legal team. Compliance with the final rule's requirement that the EEOC prepare these detailed written disclosures, ultimately hinders the EEOC's ability to resolve claims via litigation, particularly for unnamed class members, should conciliation be unsuccessful. Determining who the victims are and naming them is a process that normally occurs after liability is determined or the case is settling. Requiring the EEOC to make this disclosure when it has not had the chance to go through discovery almost ensures that individuals may be left out of the process. Employers, armed with the new rule on conciliation, will argue that newly found individuals are not entitled to relief, creating another round of costly litigation, and potentially denying relief to claimants whose rights have been violated. Employers are also likely to engage in ancillary litigation about whether the EEOC has fully met its

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[4] *See* Attachment A, NWLC, *Comment Re: Proposed Update of Commission's Procedures, FR Docket Number EEOC-2020-0006 Docket RIN 3046-AB19* (Nov. 9, 2020) (arguing that the proposed agency rulemaking seeks to make conciliation more attractive to employers in a manner that would impose significant and time-consuming requirements on the EEOC, and further stack the deck against working people seeking justice in the face of employment discrimination, making it harder for workers who, for example, are fired for being transgender, or sexually harassed at work, or denied a promotion because they are Black, or retaliated against for asking for an accommodation because of a disability, to seek and obtain redress for unlawful discrimination through the EEOC). Detailed objections are included in the attachment.

[5] U.S. Equal Emp. Opportunity Comm'n, Update of Commission's Conciliation Procedures, 86 Fed. Reg. 2974, 2985 (Jan. 14, 2021) (to be codified at 29 C.F.R. pt. 1601 and 1626).

[6] *Id*.

[7] *Id*. at 2974.

conciliation disclosure requirements, further delaying the availability of relief to individuals who have experienced discrimination. And by providing employers with an entitlement to detailed insights into EEOC's analysis, while limiting employees' access to this information to situations where they are savvy enough to affirmatively request it, the rule puts a thumb on the scale for employers.

Moreover, the final rule's new requirements impose a financial cost to workers by making remedies for discrimination less available, and discrimination severely undercuts worker earnings in the first place. For example, in 2016, the estimated total impact of the unexplained causes of gender wage inequality, presumed to be attributable to discrimination, resulted in $303.7 billion in wage differences between women and men.[8] The EEOC should not be creating new rules which will hurt workers and make it more difficult for the agency to carry out its enforcement duties.

The final rule also imposes significant monetary costs and other burdens on workers who have experienced discrimination, by skewing the conciliation process in favor of employers, potentially prolonging the time to resolve the matter, because of increased litigation challenging the sufficiency of conciliation procedures, and increasing the risk of retaliation for those workers by exposing details of these individuals' identity and allegations to the employer. Additionally, because of the disclosures required by the rule, charging parties are more likely to feel compelled to settle, and for lower amounts, because the respondent employer will have significant additional leverage.

These burdensome requirements ultimately make workers less likely to challenge discrimination at all. When employees know that the odds are stacked against them and in favor of employers, they may forego filing a complaint with the reporting agency altogether, and the EEOC is the civil rights agency tasked with enforcing Title VII and protecting workers' rights. Individuals not represented by counsel will be at a particular disadvantage, as they depend on the EEOC to protect their interests and move a timely resolution forward.

Significantly, the final rule is also contrary to the Supreme Court's 2015 decision in *Mach Mining*, which held that the EEOC's statutory obligation to conciliate is subject to narrow judicial review and, most critically for this purpose, unanimously affirmed the importance given Title VII's intent, purposes, and structure of maintaining flexibility in the conciliation process to increase the chances of resolution.[9] The

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[8] WASHINGTON CENTER FOR EQUITABLE GROWTH, GENDER WAGE INEQUALITY 46 (2018), *available at* https://equitablegrowth.org/research-paper/gender-wage-inequality/.

[9] *Mach Mining*, 575 U.S. at 491–92. According to the Supreme Court,

> [] Mach Mining's proposed code of conduct [with respect to conciliation] conflicts with the latitude Title VII gives the [EEOC] to pursue voluntary compliance with the law's commands. Every aspect of Title VII's conciliation provision smacks of flexibility. To begin with, the EEOC need only "endeavor" to conciliate a claim, without having to devote a set amount of time or resources to that project. Further, the attempt need not involve any specific steps or measures; rather, the [EEOC] may use in each case whatever "informal" means of "conference, conciliation, and persuasion" it deems appropriate. And the EEOC alone decides whether in the end to make an agreement or resort to litigation: The Commission may sue whenever "unable to secure" terms "acceptable to the Commission." All that leeway respecting how to seek voluntary compliance and when to quit the effort is at odds with Mach Mining's bargaining checklist. Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield. So too Congress

disclosures required under the final rule closely track the information disclosures the employer in *Mach Mining* argued should be judicially imposed on the EEOC. With the final rule, the agency acceded to the business community's similar demands in that case—demands that were rejected by a unanimous Supreme Court.

The Supreme Court's interpretation of Title VII's conciliation provision in *Mach Mining* is consistent with the legislative intent. Congress did not intend for a rigid rule or compliance standard to govern the EEOC's conciliation obligations.

***b. What actions should Congress consider taking with regards to this rule?***

We urge Congress to invoke its powers under the Congressional Review Act ("CRA") to review and pass a resolution of disapproval with respect to the final EEOC conciliation rule. A resolution of disapproval would be an appropriate exercise of Congress's power in this case, because the CRA is the most expeditious and effective option for addressing the harmful impact of the EEOC's final rule, given the EEOC's status as an independent, bipartisan agency.

By invoking the CRA and passing a resolution of disapproval, Congress could quickly restore the status quo with respect to the EEOC's conciliation procedures, minimizing the harm to workers and eliminating the need for the EEOC to expend its scare resources either revising the conciliation rule or implementing the onerous new procedures in the final rule and defending the sufficiency of the new conciliation process in collateral litigation.

Importantly, application of the CRA to the final rule also ensures that the EEOC would be prohibited from promulgating a "substantially" similar rule in the future that would hinder vigorous enforcement of federal workplace antidiscrimination laws.[10] The final conciliation rule was both procedurally and substantively flawed, raising concerns about its integrity.[11] The EEOC released the proposed rule before it had completed or evaluated its own conciliation pilot program, which was in progress at the time.[12] Moreover, the EEOC provided stakeholders with only 30 days to comment on the proposed rule, further exacerbating barriers created by the global pandemic. As I described in response to the previous question, and as detailed in NWLC's comment on the proposed rule attached here as Attachment A, the final rule is based on a number of unsupported assumptions and assertions—including that the changes were needed to address "a widespread rejection of the [conciliation] process" by employers; contravenes legislative intent and controlling Supreme Court precedent; and is harmful to workers and to the EEOC's enforcement mission. As such, Congress's exercise of the CRA would be warranted here.

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> granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief.

*Id.* at 492 (internal citations omitted).

[10] Section 801(b)(2) of the CRA prohibits federal agencies from issuing a subsequent rule that is "substantially the same" as a disapproved rule.

[11] *See* Attachment A, *supra* note 4.

[12] U.S. Equal Emp. Opportunity Comm'n, Press Release, *EEOC Announces Pilot Programs to Increase Voluntary Resolutions* (July 7, 2020), *available at* https://www.eeoc.gov/newsroom/eeoc-announces-pilot-programs-increase-voluntary-resolutions.

***c. Should Congress consider passing a Congressional Review Act Resolution of Disapproval with respect to this rule?***

Please see above response to Question 1b.

Representative Alma S. Adams (D – NC)

***1. Ms. Goss Graves, during the hearing we heard the assertion that H.R. 7 would prevent employers from differentiating pay between different employees on the basis of experience, education, hours worked, overtime hours worked, and even eliminate employers' ability to provide holiday bonuses. Can you discuss why that is not the case?***

That assertion is not true. Pursuant to the Paycheck Fairness Act (H.R. 7), employers still may consider an applicant's or employee's relevant education, experience, special skills, seniority, and expertise in setting pay and to account for any pay disparities, as long as they are not based on sex.

The Paycheck Fairness Act does not eliminate employers' ability to provide holiday bonuses, so long as employers are not discriminating based on gender when doing so. Neither the Equal Pay Act or the Paycheck Fairness Act prevent employers from awarding bonuses for other reasons, such as merit or job performance.

Under the Equal Pay Act, an employer bonus based on merit or job performance may be justified by one of the Equal Pay Act's affirmative defenses, including a merit or seniority system, or an incentive system based on the quantity or quality of production. Nothing in the Paycheck Fairness Act changes those defenses or the ability of employers to award bonuses, as long as the bonuses are job-related and not based on sex.

***2. Ms. Goss Graves, in her written testimony, Ms. Olson urged the Committee to consider policies that would provide legal safe harbors for "encouraging employers to perform compensation audits." How do such safe harbors prohibit relief for workers who have experienced gender pay discrimination?***

Nearly 60 years after the enactment of the Equal Pay Act, many employers are still not paying equal pay for equal work. There is no reason to believe incentives alone will resolve this issue.

In the context of hiring and pay-setting, employers hold the power and the information. Employers determine and make decisions about compensation based on a variety of factors that are not generally available or transparent to employees—budget, location, market surveys, competitors' wages and products/services, cost of benefits, etc. All pay decisions lie in the hands of the employer, who determines the compensation for a position and for each employee—and presumably does so intentionally. An employee rarely has access to the rationale underlying the compensation decision. Given that power differential, employers should be incentivized to set pay for their employees lawfully from the beginning.

Moreover, employer incentives should not come at the expense of individual workers who have suffered real harms because of discrimination or result in a lack of accountability. The Massachusetts example cited by Ms. Olson raises important issues about how these incentives work, and the unintended consequences of these safe harbors. Massachusetts has adopted a safe harbor defense from liability in

pay discrimination cases where an employer has engaged in a "reasonable" and "good faith" self-analysis.[13]

Problems arise where an employer conducts a self-evaluation that did not correct the pay discrimination experienced by an individual plaintiff that is the subject of the lawsuit, but still satisfies the state law requirement as a "good faith" and "reasonable" self-audit. In that case, the employer would be immunized from liability, but the victim of pay discrimination would have no way of being made whole or obtaining justice.

There is also the danger that the self-evaluation in such safe harbor provisions becomes a box-checking compliance exercise, as in other analogous contexts. For example, the Supreme Court-created *Faragher-Ellerth*[14] affirmative defense to liability for workplace harassment is an instructive example of the consequences of safe harbor provisions. Twenty years on, the *Faragher-Ellerth* affirmative defense has resulted in employers creating compliance-based systems for reporting harassment that shield employers from liability even in the absence of any showing that these systems have meaningfully curbed harassment in the employer's workplace. Courts have accepted employers' assertions that they have policies and procedures for reporting and addressing harassment, without scrutinizing their quality or efficacy, or whether employees were discouraged from reporting or retaliated against for doing so. As a result, the mere existence of an employer policy or reporting procedure has resulted in the dismissal of harassment claims without employers addressing underlying or repeated problems. The safe harbor provision proposed here also threatens to elevate "on paper" compliance over meaningful remedies for workplace discrimination.

***3. Ms. Goss Graves, in her written testimony, Ms. Olson asserted that under H.R. 7, "market forces would effectively be excluded from consideration when an employer sets an individual's pay rates unless an employer is able to prove a negative – that the market rate used was not derived or influenced by a sex-based differential in pay." Can you respond to this assertion?***

Some courts have adopted interpretations of the Equal Pay Act's "factor other than sex" affirmative defense that create a large loophole in the guarantee of equal pay for women. For instance, some courts have interpreted this affirmative defense so broadly that factors such as a male worker's stronger salary negotiation skills, or higher previous salary qualify, even if these factors themselves may be "based on sex."[15] The prior salary earned by a male comparator may itself be the product of sex discrimination or may simply reflect the residual effects of the traditionally enhanced value attached to work performed by men. This is particularly true where the employer matches the salary of highly paid male without regard for whether his experience, skills and talents are any different from the lower paid female employee.

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[13] M.G.L. Ch. 149, Section 105A.

[14] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

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

In addition, some courts have accepted the argument that employers can rely on vague, ill-defined "market forces" excuses to justify pay discrimination between men and women doing equal work.[16] In contrast, other courts have scrutinized employers' proffered justifications for sex-based wage disparities, and have recognized that the Equal Pay Act requires that any "factor other than sex" that justifies paying a woman less than a man for the same work must be closely tied to an employer's business needs.[17]

Relying on "market forces" or market value alone as a justification for offering a male employee a higher salary than a similarly situated female employee to prevent him from leaving, or to recruit him from another employer, is the type of compensation practice that invites stereotyping and faulty assumptions about women's competence and value. In *Corning Glass Works v. Brennan*,[18] the Supreme Court rejected the argument that "market forces"—that is, the value assigned by the market to men's and women's work, or the greater bargaining power that men have historically commanded—can constitute a "factor other than sex," since sex is precisely what those forces have been based upon. The court recognized that the compensation market has been influenced in numerous ways by sex stereotyping and other discrimination over time. Relying on vague assertions of "market forces" to recruit or pay a man more can perpetuate this discrimination when an employer does not adjust the pay of other employees doing substantially equal work to meet the market.

The Paycheck Fairness Act would ensure that employers would no longer be able to justify paying women less for the same work as men based on faulty and invalid justifications that are not related to the job or any business necessity. The Paycheck Fairness Act would not eliminate the factor other than sex defense, and it would not allow employees to determine an employer's business purpose. Employers still may consider an applicant's or employee's relevant education, experience, special skills, seniority, and expertise in setting pay and to account for any pay disparities, as long as they are not based on sex.

Under the Paycheck Fairness Act the employer's pay practices will be scrutinized, as they are under Title VII, to determine whether they serve a legitimate business purpose and whether there are comparable alternatives, which the employer refuses to adopt, that would not result in gender-based pay disparities.

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

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

[18] 417 U.S. 188 (1974).

The Paycheck Fairness Act explicitly prohibits employers from relying on a job applicant's prior salary during the hiring process, so that pay discrimination and disparities do not follow women and people of color from job to job.

***4. Ms. Goss Graves, how would raising the federal minimum wage to $15 an hour impact the gender pay gap?***

One of the main drivers of the gender wage gap is women's overrepresentation in low-paid jobs and underrepresentation in higher paid jobs. Women are close to two-thirds of the workforce in jobs that pay the federal minimum wage of $7.25 per hour or just a few dollars above it, and women are more than two-thirds of tipped workers, for whom the federal minimum cash wage has been just $2.13 per hour for three decades.[19]

Raising the federal minimum wage to $15 an hour—and ensuring that tipped workers receive the full minimum wage before tips—can help lift women and their families out of poverty, narrow racial and gender wage gaps, and spur the consumer demand we need for a strong, shared economic recovery post the COVID-19 pandemic.[20]

Because women and people of color workers would see higher pay as the result of a minimum wage increase, raising the federal minimum wage is likely to narrow both racial and gender wage gaps. One in four working women—including 34% of Black working women and 31% of Latina workers—will get a raise if the minimum wage rises to $15 per hour by 2025.[21] By 2025, on average, women working year-round who are affected by an increase in the federal minimum wage would see their annual earnings increase by about $3,500, compared to approximately $3,100 for men.[22] Black women and Latinas would see the largest average annual increase, at $3,700.[23]

Increasing the minimum wage works. States with higher minimum wage tend to have smaller wage gaps. Women working full-time, year-round in states with a minimum wage of at least $10 dollar per hour face a gender wage gap that is 17% smaller than the wage gap in states with a $7.25 minimum wage.[24] In the

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[19] Women are 64% of the workforce in the 40 lowest-paying jobs in the United States. Jasmine Tucker & Julie Vogtman*, When Hard Work Is Not Enough: Women in Low-Paid Jobs*, NAT'L WOMEN'S LAW CTR. ("NWLC") (April 2020), https://nwlc.org/wp-content/uploads/2020/04/Women-in-Low-Paid-Jobs-report_pp04-FINAL-4.2.pdf. Among the 1.1 million workers paid exactly $7.25 per hour or less, women are 67% of the workforce. NWLC calculations based on Bureau of Labor Statistics (BLS), *Characteristics of Minimum Wage Workers*, 2020, https://www.bls.gov/opub/reports/minimum-wage/2020/home.htm (Table 1).

[20] NWLC, THE RAISE THE WAGE ACT: VALUING WORKING PEOPLE & ADVANCING EQUAL PAY (March 2021), https://nwlc.org/wp-content/uploads/2019/10/RTWA-FS-2021-v3.pdf.

[21] BLS, *Characteristics of Minimum Wage Workers*, supra note 19 at 30 (Table 5); Sarah Jane Glynn, *Raising the Minimum Wage Is Key to Supporting the Breadwinning Mothers Who Drive the Economy*, CTR. FOR AM. PROGRESS (Feb. 23, 2020), https://www.americanprogress.org/issues/economy/news/2021/02/23/496219/raising-minimum-wage-key-supporting-breadwinning-mothers-drive-economy/.

[22] David Cooper, Zane Mokhiber & Ben Zipperer, *Raising the Federal Minimum Wage to $15 by 2025 Would Lift the Pay of 32 Million Workers*, ECON. POLICY INST. (EPI) 30 (March 2021), https://files.epi.org/pdf/221010.pdf (Table 5).

[23] *Id.* at 8–9.

[24] NWLC calculations based on U.S. Census Bureau, 2019 ACS 1-year estimates using IPUMS USA. Figures represent the median wage gaps for women who are employed full time, year-round compared to their male counterparts across all of the states in each minimum wage category (i.e., states with a $7.25 minimum wage and states with a minimum wage of $10+ per hour).

seven "One Fair Wage" states where employers are required to pay their tipped workers the regular minimum wage before tips, the overall wage gap for women working full time, year-round is 33% smaller than in states with a $2.13 tipped minimum wage.[25]

Moreover, a recent study found minimum wage increases between 1990 and 2019 reduced Black–white wage gaps by 12% overall, and by 60% for workers without post-secondary education; while wage increases lifted income for men and women of all races, Black workers, and particularly Black women, experienced the greatest gains.[26] The study also found that wage gaps would have narrowed further had the federal minimum wage not eroded over this period.[27]

Representative Ilhan Omar (D – MN)

1. I was proud to see reporting provisions included again in the Paycheck Fairness Act to improve the collection of pay data.
    a. ***Ms. Goss Graves, can you explain the need for pay data reporting and how it would benefit both workers and employers?***

Vigorous enforcement of equal pay laws, and proactive measures taken to prevent violations of existing pay discrimination laws, are critical to ensuring that women and people of color are paid fairly for the work that they perform. Pay data reporting is one of the proactive measures we can take to prevent discrimination.

Pay discrimination is very difficult to uncover because pay is so often cloaked in secrecy. Pay decisions are routinely made behind closed doors with little scrutiny and most workers are unaware of how much their colleagues are being paid unless they work in settings where salaries are publicly shared or collectively negotiated, such as many public sector or unionized workplaces.

Whether by custom or employer practice, many workers in the private sector are forbidden or strongly discouraged from discussing their pay with each other. As a result, many victims of pay discrimination are unaware they are even experiencing discrimination. Receiving equal pay should not have to depend on an anonymous note writer letting you know you are being underpaid. That is why we need strong federal enforcement of equal pay laws and why we need employers to look at their own pay practices and close any pay gaps that are not justified by legitimate factors such as differences in qualifications.

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[25] NWLC, ONE FAIR WAGE: WOMEN FARE BETTER IN STATE WITH EQUAL TREATMENT FOR TIPPED WORKERS (Feb. 2021), https://nwlc.org/wp-content/uploads/2021/02/OFW-Factsheet-2021-v3.pdf.

[26] Jesse Wursten & Michael Reich, *Racial Inequality and Minimum Wages in Frictional Labor Markets* (IRLE Working Paper No. 101-21), http://irle.berkeley.edu/files/2021/02/ Racial-Inequality-and-Minimum-Wages.pdf. Notably, Wursten and Reich find that "gains for black workers do not crowd out those of white or Hispanic workers. Rather, minimum wages increase earnings for all race/age/gender groups; they simply increase more for black workers and women in general. We do not find any disemployment effects among race/ethnicity and gender groups. On the contrary, black workers are less likely to lose their jobs after minimum wage changes." *See also* Ellora Derenoncourt & Clare Montialoux, *Minimum Wages and Racial Inequality*, 136 QUARTERLY J. ECON. 169-228 (Feb. 2021), https://doi.org/10.1093/qje/qjaa031 (finding that raising the federal minimum wage to $1.60 in 1968, its historic peak, was responsible for more than 20% of the fall in the Black–white earnings gap during the Civil Rights Era).

[27] *Id.*

One key tool is to enhance the ability of enforcement agencies to access comprehensive pay data from employers to gain better insight into existing race and gender pay disparities. With this information, enforcement agencies and employers can root out discrimination in pay early on.

The current COVID-19 pandemic and its immediate and long-term economic impacts heighten the importance of proactive efforts to address gender, race, and ethnicity-based wage gaps and pay discrimination. The pandemic and the unemployment/underemployment crisis it has ushered in has exposed and exacerbated existing inequities and economic insecurities that increase risk of workplace discrimination and harassment, including pay discrimination. Now, workers are more desperate to keep a paycheck at any cost; they are less willing to uncover and challenge discrimination and workplace abuses, and face retaliation for doing so. The threat of retaliation is all too real; retaliation continued to be the most frequently cited claim in all charges filed with the EEOC in FY 2020.[28] The pandemic is also likely to exacerbate the challenges women face in hiring, promotion, and advancement.

Pay data reporting by employers promises to shine light on race and gender pay disparities, increase the likelihood of employer self-analysis and self-correction, and identify areas of concern for further investigation by enforcement agencies. It ensures that employers are reviewing wage data by sex, race, and ethnicity. The reporting requirement provides an opportunity and strong incentive for employers to proactively self-evaluate their pay practices and not only correct unjustified pay disparities, but prevent them from occurring in the first place.

Analyzing and reporting compensation data has been shown to help close the gender wage gap in certain occupations in countries where analysis and reporting are required. Disclosure requirements are a key driver of pay audits internationally.[29] According to a recent survey in the Harvard Business Review of businesses in the U.K., which implemented a public disclosure requirement in 2018, "54% of U.K. respondents cite pay data reporting requirements from federal/national and regional governments as external drivers for them to perform pay equity analyses, versus 28% for their U.S. counterparts."[30] Denmark's 2006 Act on Gender Specific Pay Statistics mandates that companies with over 35 employees report on gender pay gaps. A recent study of the law showed that from 2003 to 2008, the gender pay gap at mandatory reporting firms shrank 7% relative to the pre-regulation wage gap.[31] In Australia, reporting

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[28] In FY 2020, retaliation accounted for 55.8% of all charges filed. *See* EEOC, EEOC Releases Fiscal Year 2020 Enforcement and Litigation Data, Feb. 26. 2021, https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data.

[29] For an overview of this legislation, see NWLC, PROMOTING PAY TRANSPARENCY TO FIGHT THE GENDER WAGE GAP: CREATIVE INTERNATIONAL MODELS (Mar. 2020), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/06/International-Pay-Transparency-Models-v2.pdf; Fawcett Society, The Global Institute for Women's Leadership and Thomson Reuters Foundations, *Gender Pay Gap Reporting: A Comparative Analysis* (Sept. 2020), https://www.kcl.ac.uk/giwl/assets/gender-pay-gap-reporting-a-comparative-analysis.pdf.

[30] *See* Harv. Bus. Rev. Analytic Serv., *Pulse Survey: Navigating the Growing Pay Equity Movement: What Employers Need to Know About What To Do* 3 (2019), https://hbr.org/sponsored/2019/10/why-your-company-needs-to-implement-pay-equity-audits-now.

[31] Morten Bennedsen, et al., *Research: Gender Pay Gaps Shrink When Companies Are Required to Disclose Them*, HARV. BUS. REV. (Jan. 23, 2019), https://hbr.org/2019/01/research-gender-pay-gaps-shrink-when-companies-are-required-to-disclose-them.

requirements apply to companies with 100 or more employees.[32] The pay gap has declined by more than 4 percentage points between 2013 when reporting began and 2019, though a report issued in 2018 showed uneven results across industries with little progress in sectors like accommodations and food service, health care and social assistance and information, media, and telecommunications. [33]

Gaining a deeper understanding of pay disparities is important for all workers, but particularly women of color, who experience the largest pay gaps. The unique challenges facing women of color get lost in the broader equal pay conversation because there is a lack of information beyond the data documenting the wage gap. More data and analysis is needed to understand why these gender and racial wage gaps persist, such as identifying specific job categories where the widest disparities occur. The data gathered through the EEO-1 form can be an important tool—such data have been used, for example, to document where women of color are employed across the private sector.

Individual employees can find out if they are working in an industry or region where they are more at risk of experiencing pay discrimination and be prompted to investigate further to ensure that they are being treated fairly. They also can better understand pay trends with their region and industries, thus empowering them to seek and negotiate fair pay.

The reporting requirement in the Paycheck Fairness Act provides an opportunity and strong incentive for employers to proactively self-evaluate their pay practices and not only correct unjustified pay disparities but prevent them from occurring in the first place.

Employers can use the aggregate data to evaluate their own metrics and pay practices and set industry benchmarks within a specific geographic area. Self-evaluation is likely to encourage employers to proactively implement practices to help prevent pay disparities in the first instance and to develop a diverse workforce, both of which are good for business.

A diverse workforce and equitable employment practices can confer a wide array of benefits on a company, including decreased risk of liability, access to the best talent, increased employee satisfaction and productivity, increased innovation, an expanded consumer base, and stronger financial performance. Competitive—and thus equal—pay is critical for recruiting and retaining a diverse workforce and high performers, particularly for younger women workers.

When workers are confident they are being paid fairly, they are more likely to be engaged and productive. Significantly, shareholders and potential investors are recognizing these benefits and are increasingly interested in companies' commitment to diversity and equal employment opportunity. They see compliance with antidiscrimination laws—particularly regarding equal pay—as an important factor impacting risk and profitability, and therefore relevant to investment decisions.

***b. How would this data assist the missions of federal enforcement agencies like the equal Employment Opportunity Commission and Department of Labor?***

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[32] *Australia's Gender Pay Gap Statistics 2020*, https://www.wgea.gov.au/data/fact-sheets/australias-gender-pay-gap-statistics-2020; *Progress Report, 2017-18*, Australian Government Workplace Equality Agency (2019), https://www.wgea.gov.au/sites/default/files/documents/wgea-progress-report-2017-18.pdf.
[33] *Id.*

One of the purposes of collecting pay data is to assist with complaint investigations and provide information about pay disparities to strengthen the enforcement efforts of agencies like the EEOC and OFCCP. The requirement to collect pay data addresses a major shortcoming in equal pay enforcement—the availability of comprehensive employer pay data to help expand and refine enforcement efforts, strengthen investigations, better target resources, and deepen understanding of workforce patterns and trends.

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

Pay data collection will not conclusively establish that any employer is violating the law—and it is not intended to. What it will do is aggregate millions of data points to establish gender and racial pay patterns within job categories, industries, and localities, thus allowing identification of firms that significantly depart from those benchmarks and may warrant further analysis and investigation. Collecting pay data allows enforcement agencies to efficiently focus investigatory resources to identify potential issues.

2. Additionally, I wanted to give you an opportunity to discuss the pandemic's economic and health effects on women of color. There was a recent University of Minnesota study that stressed the dual vulnerability faced by women of color in my state – they are at a greater risk of COVID exposure and a greater likelihood of layoffs. The researchers concluded that discrimination is at least one of the most constant factors contributing to worsened economic and health outcomes for women of color during the COVID-19 pandemic.
    a. ***Ms. Goss Graves, could you tell us how the gender pay gap is compounded by the racial gap for women of color, and how these gaps affect women's individual income and lifetime earnings?***

Overall, women in the United States working full-time, year-round typically are only paid 82 cents for every dollar paid to men. The gender wage gap is widest for women of color; among women who hold full-time, year-round jobs in the U.S., Black women are typically paid 63 cents, Native American women 60 cents, and Latinas just 55 cents for every dollar paid to white, non-Hispanic men. Asian women make 87 cents for every dollar paid to white, non-Hispanic men, but wage gaps for Asian American and Pacific Islander women of some ethnic and national backgrounds are much larger.[34]

The gender wage gap significantly diminishes the earning power of women. In 2019, women's median earnings were $10,157 less per year than the median earnings for men, with higher losses for women of color.[35] Put another way: that is equal to about three months of rent, three months of child care payments, three months of health insurance premiums, two months of groceries, four months of student loan payments, and six tanks of gas.[36]

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[34] *See* NWLC, THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO (Oct. 2020), https://nwlc.org/resources/the-wage gap-the-who-how-why-and-what-to-do/.
[35] *Id.*
[36] *Id.*

Over the course of a 40-year career, a woman beginning her career today typically stands to lose $406,280 to the wage gap.[37] Women of color stand to lose the most, with Black women typically losing $964,400, Native American women losing $986,240, and Latinas losing $1,163,920 over their lifetime to the wage gap as compared to white, non-Hispanic men.[38]

Women were already struggling to make ends meet before the pandemic; closing the wage gap is essential for helping to lift women and children out of poverty. In 2019, nearly one in nine women in the U.S. lived in poverty, with high rates for women of color, including 18% of Native American women, 18% of Black women, and 15% of Latinas.[39] More than 1 in 3 families headed by unmarried mothers lived in poverty in 2019, and 60% of all poor children lived in families headed by unmarried mothers.[40] Six months into the pandemic, in October 2020 one in six Latinas (16.5%) and one in five Black, non-Hispanic women (20.1%) reported not having enough food in the past week, and many reported being behind on rent or mortgage payments.[41] Closing the wage gap is not only fair, it is urgently needed to address the economic impacts of the pandemic.

Racial stereotypes compound the effects of the gender wage gap for women of color, contributing to their overrepresentation in low-paying jobs, and underrepresentation in higher-paying jobs and leadership positions within organizations.

***b. How has this pandemic widened these gaps?***

Women of color across the country are bearing the brunt of the COVID-19 pandemic—both in the workforce, as the percentage of women of color facing pandemic-related joblessness steadily rises, and in terms of lives lost to COVID-related illnesses or complications.[42] It is crucial that Congress pass the Paycheck Fairness Act to strengthen protections for all workers, but especially the communities most impacted by the financial effects of the COVID-19 pandemic.

Women are on the frontlines of the pandemic, working in the low-paid jobs that we rely on and deem essential, but they are also being paid less than their male counterparts. Earnings lost because of the wage gap are exacerbating the financial strain of COVID-19 and its impact on our communities.

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[37] NWLC calculations are based on U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2020 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT, Table PINC-05, *available at* https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-05.html. Figures for Native American women are NWLC calculations based on U.S. CENSUS BUREAU, 2019 AMERICAN COMMUNITY SURVEY, Tables B20017H, B20017C, and B20017E, *available at* https://www.census.gov/programs-surveys/acs/.

[38] *Id.*

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

[40] *Id.*

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

[42] The Administrative Procedures Act requires that agencies allow "interested parties and opportunity to participate." 5 U.S.C. § 553(c). EEOC strayed from rulemaking requirements by providing for only a 30-day comment period, rather than the required 60-day comment period. Under section 2(b) of Executive Order 13563, Improving Regulation and Regulatory Review, the Department must "afford the public a meaningful opportunity to comment . . . with a comment period that should generally be at least 60 days." Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

In addition to being overrepresented in essential jobs, women have borne the majority of job losses since the pandemic hit. The unemployment rate for women of color remains exceptionally high: nearly 1 in 11 Black women ages 20 and over (8.7%) were unemployed in March 2021, more than 1 in 13 Latinas ages 20 and over (7.3%), and nearly 1 in 18 Asian women ages 20 and over (5.7%).[43] At the same time, the lack of supports during the pandemic for individuals who are caregivers as well as breadwinners has forced women out of the workforce in droves. The net number of women who have left the labor force since the start of the pandemic remains at over 1.8 million, leaving women's labor force participation rate—the percent of adult women who are either working or looking for work—at 57.4%.[44] Before the pandemic, women's labor force participation rate had not been this low since 1988.[45] Black women and Latinas continue to be hit particularly hard by the economic crisis,[46] and workers in low-paid jobs, like retail, hospitality, and child care have shouldered much of the job loss. Many unemployed people have been out of work for most of the COVID-19 crisis. Among adult women ages 20 and over who were unemployed in March, 2 in 5 (46.5%) had been out of work for 6 months or longer.[47] The need for additional supports when women reenter the workforce post the COVID-19 pandemic is evinced by the most recent jobs report. The March BLS monthly jobs report shows that the economy gained 916,000 net jobs in March 2021, the largest gain since August 2020.[48] But women accounted for only 34.4% of net job gain last month, gaining 315,000 jobs while men gained 601,000.[49] Women would need nearly 15 straight months of job gains at last month's level to recover the over 4.6 million net jobs they have lost since February 2020.[50]

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

[43] Claire Ewing-Nelson & Jasmine Tucker, NWLC, ONLY ABOUT ONE THIRD OF THE 916,000 JOBS GAINED LAST MONTH WENT TO WOMEN (Apr. 2021), https://nwlc.org/wp-content/uploads/2021/04/March-Jobs-Day-2021-v1.pdf.
[44] Claire Ewing-Nelson & Jasmine Tucker, NWLC, ONLY ABOUT ONE THIRD OF THE 916,000 JOBS GAINED LAST MONTH WENT TO WOMEN (Apr. 2021), https://nwlc.org/wp-content/uploads/2021/04/March-Jobs-Day-2021-v1.pdf.
[45] Claire Ewing-Nelson, NWLC, ANOTHER 275,000 WOMEN LEFT THE LABOR FORCE IN JANUARY (Feb. 2021),https://nwlc.org/wp-content/uploads/2021/02/January-Jobs-Day-FS.pdf.
[46] *Id.*
[47] Claire Ewing-Nelson & Jasmine Tucker, NWLC, ONLY ABOUT ONE THIRD OF THE 916,000 JOBS GAINED LAST MONTH WENT TO WOMEN (Apr. 2021), https://nwlc.org/wp-content/uploads/2021/04/March-Jobs-Day-2021-v1.pdf.
[48] NWLC calculations based on BLS, March 2021 Employment Situation Summary, Establishment Data Table B-1: Employees on nonfarm payrolls by industry sector and selected industry detail, *available at* https://www.bls.gov/news.release/empsit.t17.htm.
[49] NWLC calculations based on BLS, March 2021 Employment Situation Summary, Establishment Data Table B-1 and BLS, March 2021 Employment Situation Summary, Establishment Data Table B-5: Employment of women on nonfarm payrolls by industry sector, seasonally adjusted, *available at* https://www.bls.gov/news.release/empsit. t21.htm.
[50] NWLC calculations based on BLS, historical data for Establishment Data Table B-1, *available at* https://www.bls.gov/webapps/legacy/cesbtab1.htm. We measure changes since the start of the COVID-19 pandemic using the February 2020 Employment Situation Summary as a reference point.

to build wealth, contributing to racial and gender wealth gaps and creating barriers to families' economic prosperity.

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

APPENDIX A


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November 9, 2020

Bernadette Wilson
Acting Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
131 M St., N.E.
Washington, DC 20507

*Submitted via regulations.gov*

**Re: Proposed Update of Commission's Conciliation Procedures, FR Docket Number EEOC-2020-0006, Docket RIN 3046-AB19**

Dear Ms. Wilson:

The National Women's Law Center strongly opposes the Equal Employment Opportunity Commission's ("EEOC" or "the Commission") notice of proposed rulemaking, *Update of Commission's Conciliation Procedures*, RIN Number 3046-AB19 (the "Proposed Rule" or "NPRM").

The National Women's Law Center ("the Center") has worked for over 45 years to advance and protect women's equality and opportunity—with a focus on women's employment, education, income security, health, and reproductive rights—and has long worked to prevent and remedy workplace discrimination, including sexual harassment, pregnancy discrimination, and pay discrimination, through EEOC processes as well as in the courts.

The Proposed Rule seeks to make conciliation more attractive to employers in a manner that would impose significant and time-consuming requirements on EEOC, and further stack the deck against working people seeking justice in the face of employment discrimination. The NPRM will make it harder for workers who, for example, are fired for being transgender, or sexually harassed at work, or denied a promotion because they are Black, or retaliated against for asking for an accommodation because of a disability to seek and obtain redress for unlawful discrimination from EEOC.

The Commission proposes to provide employers (but not charging parties) with the following new information: (1) a summary of the facts and non-privileged information that the Commission relied on in its reasonable cause finding, and in the event that it is anticipated that a claims process will be used subsequently to identify aggrieved individuals, the criteria that will be used to identify victims from the pool of potential class members; (2) a summary of the

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Commission's legal basis for finding reasonable cause, including an explanation as to how the law was applied to the facts, as well as non-privileged information it obtained during the course of its investigation that raised doubt that employment discrimination had occurred; (3) the basis for any relief sought, including the calculations underlying the initial conciliation proposal; and (4) identification of a systemic, class, or pattern or practice designation. The Commission also proposes that employers must be provided at least 14 calendar days to respond to the initial conciliation proposal.[1]

The Proposed Rule is based on unsupported assumptions, does not provide appropriate time for notice and comment, contravenes legislative intent and Supreme Court precedent, fails to provide adequate cost-benefit analysis, ignores costs to workers and the Commission, fails to address EEOC's ongoing conciliation pilot program and is harmful not only to workers but also to EEOC's enforcement mission.

The Center strongly opposes this attempt by EEOC to upend its conciliation procedures and urges the EEOC to withdraw the rule.

## I. The Rulemaking Process and Unsupported Assumptions Underlying the Proposed Rule Undermine the Integrity of the Rule

### A. EEOC'S Decision to Pursue Rulemaking During a Pandemic With a 30-Day Comment Period Is Unconscionable

EEOC's decision to pursue rulemaking in the middle of a national pandemic, and to provide only 30 days for public comment, instead of the customary 60 days, casts doubt on the integrity of the administrative process and the legality of the NPRM.[2] The COVID-19 global pandemic has created an unprecedented public health crisis and widespread economic instability. Quarantine, social distancing, and widespread closures, combined with illness, economic insecurity, relocation, and loss of internet access create substantial barriers to the ability of members of the public—including working people affected by the change sought by the Proposed Rule—to submit comments at all, let alone in a timely manner. EEOC is well aware of these barriers but

[1] Update of Commission's Conciliation Procedures, 85 Fed. Reg. 64079, 64080 (proposed Oct. 9, 2020) (to be codified at 29 C.F.R. pts. 1601, 1626).

[2] The Administrative Procedures Act requires that agencies allow "interested parties and opportunity to participate." 5 U.S.C. § 553(c). EEOC has already strayed from rulemaking requirements by providing for only a 30-day comment period, rather than the required 60-day comment period. Under section 2(b) of Executive Order 13563, Improving Regulation and Regulatory Review, the Department must "afford the public a meaningful opportunity to comment . . . with a comment period that should generally be at least 60 days." Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

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nevertheless seeks to continue this rulemaking process, despite requests by NWLC and other civil, women's and workers' rights advocates for an extension.[3]

Moreover, the pandemic exposes and exacerbates existing inequities and economic insecurities that increase risk of discrimination and harassment at work. The pandemic and its economic repercussions are disproportionately impacting women, people of color, and other historically marginalized communities.[4] In a time of economic crisis, amidst a wave of anti-Asian bias, workers now face heightened risks of workplace discrimination, including discrimination based on sex, race, age, and disability, as well as retaliation, and the crisis has made concrete the ways in which the country is depending on the work performed largely by women and people of color.[5] The NPRM provides no explanation for why EEOC needs to depart from the requirements of EO 13563 and makes it almost impossible for workers who will be harmed by the NPRM—many of whom will not be able to obtain legal representation—to weigh in with the agency.[6]

**B. EEOC's Justification for the Proposed Rule Is Baseless and Unsupported**

The NPRM is a solution in search of a problem. EEOC claims the changes proposed by the NPRM are necessary in order to address "a widespread rejection of the [conciliation] process" by employers.[7] The agency estimates that one-third of employers who receive reasonable cause findings decline to conciliate.[8] But recent statistics show increased rates of resolutions reached through conciliation; and as EEOC acknowledges, 41.23% of conciliations were successful between FY 2016 and 2019.[9] EEOC's unsupported assertions about employer motivations

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[3] Letter from The Leadership Conference on Civil & Human Rights to Bernadette B. Wilson, Executive Officer, Executive Secretariat, United States Equal Employment Opportunity Commission (Oct. 21, 2020), https://civilrights.org/resource/extension-of-comment-period-for-rin-3046-ab19-update-of-commissions-conciliation-procedures/#.

[4] *Four Times More Women Than Men Dropped Out of the Labor Force in September*, NAT'L WOMEN'S LAW CENTER (Oct. 2, 2020) https://nwlc.org/resources/four-times-more-women-than-men-dropped-out-of-the-labor-force-in-september/.

[5] *Women on the Front Lines: Tracking Women's Employment in the COVID-19 Crisis*, NAT'L WOMEN'S LAW CENTER: RESOURCE COLLECTION, https://nwlc.org/resources/women-on-the-front-lines-tracking-womens-employment-in-the-covid-19-crisis/ (last visited Nov. 6, 2020).

[6] Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011), *supra* at 2.

[7] Update of Commission's Conciliation Procedures, *supra* note 1, at 64079, 64080.

[8] *Id.*

[9] For FY 2012-2015, the rate was 40%. U.S. EQUAL EMP. OPPORTUNITY COMM'N, All Statutes (Charges filed with EEOC) FY 1997 - FY 2019 *https://www.eeoc.gov/enforcement/all-statutes-charges-filed-eeoc-fy-1997-fy-2019* (last visited Nov. 7, 2020); In a 2015 guidance document issued by the Agency, it painted a significantly more upbeat picture of the conciliation process, documenting that "the EEOC improved its rate of successful conciliations from 27% in fiscal year 2010 to 38% in fiscal year 2014. The successful conciliation rate for systemic cases in fiscal year 2014 is

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regarding conciliation, the lack of any discussion or evidence about workers' experiences, and the failure to address EEOC's ongoing conciliation pilot program all fatally undermine the justification for the NPRM.

The Proposed Rule is based on assumptions about employer behavior that are completely unsubstantiated. Foremost, the Commission assumes that the proposed changes will result in more successful conciliations and that the NPRM will "enhance efficiency and better encourage a negotiated resolution when possible" by giving employers a "better understanding of the EEOC's position in conciliation."[10] There is no evidence in the NPRM of any relevant data to assess the validity of these assertions, such as the number of conciliation proposals sent to employers within a period of time, the point at which they failed and why, interviews with employers to determine why they chose not to engage in the conciliation process, elements of a successful conciliation, numbers of charges settled through private settlement per year, the impact on EEOC's litigation program and monetary and injunctive relief and related benefits for charging parties if the Proposed Rule goes into effect, and other critical metrics.

While EEOC asserts that there are "various reasons" why an employer may decline to conciliate it concludes, without further discussion of these reasons or evidence, that data regarding conciliation "suggest" that all parties may not value the conciliation process,[11] and thus that the changes in the NPRM are necessary. But notably, the NPRM contains no discussion of any other parties. EEOC has failed to present any evidence in the NPRM of workers' perception of the conciliation process, or how the process might be improved or become more favorable to benefit charging parties. That is because EEOC is attempting to re-write the rules of the game for the benefit of employers who EEOC has found reasonable cause to conclude have discriminated against their employees. [12]

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even better -- with 47% of systemic investigations being resolved." The same document notes that "over 14,000 charges are settled with EEOC or through private settlements each year" and that in the cases where conciliation fails, EEOC has a "remarkable" record in court. In 2014, it achieved a favorable result in "approximately 90 percent of all district court resolutions." U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-0000-21, WHAT YOU SHOULD KNOW: THE EEOC, CONCILIATION, AND LITIGATION (2015), https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-conciliation-and-litigation.

[10] Update of Commission's Conciliation Procedures, *supra* note 1, at 64081, 64082.

[11] *Id.* at 64,080.

[12] Even JacksonLewis, a large employer-side law firm, in a recent article about the conciliation pilot program did not make this jump. While it did call the lack of information employers receive a "shortfall" it did not state that more information would lead to additional successful conciliations -- but rather wrote that under the current system, "the EEOC has successfully conciliated cause determinations." Nadine C. Abrahams, John M. Nolan & Paul Patten, *EEOC Looks to Increase Early Resolutions with Pilot Conciliation, Mediation Programs*, JACKSONLEWIS (July 8, 2020), https://www.jacksonlewis.com/publication/eeoc-looks-increase-early-resolutions-pilot-conciliation-mediation-programs.

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EEOC also has failed to explain how required disclosures of sensitive information to employers roadmapping the evidence and arguments against them would achieve the goal of preventing discrimination. The proposed mandatory disclosures put workers in an especially precarious position and could substantially increase the risk of retaliation—already the largest source of charges filed at EEOC.[13] The NPRM requires EEOC to disclose facts supporting the reasonable cause determination, which could include the identity of witnesses or other potential claimants, which will only be kept confidential if the witness makes a specific request. The effect will be to chill potential claimants and witnesses from reporting discrimination. Such an outcome is entirely at odds with the EEOC's mission.

Finally, the Proposed Rule is premature because it fails to take account of EEOC's ongoing conciliation pilot program. EEOC is attempting to change its conciliation procedures without any data from or analysis of the pilot program it created to determine whether changing conciliation procedures is even necessary.

On July 7, 2020, EEOC announced that it had initiated a six-month conciliation pilot program on May 29, 2020.[14] The Commission stated that the pilot, which is nationwide and not limited to one or two offices, "seeks to drive greater internal accountability and improve the EEOC's implementation of existing practices." However, the Chair unilaterally implemented these changes, without bringing them to a vote by the Commission's leadership,[15] and without rigorous consultation with or examination of the changes or their effects on all stakeholders. Moreover, EEOC has publicly disclosed virtually no information about the nature of the changes implemented pursuant to the pilot program.

Remarkably, EEOC drafted and sought approval for the Proposed Rule making changes to the conciliation process before it completed or evaluated its own conciliation pilot program, which is still in progress. Making changes to the conciliation process without this information is a waste of the Commission's resources; once the data is gathered and evaluated, it may suggest a different set of responses and changes.

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[13] In FY 2019, retaliation accounted for 53.8% of all charges filed with EEOC. Press Release, U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data (Jan. 24, 2020), https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data.

[14] Press Release, U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC Announces Pilot Programs to Increase Voluntary Resolutions (July 7, 2020), https://www.eeoc.gov/newsroom/eeoc-announces-pilot-programs-increase-voluntary-resolutions#:~:text=The%20EEOC's%20conciliation%20pilot%2C%20which,for%20remedying%20complaints%20of%20discrimination.&text=More%20information%20is%20available%20at%20www.eeoc.gov.

[15] Paige Smith, *EEOC Chair Alters Pre-Lawsuit Process for Resolving Bias Claims,* BLOOMBERG LAW (June 1, 2020), https://news.bloomberglaw.com/daily-labor-report/eeoc-chair-alters-pre-lawsuit-process-for-resolving-bias-claims.

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EEOC has not indicated if it has a plan for how information from the pilot program is to be collected and assessed, or whether it will be made public. If EEOC has already collected and evaluated data from the pilot program, it has not said so publicly or provided the public with any notice of this evaluation; nor has it indicated that any data from the pilot program was relied upon for this rulemaking. At best this indicates a lack of transparency, which has been a hallmark of the agency under the Chair's leadership; at worst, it suggests an arbitrary preference for reforms that amount to a thumb on the scale for employers over evidence-based decision-making.

## II. The Proposed Rule Contravenes Controlling Precedent and Seeks to Rewrite Title VII Absent Congressional Approval to Create a New Employer Defense

### A. The Proposed Rule Is Contrary to Legislative Intent and Controlling Supreme Court Precedent

The Proposed Rule is contrary to the Supreme Court's 2015 decision in *Mach Mining, LLC v. EEOC,* which held that EEOC's statutory obligation to conciliate is subject to narrow judicial review and, most critically for this purpose, unanimously affirmed the importance given Title VII's intent, purposes, and structure of maintaining flexibility in the conciliation process so as to increase the chances of resolution.[16] The Proposed Rule, without justification or explanation, reverses EEOC's position from *Mach Mining*, which was affirmed by the Supreme Court, where the agency argued against regimented, cookie-cutter requirements for conciliation. The mandatory disclosures in the Proposed Rule closely track the information disclosures the employer in *Mach Mining* argued should be imposed on EEOC.[17] With this rulemaking, the agency is acceding to the business community's similar demands in that case – demands that were rejected by a unanimous Supreme Court.

In the *Mach Mining* decision, the Supreme Court rejected the employer's proposal, explaining that rather than requiring the Commission to conciliate through a rigid process, Title VII is centered on achieving substantive end results in eliminating unlawful discrimination from the

[16] *Mach Mining, LLC v. E.E.O.C.,* 575 U.S. 480 (2015).
[17] *Mach Mining, LLC v. E.E.O.C.,* 575 U.S. 480, 490–91 (2015). ("In every [conciliation] case, the EEOC must let the employer know the 'minimum ... it would take to resolve' the claim—that is, the smallest remedial award the EEOC would accept. Tr. of Oral Arg. 63. The Commission must also lay out 'the factual and legal basis for' all its positions, including the calculations underlying any monetary request. Brief for Petitioner 39. And the Commission must refrain from making 'take-it-or-leave-it' offers; rather, the EEOC has to go back and forth with the employer, considering and addressing its various counter-offers and giving it sufficient time at each turn 'to review and respond.'")

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workplace.[18] As such, the Supreme Court held that EEOC should maintain the wide latitude conferred by Congress in Title VII to guide individual conciliation processes.[19] Far from imposing an inflexible set of required disclosures, the Court reasoned, "every aspect of Title VII's conciliation provision smacks of flexibility."[20] The Court also observed that the employer's proposed judicial review process "flout[ed]" the manner in which Title VII meant to protect the confidentiality of the conciliation process.[21] As Title VII directs, "[n]othing said or done during and as a part of such informal endeavors [conciliation] may be made public by the Commission"[22] or in subsequent proceedings without the written consent of both parties; but the employer's requested review in *Mach Mining* would have necessitated disclosures about the conciliation in order for a court to assess its sufficiency. The same problem plagues this NPRM. Should it be finalized, it would almost certainly lead to litigation by employers challenging the sufficiency of the conciliation proceeding, which in turn would put the confidentiality of the conciliation in jeopardy.

The Proposed Rule distorts *Mach Mining's* recognition of the importance of flexibility in the conciliation process to conclude that EEOC has the "flexibility" to impose binding, one-size-fits-all mandates, thus burdening agency enforcement processes, exposing workers to retaliation from their employer, and giving employers outsized power in the process.

EEOC can hardly claim ignorance about the correct reading of *Mach Mining* or Congressional intent in crafting a flexible conciliation process. During an August 18, 2020, public meeting about the draft of the NPRM, Commissioner Charlotte Burrows put forward an amendment to the draft rule that was unanimously adopted by the Commissioners, which sought to clarify both the correct reading of *Mach Mining* as well as Congressional intent with regard to conciliation procedures in Title VII. Troublingly, despite this amendment, the Proposed Rule is still in conflict with the correct reading of *Mach Mining*.[23]

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[18] *Mach Mining*, 575 U.S. at 491 (2015) ("Its conciliation provision explicitly serves a substantive mission: to "eliminate" unlawful discrimination from the workplace. 42 U.S.C. § 2000e–5(b). In discussing a claim with an employer, the EEOC must always insist upon legal compliance; and the employer, for its part, has no duty at all to confer or exchange proposals, but only to refrain from any discrimination.").
[19] *Id.* at 495 ("[R]eflecting the abundant discretion the law gives the EEOC to decide the kind and extent of discussions appropriate *in a given case*."(emphasis added)).
[20] *Id.* at 492
[21] *Id.*
[22] 42 U.S.C.A. § 2000e-5 (West)
[23] Meeting of August 18, 2020 - Discussion of Notice of Proposed Rulemaking on Conciliation - Transcript, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/meetings/meeting-august-18-2020-discussion-notice-proposed-rulemaking-conciliation/transcript (last visited Nov. 9, 2020).

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### B. EEOC Is Using the Regulatory Process to Create a New Defense For Employers Without Statutory Authorization

The Proposed Rule also entirely fails to acknowledge that the EEOC may also have to defend its conciliation process in cases brought by private individuals. For these cases, the NPRM provides employers an opportunity to require the individual or the EEOC to litigate about the EEOC's conciliation of the charge. This will be a drain on the agency's resources and could harm the cases brought by individuals who have been discriminated against.

The mandatory disclosures in the Proposed Rule will result in additional challenges to the Commission's conciliation efforts by litigious defendants and will in effect create a new defense for employers, circumventing and subverting *Mach Mining*.

In *Mach Mining* the Supreme Court indicated that EEOC was in charge of conciliation and had the latitude and flexibility to manage those efforts appropriately. It rejected the argument that employers could use the courts to closely scrutinize and second guess these processes. The mandatory nature of the disclosures and procedures in the Proposed Rule invite employers to bring motions attacking the manner and substance of EEOC's conciliation efforts before the case is even underway, delaying or foreclosing resolution of the merits of the claim. The proposed changes would result in additional litigation – and expenditure of agency resources -- and would undermine EEOC's statutory mission to protect workers from employment discrimination.

## III. EEOC Has Failed to Provide an Adequate Cost-Benefit Analysis of the Proposed Rule, Ignoring the Costs to Victims of Discrimination and to the Commission

While EEOC focuses on the benefits of the NPRM to employers, and makes dubious assertions about the benefits to the economy, it conspicuously fails to provide sufficient economic analysis to quantify the costs of its proposal to working people and to the agency itself. In so doing, the Commission violates its responsibility to quantify costs and benefits of proposed regulations[24] and abandons its duty to the public to ensure a transparent regulatory process that is fair, reasonable, and consistent with the law.

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[24] *See* Exec. Order 13563, at § 1, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) ("[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."); *see also* Exec. Order 12866, at §§ 1(a), 1(b)(6), 6(a)(3)(C), *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4, at 18-27 (2003).

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EEOC calculates an estimated $4 million per year cost saving to employers if it successfully conciliates 100 more cases per year pursuant to the proposed changes.[25] It bases this calculation on the likelihood that out of every 100 cases where conciliation is unsuccessful, half will be litigated. EEOC estimates that of that half, it will bring 10% of those cases. It estimates that 40% of the cases with a cause finding will be litigated by a private attorney, yet attempts to estimate the cost of litigation *only for the employer.* EEOC admits in a footnote that its analysis "focuses only on an employer's litigation costs" but fails to justify why that is the case.[26]

To add insult to injury, EEOC then relies on a trickle-down economics theory to claim that this cost-saving will "benefit the economy as a whole" with nary an explanation as to how, beyond the vague claim that employer cost-savings can be put towards "expanding business and hiring more employees."[27] EEOC has not attempted quantify this supposed benefit to the economy as a whole, nor has it put forward any evidence in support of its conclusion that employers who avoid discrimination litigation hire more employees as a result.

EEOC also claims the agency will offset costs because if the agency issues fewer right to sue notifications as a result of more successful conciliations, it will not have to spend money responding to charging parties' FOIA requests for their files.[28] First, the agency could decide to disclose a charging party's file without a FOIA request, saving money by streamlining and normalizing the system for disclosing information to a charging party. Second, EEOC did not support its claim by providing an estimate of how much it would save on FOIA costs due to the NPRM.

The Commission's failure to include a quantitative analysis of the costs and benefits of the proposed rule in its NPRM runs counter to standard practice and multiple rulemaking authorities. This failure alone could render the agency's actions arbitrary and capricious, in light of its duties to both consider and publicize the likely effect of the proposed rule on working people and the agency itself.[29] It is all the more galling given that EEOC is rushing this NPRM with a 30-day comment period, allowing inadequate time for independent review, analysis, and feedback.

### A. The Proposed Rule Will Impose Significant Costs and Negative Impacts on Workers

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[25] Update of Commission's Conciliation Procedures, *supra* note 1, at 64082.
[26] Update of Commission's Conciliation Procedures, *supra* note 1, at 64084, footnote 12.
[27] Update of Commission's Conciliation Procedures, *supra* note 1, at 64082.
[28] Update of Commission's Conciliation Procedures, *supra* note 1, at 64081.
[29] *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 106 (2015) (explaining that "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy'" (quoting *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009))); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

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The Proposed Rule will impose significant monetary costs and other negative impacts on workers who have experienced discrimination, by skewing the conciliation process in favor of employers, potentially prolonging the conciliation process through litigation challenging the sufficiency of conciliation procedures, and increasing the risk of retaliation for those workers by exposing details of these individuals' identity and allegations to the employer – potentially making workers less likely to challenge discrimination at all in the future. Individuals not represented by counsel will be at a particular disadvantage, as they depend on EEOC to protect their interests and move a timely resolution forward.

All of this comes at a financial cost by making remedies for discrimination less available. Discrimination severely undercuts worker earnings. For example, in 2016, the estimated total impact of the unexplained causes of gender wage inequality, presumed to be attributable to discrimination, resulted in $303.7 billion in wage differences between women and men. Or, put another way, more effective anti-discrimination enforcement of equal pay laws alone could result in increased earnings to women up to $300 billion per year.[30] EEOC should not be proposing rules which will hurt working people who have experienced discrimination and make it more difficult for the agency to carry out its enforcement duties.

This Proposed Rule will also harm workers by delaying redress for discrimination. Employers who are the subject of a reasonable cause determination will be able to prolong the conciliation process by challenging the sufficiency of the required disclosures at every turn and refusing to cooperate for months by dragging their feet, and blocking efforts – even if they do not outright refuse to comply with demands – and then could litigate the issue of EEOC's conciliation process in court. The NPRM would turn back the clock to the days before the Supreme Court's *Mach Mining* decision, discussed in Section II(A). In fact, the *Mach Mining* case itself is an illustrative example of the dangers the NPRM poses for workers.

In *Mach Mining*, the EEOC brought suit on behalf of women were denied work in a coal mine based on their sex. [31] EEOC alleged a pattern or practice of discrimination at the employer at least since January 2006.[32] The case reached the Supreme Court in 2015, but the merits of the underlying claim were not at issue. Instead, the litigation had been snarled for years in a dispute about the sufficiency of EEOC's conciliation processes; as several women's rights

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[30] WASHINGTON CENTER FOR EQUITABLE GROWTH, GENDER WAGE INEQUALITY 46 (2018), https://equitablegrowth.org/research-paper/gender-wage-inequality/.
[31] Irin Carmon, *Sex Discrimination Before the Supreme Court*, MSNBC (Jan. 12, 2015, 11:31 PM), https://www.msnbc.com/msnbc/sex-discrimination-the-supreme-court-msna503471.
[32] *E.E.O.C. v. Mach Min.*, LLC, No. 11-CV-879-JPG-PMF, 2013 WL 319337, at *1 (S.D. Ill. Jan. 28, 2013), rev'd, 738 F.3d 171 (7th Cir. 2013), vacated and remanded sub nom. *Mach Mining, LLC v. E.E.O.C.,* 575 U.S. 480, 135 S. Ct. 1645, 191 L. Ed. 2d 607 (2015).

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organizations, including the Center, argued in their 2015 amicus brief in support of the women, "justice delayed is justice denied."[33] The women who were illegally denied employment eventually settled the case in 2017 – over a decade after the discrimination first occurred.[34] For those women, there is no getting back the years of their lives they spent waiting for justice and no way to fully recoup their economic losses or to quantify the pain they endured while their lives were on hold as the result of a protracted legal battle on a matter ancillary to the harm they experienced. This NPRM would ensure that many other workers find themselves shouldering similar costs and harms.

The proposed changes to the conciliation process will also harm workers by giving employers an enormous amount of information from EEOC, including confidential information related to potential litigation strategy– and thereby an enormous amount of power to manipulate the process without even committing to a resolution of the case. In the NPRM, disclosures to the employer are mandatory. Disclosures will be made to charging parties only if they request, and many will not know to make a request. The employer must be given at least 14 days to respond. There is no such protection for the charging party when it comes to windows of time or timelines to respond to employers' offers.

This revised process virtually ensures that employers will be able to mount a stronger legal defense to any case brought by EEOC or the private plaintiff in litigation if they do not reach a successful resolution in conciliation. This would ultimately result in fewer successful litigation related resolutions for EEOC, and by extension the workers who are relying on EEOC's litigation program to help them achieve justice.

EEOC's public litigation also has an important preventative effect on discrimination by employers. The NPRM fails to account for the costs of additional discrimination that is likely absent the deterrent effect of public EEOC litigation. While conciliation is typically confidential, EEOC files a press release with each new case, and litigates in the public view. EEOC also issues press releases when it resolves matters through consent decrees. In these ways, EEOC litigation is an educational and outreach tool and may lead other employers to change practices, or to conclude that discrimination does not pay. Public enforcement activities have been shown to have a preventative impact with regard to other workplace protections. In a groundbreaking

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[33] Brief for Women's Rights Organizations & Individuals as Amici Curiae Supporting Respondents, Mach Mining, LLC v. E.E.O.C., 575 U.S. 480 (2015), https://www.legalmomentum.org/amicus-briefs/mach-mining-v-equal-employment-opportunities-commission; Irin Carmon, *Sex Discrimination Before the Supreme Court*, MSNBC (Jan. 12, 2015, 11:31 PM), https://www.msnbc.com/msnbc/sex-discrimination-the-supreme-court-msna503471.

[34] Press Release, U.S. EQUAL EMP. OPPORTUNITY COMM'N, Mach Mining and Affiliated Companies to Pay $4.25 Million to Settle EEOC Sex Discrimination Suits (Jan. 25, 2017), https://www.eeoc.gov/newsroom/mach-mining-and-affiliated-companies-pay-425-million-settle-eeoc-sex-discrimination-suits.

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research paper, academic Matthew Johnson found that publicizing the Occupational Safety and Health Administration's findings of safety and health violations led other facilities to improve compliance and experience fewer injuries.[35]

This Proposed Rule will also severely increase the risk of retaliation to workers – already a serious problem – which in turn would make workers in need of help less likely to report discrimination to EEOC. Discrimination carries many potential costs for which EEOC does not account. Employment discrimination wastes money because it leads to employers not obtaining the best talent and experiencing unnecessary and costly worker turnover. Discrimination also imposes economic and non-economic costs on workers in the form of lost wages and benefits, out of pocket medical expenses, costs associated with job searches, and costs related to negative mental and physical health consequences of discrimination. The Proposed Rule fails to address these significant costs to workers.

### B. The Proposed Rule Will Impose Significant Costs on EEOC and Undermine Its Enforcement Mission

EEOC observes that "the proposed rule imposes no direct costs on any third parties and only imposes requirements on the EEOC itself." Yet EEOC fails to acknowledge that the significant new requirements imposed by the Proposed Rule will undermine, and divert scarce resources away from EEOC's enforcement activities, thus harming the working people whom the EEOC is intended to serve.

The mandated disclosures in the Proposed Rule will expend scarce agency resources. Preparing and providing the required extensive disclosures to employers will result in a heavy burden on EEOC enforcement staff and divert resources away from enforcement activities. EEOC is also considering allowing such disclosures to be made orally as well as in writing. Oral disclosures leave no record, perpetuating lack of transparency about communications between the agency and respondents, to the detriment of charging parties. This could also undermine efforts to defend EEOC's conciliation efforts in litigation employers will likely bring to challenge conciliation efforts.

The Proposed Rule would jeopardize EEOC's enforcement activities by requiring EEOC to turn over its factual and legal analysis and strategy to every respondent during conciliation, risking waiver of EEOC's deliberative process and attorney-client privileges over confidential pre-

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[35] Matthew S. Johnson, Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws, 110 AM. ECON. REV. 1866 (2020), *https://www.aeaweb.org/articles?id=10.1257/aer.20180501*.

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litigation strategy discussions.[36] The privileges help facilitate candid discussions within the Commission and its investigators' consultation with the Commission's attorneys. Requiring EEOC to potentially reveal its internal deliberations and legal arguments as part of these disclosures will significantly undermine the strength of the Commission's legal position – and thus a worker's ability to obtain redress for unlawful discrimination. And the potential waiver of privilege not only harms the agency in the context of a particular case but also in subsequent cases and litigation, where respondents likely will be able to successfully challenge privilege assertions. The Proposed Rule should at minimum have made clear that such information need not be produced as part of the disclosures to employers following a reasonable cause determination.

The Proposed Rule's mandated disclosures also will undermine EEOC's ability to pursue systemic or class litigation on behalf of classes of harmed individuals.[37] Under the proposed rule, the EEOC must disclose the names of potential victims in class cases. At times, EEOC finds a violation of the law based on an illegal policy or practice and then identifies the full universe of victims of the policy or practice only through the litigation process. However, the NPRM requires EEOC to provide information up front as to how they will identify class members, including the claims process that will be used subsequently to identify aggrieved individuals and the criteria that will be used to identify victims from the pool of potential class members. This stage – determining who the victims are and naming them – is one that normally happens after liability is determined or the case is settling. Requiring EEOC to make this disclosure when it has not had the chance to go through discovery almost ensures that individuals may be left out. Employers, armed with the new rule on conciliation, will argue that newly found individuals are not entitled to relief, creating another round of costly litigation and potentially denying relief to claimants whose rights have been violated.

As a result of the disclosures required by the Proposed Rule, charging parties are more likely to feel compelled to settle, and for lower amounts, because the respondent employer will have significant additional leverage. The Proposed Rule and disclosures also may result in more

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[36] David Lopez, *EEOC Proposed Regulation Would Impede Its Ability to Combat Workplace Discrimination*, THE HILL: CONGRESS BLOG (Aug. 20, 2020, 7:00 PM), https://thehill.com/blogs/congress-blog/politics/513015-eeoc-proposed-regulation-would-impede-its-ability-to-combat.

[37] For example, if an employer fails to accommodate pregnant women but accommodates others who need short-term modifications to their work, that would violate federal civil rights laws. In that case, EEOC may use letters or other outreach efforts to identify and locate victims of the illegal policy. It would not make sense for EEOC to engage in those efforts before knowing if the employer is willing to change their policy or provide damages. In such a case, conciliation efforts may take years before EEOC could file suit. If pre-litigation resolution fails, EEOC could file suit and subsequently work to locate the victims at the appropriate time, likely after several stages of the case including motions to dismiss or in some cases, summary judgment. It is not feasible to alert the employer to all of the harmed individuals during the conciliation or pre-litigation process.

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settlements focused on individual relief, leading EEOC to address multiple individual charges against the same employer in isolation without addressing the underlying discriminatory practices, instead of obtaining wide ranging changes through systemic litigation.

This requirement can also create enormous delays in the process, and the deep involvement of EEOC's legal team to advise the investigators, even before there is any indication that an employer might be interested in changing its policy or resolving the case. In the event that the matter does not resolve during conciliation, it also tips EEOC's hand as to its litigation strategies in some of its most important cases, and encourages employers not to settle those cases until and unless all of the victims are found and named --- all before litigation ensues. This will take up vast resources at EEOC, again, potentially for matters that some employers will have no interest in resolving.

Incentivizing conciliation at the expense of EEOC's litigation efforts greatly harms EEOC's mission to use its litigation to educate the broader employer community about their obligations and to inform workers about their rights. EEOC's litigation program is a vital lever to encourage employers to prevent discrimination, come into compliance, and resolve matters to avoid being the target of litigation efforts. Significantly, conciliations are typically confidential resolutions. Litigation, in contrast, can play an important role in raising public awareness, educating the judiciary and encouraging progressive legal change.[38]

For these reasons, the National Women's Law Center opposes this harmful and unnecessary Proposed Rule and strongly urges EEOC to withdraw it.

Sincerely,

Sarah David Heydemann
Senior Counsel for Education & Workplace Justice

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[38] Robert D. Friedman, Comment, *Confusing the Means for the Ends: How a Pro Settlement Policy Risks Undermining the Aims of Title VII*, 161 U. Pa. L. Rev. 1361, 1366 (2013) ("Without being able to point to previous prevailing plaintiffs, an employee loses significant leverage when bargaining with her employer. Similarly . . . an employee reviewing a largely undeveloped caselaw will find it harder to assess the degree of risk involved when deciding whether to reject a settlement."); see also, generally, Kaitlin Owens, Women's Legal Education and Action Fund, *This Case Is About Feminism: Assessing the Effectiveness of Feminist Strategic Litigation* (2020) (on file with authors) (identifying metrics used to determine whether a case has had the desired impact, based upon interviews with activists engaged in feminist strategic litigation; at pp 40-41 "Even where litigation does not immediately bring about a change in law, it produces a narrative which may uplift issues in the public imagination.")

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Emily Martin
Vice President for Education & Workplace Justice

[Questions submitted for the record and the responses by Ms. Olson follow:]



April 7, 2021

Ms. Camille Olson
Partner
Seyfarth Shaw LLP
233 South Wacker Drive, Suite 8000
Chicago, IL 60606

Dear Ms. Olson,

I would like to thank you for testifying at the March 18, 2021 Subcommittees on Civil Rights and Human Services and Workforce Protections joint hearing entitled "*Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination.*"

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Wednesday, April 14, 2021, for inclusion in the official hearing record. Your responses should be sent to Eunice Ikene of the Committee staff. She can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

**ROBERT C. "BOBBY" SCOTT**
Chairman

Enclosure

Civil Rights and Human Services and Workforce Protections Joint Subcommittee Hearing
***"Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination"***
Thursday, March 18, 2021
10:15 a.m. (Eastern Time)

**Representative Victoria Spartz (R – IN)**

1. Ms. Olson, what would you propose to address the issue covered by H.R. 1065 more effectively, specifically to provide protections for pregnant workers while ensuring we do not create unreasonable burdens, especially for small businesses?

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April 20, 2021

Representative Robert C. "Bobby" Scott
Chairman, Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, D.C. 20515-6100

Representative Victoria Spartz
Member, Committee on Education and Labor
U.S. House of Representatives
1523 Longworth House Office Building
Washington, DC 20515-2276

Re: Response to Question from Representative Spartz Regarding H.R. 1065

Dear Chairman Scott and Representative Spartz:

This letter provides a response to the question in your letter dated April 7, 2021 following my participation in the hearing held on March 18, 2021 entitled, "Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination."

**Question:**

Ms. Olson, what would you propose to address the issue covered by H.R. 1065 more effectively, specifically to provide protections for pregnant workers while ensuring we do not create unreasonable burdens, especially for small businesses?

**Response:**

As I discussed in my written testimony, certain protections and affirmative reasonable accommodation obligations described in H.R. 1065 overlap with other existing federal, state, and/or local obligations with respect to an employer's treatment of an applicant and/or employee who is pregnant. For example, currently approximately thirty different statutes at various jurisdictional levels address an employer's obligation to provide appropriate accommodations to pregnant workers. Not only are there specific pregnancy accommodation statutes, including laws such as the Americans with Disabilities Act, the Americans with Disabilities Act Amendments Act, the Pregnancy Discrimination Act, Title VII of the Civil Rights Act of 1964, and similar protections in state and local laws, but they all address, in various forms, an employer's obligations to accommodate pregnant workers. As a result, different, often overlapping agencies and enforcement bodies are charged with education, investigation and enforcement of the laws' requirements leading to a confusing array of procedures, interpretations, obligations, and remedies related to an employer's treatment of pregnant workers.

H.R. 1065 is a standalone bill that does not address its relationship to other federal bills. H.R. 1065 follows the United States Supreme Court decision of *Young v UPS*, 575 US __ (2015), which left unclear an employer's specific obligations with respect to offering pregnant workers accommodations under the Pregnancy Discrimination Act. Justice Breyer noted in his majority opinion that he was not addressing the implications of the Americans with Disability Act Amendments Act or recent EEOC interpretations. This plethora of law, regulation, and opinion bears most heavily upon small businesses, which for Title VII purposes are defined as employers of only 15 or more employees and even smaller at state or local levels. It is incumbent upon Congress to take into account that a law otherwise designed to assist pregnant workers cannot be effective in this morass of legal obligations. I suggested that at the very least Congress should consider including new accommodation requirements in Title VII, the primary non-discrimination law, and one with which most small businesses are already familiar. The general inclusions, exclusions, interpretations, and requirements of Title VII are already well known. The protections included within H.R. 1065, if enacted, should be incorporated into, and "accommodated with" existing known legal obligations on the same matter applicable to small businesses.

Very truly yours,

Camille A. Olson
Partner, Seyfarth Shaw LLP

[Whereupon, at 12:40 p.m., the subcommittees were adjourned.]

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