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Pregnant Workers Fairness Acts: Advancing a Progressive Policy in Both Red and Blue America

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PREGNANT WORKERS FAIRNESS ACTS: ADVANCING A PROGRESSIVE POLICY IN BOTH RED AND BLUE AMERICA

Deborah A. Widiss*

Pregnant workers often need small changes—such as permission to sit on a stool or to avoid heavy lifting—to stay on the job safely through a pregnancy. In the past decade, twenty-five states have passed laws that guarantee pregnant employees a right to reasonable accommodations at work. Despite the stark partisan divide in contemporary America, the laws have passed in both Republican- and Democratic-controlled states. This Essay offers the first detailed case study of this remarkably effective campaign, and it shows how it laid the groundwork for analogous federal legislation, passed in December 2022, that ensures workers across the country will have the support they need to maintain healthy pregnancies.

Advocates have generated bipartisan support by highlighting that the laws, generally known as Pregnant Workers Fairness Acts, simultaneously advance numerous distinct policy objectives. Lack of accommodations for pregnancy is a major barrier to women’s equality that disproportionately disadvantages poor and working-class women of color. Addressing this need is also a pro-family policy that promotes maternal and infant health and reduces liability risk to employers. These various frames help sell the policy to lawmakers across the political spectrum.

The state-level success has also been the result of effective partnerships between national organizations and state and local groups. Additionally, the Essay shows how the state legislative campaign has been reinforced by litigation in federal courts, advocacy to federal agencies and Congress, and worker organizing. Finally, the Essay explores how state-level organizing—even unsuccessful state campaigns—played an important role in bolstering support for the federal Pregnant Workers Fairness Act.

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* Professor of Law and Associate Dean for Research, Indiana University Maurer School of Law. My thanks to Sarah Brafman, Joanna Grossman, and Erin Macey for very helpful comments on earlier drafts, and to Ann McGinley for inviting me to be part of this symposium. My thanks as well to the students of the *Nevada Law Journal* for their extremely conscientious work finalizing the piece for publication, including allowing me to continue to make updates to the text when publication was delayed by several months.

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“It’s really important that folks understand that pregnancy isn’t a Democratic or Republican issue. It affects all of us.”

— Delaware State Senator Bethany Hall-Long¹

INTRODUCTION

In presidential election years, when maps color coding our country become ubiquitous, Nebraska, North Dakota, and South Carolina are consistently “red” states, and Illinois, New York, and Washington are consistently “blue” states.² Numerous studies emphasize (with good reason) how sharply polarized the country has become and how difficult it is to find common ground.³ But in recent years, each of these states has passed a law guaranteeing pregnant workers a right to reasonable accommodations at work.⁴ In fact, since 2013, twenty-five states, as well as the District of Columbia, have passed such laws; all have been passed with bipartisan support and many have passed unanimously.⁵ Four additional states have older laws that provide similar, although less comprehensive, support for pregnant workers.⁶ These state laws laid the groundwork for analogous federal legislation, passed in December 2022, that ensures workers across the country will have the support they need to maintain healthy pregnancies.

¹ Statement quoted in Brigid Schulte, *States Move to Ensure Pregnant Workers Get Fair Chance to Stay on Job*, WASH. POST (Sept. 8, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/09/08/states-move-where-congress-wont-to-ensure-pregnant-workers-get-fair-shot-to-stay-on-job/> [https://perma.cc/E5Z2-DRY3].

² See, e.g., *Electoral Map: Blue or Red States Since 2000*, 270TOWIN, <https://www.270towin.com/content/blue-and-red-states> [https://perma.cc/8MXT-XHJX].

³ See, e.g., Elizabeth Kolbert, *How Politics Got So Polarized*, THE NEW YORKER (Dec. 27, 2021) (collecting and discussing several recent books on political polarization).

⁴ See *Fact Sheet: State and Local Pregnant Workers Fairness Laws*, A BETTER BALANCE, (Aug. 12, 2021) <https://www.abetterbalance.org/resources/fact-sheet-state-and-local-pregnant-worker-fairness-laws/> [https://perma.cc/9ALC-6V4S] [hereinafter *Fact Sheet*].

⁵ See *id.*

⁶ See *id.*

The state laws, generally known as a Pregnant Workers Fairness Act (PWFA), respond to a common problem: Pregnant employees may need small changes—such as permission to sit on a stool, take extra restroom breaks, or avoid heavy lifting—to work safely through a pregnancy. Although some employers grant such requests, many do not,⁷ and federal laws addressing sex discrimination and disability discrimination offer limited support.⁸ The result has been that many pregnant workers were faced with the intolerable choice of losing their income or putting their health at risk.

Since 85% of women become mothers during their working lives,⁹ lack of accommodations for pregnancy has long been a major barrier to women's equality.¹⁰ The demise of abortion rights throughout much of the country compounds the problem; many women may now be forced to carry pregnancies—including high-risk pregnancies—to term that they might otherwise have chosen to terminate. It also has significant racial and class-based implications. Low-wage workers, disproportionately women of color, are more likely to work in physically demanding jobs where they need accommodations, and they often do not receive such support.¹¹ Thus, providing pregnancy accommodations addresses important structural barriers to equality. There are other key benefits of the policy. For example, accommodating health needs of pregnant workers also decreases maternal and infant mortality and promotes family stability.¹² A clear standard specifically addressing pregnancy accommodations

⁷ See, e.g., *Listening to Mothers: The Experiences of Expecting and New Mothers in the Workplace*, CHILDBIRTH CONNECTION, (Jan. 2014), <https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf> [<https://perma.cc/46VN-HS55>] (reporting significant portion of pregnant workers never ask for accommodations they need and also that even when requested, accommodations are often denied).

⁸ See *infra* Part I.

⁹ See *The Pregnant Workers Fairness Act: Fact Sheet*, NAT'L P'SHIP FOR WOMEN AND FAMILIES, (Feb. 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/fact-sheet-pwfa.pdf> [<https://perma.cc/S7B3-XV5H>].

¹⁰ Transmen and non-binary persons may also become pregnant, and I fully support ensuring that relevant legislation is written in a gender-neutral manner so that it will provide support for any pregnant person. That said, the vast majority of persons who are pregnant are cisgender women; accordingly, failure to accommodate pregnant workers implicates women's equality more generally. Thus, although I primarily use the term pregnant workers in the text—a purposefully gender-inclusive term—I also sometimes refer to pregnant women. For a thoughtful exploration of the significance of language choices in this context, see Irin Carmon, *You Can Still Say "Woman" But You Shouldn't Stop There*, N.Y. MAG. (Oct. 28, 2021).

¹¹ See CHILDBIRTH CONNECTION, *supra* note 7; Black Mamas Matter Alliance et al., *Black Mamas Matter Alliance Letter Supporting the Pregnant Workers Fairness Act* (Sept. 18, 2020), <https://www.abetterbalance.org/resources/black-mamas-matter-alliance-letter-supporting-the-pregnant-workers-fairness-act/> [<https://perma.cc/G27M-WPXS>].

¹² See Black Mamas Matter Alliance et al., *supra* note 11 (discussing studies showing how workplace accommodations can reduce preterm birth and health conditions that can cause maternal morbidity); *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination: Hearing Before the Subcomm. on Civ. Rts. and Hum. Serv. and Workforce*

can help businesses better understand their responsibilities and reduce litigation that might arise under sex or disability discrimination laws.¹³ These alternative frames resonate more readily with some legislators.

The campaigns waged in state houses to pass PWFA legislation happened simultaneously with advocacy to federal agencies, litigation in federal courts, worker organizing, and lobbying in Congress.¹⁴ National advocacy organizations dedicated to advancing women's rights and worker's rights have worked strategically on all of these fronts, in concert with grassroots groups across the country. Indeed, a partial win at the Supreme Court—which made clear that accommodations were required under federal law more often than had been previously understood, but rested on a standard that has proven confusing to implement—bolstered advocacy for state laws to provide an explicit right to accommodation.¹⁵ The state advocacy, in turn, helped build support for an analogous federal law.¹⁶ The story offers a promising example of how civil rights can be advanced, even as the federal courts are relatively inhospitable to worker's rights and as Congress is hampered by gridlock.

This Essay was originally scheduled to be published in spring 2022. It was largely finalized at that time, and it was made available online through pre-publication platforms. However, actual publication of the print volume was delayed until January 2023. During the interim period, two very important developments occurred that bear mention, even though they happened too late in publication process to allow extensive revisions to fully address their implications. First, in June 2022, the Supreme Court overturned *Roe v. Wade*.¹⁷ The sharp curtailment of abortion rights makes it even more imperative that pregnant people receive the support they need at work. This is particularly true in “red” states, since many now have total or near-total bans on abortion.¹⁸ And

Prot. of the H. Comm. on Educ. and Lab. (Mar. 18, 2021) (statement of Dina Bakst, J.D., Co-Founder and Co-President, A Better Balance), <https://www.abetterbalance.org/resources/written-testimony-in-support-of-pregnant-workers-fairness-act-and-pump-act-for-fighting-for-fairness-congressional-hearing/> [<https://perma.cc/RP9R-VS62>] (discussing how workplace accommodations promote family economic security).

¹³ See NOREEN FARRELL, ET AL., EQUAL RTS. ADVOC., EXPECTING A BABY, NOT A LAY-OFF: WHY FEDERAL LAW SHOULD REQUIRE THE REASONABLE ACCOMMODATION OF PREGNANT WORKERS (2012); *Long Over Due: Exploring the Pregnant Workers' Fairness Act: Hearing on H.R. 2694 Before Subcomm. on Civ. Rts. and Hum. Serv. Of the H Comm. on Educ. and Lab.* (Oct. 22, 2019) (statement of Dina Bakst, J.D., Co-Founder and Co-President, A Better Balance) (citing Letter from Linda Hamilton Krieger & William D. Hoshijo, Hawai'i Civ. Rts. Comm'n, to A Better Balance (Feb. 1, 2013)).

¹⁴ See *infra* Parts I, III, and IV.

¹⁵ See *infra* Part I.

¹⁶ See *infra* Part IV.

¹⁷ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

¹⁸ See N.Y. Times, *Tracking the States Where Abortion Is Now Banned*, Aug. 26, 2022 (showing that as of Aug. 26, about half of the states have full or almost-full bans in place, or bans that are currently subject to litigation); most states with bans are reliably “red” states. See Electoral Maps, *supra* note 2.

while those states have failed to enact other key supports for pregnant workers and families, such as paid family leave or the expansion of Medicaid,¹⁹ many have enacted PWFA laws. The strategies that have proven effective in moving PWFA legislation in conservative states might help advance some of these other family-friendly policies. To be clear, I believe people should have the freedom to make choices regarding reproductive health care, including accessing abortion care, regardless of whether a state has enacted a PWFA or other policies supporting families; my point is simply that the *absence* of such policies further compounds the harms caused by stringent restrictions on abortion. Second, in late December 2022, just days before print publication of this Essay, Congress passed a federal PWFA law, meaning that pregnant workers nationwide will now receive these crucial protections. The state campaigns detailed below were essential in laying the groundwork for this new federal law.

Part I of this Essay will briefly explain the need for pregnancy accommodation laws because of gaps under federal sex and disability laws. Part II will discuss the state legislative campaigns, and Part III will describe a shift in business policies even without explicit legal mandates. Part IV will explore how the changes in state laws and in business norms paved the way for federal legislation on point.

One final introductory note. This Essay, written for a symposium on using state law to advance civil rights, is not intended to be a comprehensive history of PWFA advocacy.²⁰ It highlights key court cases, regulatory reform, and advocacy campaigns, but there may be some important parts of the story that are missing. In writing it, I have drawn upon my own personal involvement in

¹⁹ National Partnership for Women and Families, *Threats on All Fronts: The Links Between the Lack of Abortion Access, Health Care and Workplace Equity* (Aug. 2022), <https://www.nationalpartnership.org/our-work/health/reports/threats-on-all-fronts.html>.

²⁰ To the best of my knowledge, there is not a published article offering a more detailed account of the PWFA advocacy campaign. However, for an interesting exploration of the politics of pregnancy accommodation going back to the nineteenth century, with a brief discussion of recent legislation, see Stephanie Bornstein, *The Politics of Pregnancy Accommodation*, 14 HARV. L. & POL'Y REV. 293 (2020). Most academic theorists writing in this area are generally supportive of the PWFA approach, or at least recognize it as an attractive policy solution given political realities. See, e.g., Joanna Grossman & Gillian Thomas, *Making Sure Pregnancy Works: Accommodation Claims After Young v. United Parcel Services, Inc.*, 14 HARV. L. POL'Y REV. 319, 345–46 (2020) (advocating for enactment of PWFA to address limitations of coverage under existing federal law). I share this view. However, there are some theorists who have sounded cautionary notes. See, e.g., Jennifer Bennett Shinnall, *The Pregnancy Penalty*, 103 MINN. L. REV. 749 (2018) (suggesting paid leave policies might be preferable because accommodation mandates can spur discrimination); Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125 (2016) (arguing pregnancy-specific supports may be stigmatizing and advocating for a more universal approach). I agree there is a risk that mandating accommodations can spur discrimination. That said, a universalist approach is unlikely to gain traction politically, and existing—and proposed—paid leave policies are too short in duration to provide sufficient support for both medical needs during a pregnancy and infant care after the birth.

these efforts.²¹ Looking at the larger picture has helped me better understand how even steps backward, such as litigation losses or stalled bills, have contributed to the overall forward trajectory of expanding support for pregnant workers and their families. Most strikingly, there is some evidence that lobbying coalitions formed to advocate for state laws have successfully pivoted to federal advocacy, even in—indeed, especially in—Republican-leaning states where PWFAs have not yet been enacted.²²

I. GAPS IN PROTECTIONS UNDER FEDERAL SEX AND DISABILITY LAWS

Pregnancy is a health condition experienced only by persons with female reproductive organs.²³ It sits at the juncture of sex discrimination law and disability law, but claims for workplace accommodations related to pregnancy often fall through the cracks between these federal laws. This Part explains the key protections—and limitations—of federal laws that led to advocacy for new legislation directly on point.

Federal sex discrimination law, as amended by the Pregnancy Discrimination Act (PDA), prohibits discrimination on the basis of pregnancy, childbirth, and related medical conditions and mandates that employers “shall” treat preg-

²¹ In 2013, I wrote a law review article advocating for a robust interpretation of the federal mandate to treat pregnant workers the “same” as other workers with similar limitations. See Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS. L. REV. 961 (2013) [hereinafter *Gilbert Redux*]. This article was considered by federal regulators issuing guidance in the area. See Statement of Commissioner Chai R. Feldblum on Approval of the Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014), <http://chaifeldblum.com/wp-content/uploads/2014/07/Feldblum-Statement-on-Pregnancy-Guidance-07.14.14.pdf> [<https://perma.cc/FLW2-GM7M>] (recommending the article for the historical perspective it provided on the issue); see also *infra* text accompanying notes 55–59 (describing how the guidance adopted the interpretation that I and others urged). The article also helped shape the arguments put forward in the key Supreme Court case on point, *Young v. United Parcel Service, Inc.*, 575 U.S. 206 (2015), as it was cited in the briefs submitted by the Petitioner, the United States as *Amicus Curiae*, and several other *amici*. I subsequently published a follow-up essay, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act after Young v. UPS*, 50 U.C. DAVIS. L. REV. 1423 (2017) [hereinafter *Interaction After Young*]. I also worked closely with a coalition advocating for PWFA legislation in my home state of Indiana. See *infra* Part II.

²² See *infra* text accompanying notes 153–157.

²³ Most PWFA legislation is drafted in a gender-neutral fashion, and accordingly they provide support to transmen and non-binary persons who are pregnant, as well as cisgender women; however, the federal Pregnancy Discrimination Act references “pregnant women.” See 42 U.S.C. § 2000e(k). A full explication of whether and how pregnant persons who do not identify as women may be covered under the PDA and similar laws is outside the scope of this essay, but there may be ways in which some claims could be viable. Cf. 1 U.S.C. § 1 (providing that in general, throughout the U.S. Code, words “importing the masculine gender include the feminine as well”); see also *supra* note 10 (discussing rhetorical significance of using gendered language in this context).

nant employees the “same” as other employees with similar limitations.²⁴ The PDA was enacted in 1978 in response to a Supreme Court case holding that pregnancy discrimination was not sex discrimination.²⁵ At the time, some advocates suggested the law should be amended to guarantee maternity leave and specifically allow pregnant workers to transfer out of positions that might pose a risk to the pregnancy.²⁶ Other advocates thought such “special” supports would spur discrimination against pregnant workers or against women more generally. They argued for a non-discrimination model, specifying simply that pregnancy discrimination was illegal and that pregnancy should be treated like other health conditions.²⁷ The PDA’s same treatment standard largely reflects this latter view. However, it was enacted at a time when there had recently been significant growth in employer-provided support for health conditions other than pregnancy; this meant its practical effect was to provide important new benefits for pregnant workers.²⁸

In 1990, Congress passed the Americans with Disabilities Act (ADA), which further expanded support for workers with medical needs.²⁹ The ADA prohibits discrimination on the basis of a disability, and it requires employers to make “reasonable accommodations” for a disability, unless doing so would impose an “undue hardship” on the employer.³⁰ Disability, in turn, is defined as an “impairment” that “substantially limits” a major life activity.³¹ The Supreme Court initially interpreted the ADA very restrictively.³² In 2008, Congress passed the ADA Amendments Act (ADAAA), rejecting the Court’s constrained reasoning and directing that the standard was to be “construed in favor of broad coverage.”³³

The enactment of the ADAAA strengthened claims that pregnant workers should receive workplace accommodations. First, it suggested that many preg-

²⁴ See 42 U.S.C. § 2000e(k). The Supreme Court subsequently interpreted this language as requiring that pregnant employees be treated at least as well as other employees with comparable limitations; in other words, that it sets a floor, not a ceiling, on support. See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 286–88 (1987).

²⁵ See Widiss, *Gilbert Redux*, *supra* note 21, at 989–98 (discussing this history).

²⁶ See *id.* at 983 (discussing how this option was suggested but rejected by drafters); see also *id.* at 980–84 (discussing the “special treatment/equal treatment” debate more generally).

²⁷ See *id.*

²⁸ See *id.* at 988–89 (discussing growth in employer-provided health insurance and short-term disability benefits that typically treated pregnancy and childbirth less favorably than other health conditions or excluded them entirely).

²⁹ Pub. L. 101-336 (1990), codified at 42 U.S.C. § 12101 *et seq.*

³⁰ See 42 U.S.C. § 12112(b)(5)(A).

³¹ See 42 U.S.C. § 12102(1)(A).

³² See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *superseded by statute* ADA Amendments Act, Pub. L. 110-325 (2008); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), *superseded by statute* ADA Amendments Act, Pub. L. 110-325 (2008).

³³ ADA Amendments Act, Pub. L. 110-325 (2008), codified at 42 U.S.C. § 12102(4)(A).

nancy-related complications,³⁴ and arguably pregnancy itself,³⁵ should qualify as disabilities and thus be accommodated. Second, it suggested many conditions that caused limitations *like* those caused by pregnancy, such as a back injury that impeded a worker's ability to lift for a limited period of time, would be accommodated.³⁶ Advocates and theorists (including me) argued that the PDA's same treatment language should be interpreted to require employers to provide accommodations for pregnant workers if they provided comparable accommodations for ADA-covered conditions or for workplace injuries.³⁷

Both before and after the ADAAA's implementation, however, employers routinely denied pregnant workers' requests for accommodations, even when they made accommodations for others with comparable levels of disability or limitation.³⁸ To make matters worse, pregnant workers who asked for support and were refused were then frequently told they could not keep working unless they could provide medical documentation that "cleared" them of any applicable restrictions.³⁹ This meant they were either forced onto unpaid leave or simply fired. This caused significant economic hardship during the pregnancy. It also meant that workers often exhausted any available paid or unpaid leave before the baby was even born, leaving no job-protected time off that could be used after the birth to provide care for the new child.⁴⁰

When workers challenged an employer's refusal to provide pregnancy-related support, they usually lost. Several circuits held that so long as an employer could point to a "pregnancy-blind" justification for a distinction between a pregnant employee and a worker who received an accommodation, accommodations were not required under the PDA—and further, that compliance with the ADA or limiting light duty positions to workplace injuries constituted

³⁴ See, e.g., Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97 (2013).

³⁵ See, e.g., Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443 (2012).

³⁶ See 42 U.S.C. § 12102(2)(A) (specifying that an impairment that substantially limits "lifting" is a qualifying disability); 29 C.F.R. § 1630.2(j)(ix) (providing that this standard can be satisfied even if an impairment lasts or is expected to last fewer than six months).

³⁷ See generally, Widiss, *Gilbert Redux*, *supra* note 21, at 1025–35 (making this argument); see also, e.g., *id.* at n.12 (discussing testimony by advocates and lawyers at an EEOC hearing arguing for this approach); Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 39–41 (2009) (making similar argument); Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 27–33 (1994) (making similar argument immediately after the ADA was enacted).

³⁸ See generally, e.g., Williams et al., *supra* note 34.

³⁹ See, e.g., *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 441 (4th Cir. 2013) (describing how, after Young shared with her supervisor that she had been advised not to lift more than twenty pounds, she was not permitted to return to work unless she could provide a "medical certification removing her lifting restriction and stating she could perform the essential functions of the job"), *vacated and remanded*, 135 S. Ct. 1338 (2015).

⁴⁰ See 29 U.S.C. § 2612(a)(1)(A) (providing a total of twelve weeks leave over any twelve month period for medical needs of the worker or care of a new child).

a pregnancy-blind rationale.⁴¹ Courts also generally rejected claims that pregnancy could itself qualify as a disability under the ADA outright, citing regulations implementing the act that took the position that pregnancy was not an impairment.⁴² Pregnancy-related complications were more likely to be considered a disability under the amended ADA, but even there the results were mixed.⁴³

In February 2012, the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing both the PDA and the ADA, held a meeting on pregnancy discrimination and related issues.⁴⁴ Academic experts, lawyers from advocacy organizations, employer and union-side attorneys, and an EEOC lawyer testified.⁴⁵ Several of the speakers argued for interpretations of the PDA and the amended ADA that would often cover pregnancy-related needs.⁴⁶ In December 2012, the EEOC released a strategic enforcement plan that indicated that accommodating pregnancy-related needs under the PDA and the ADA would be a priority.⁴⁷ At some point in the next eighteen months, the agency also began working on formal guidance relating to pregnancy discrimination and accommodation claims.⁴⁸

⁴¹ See, e.g., *Young*, 707 F.3d at 448–49; *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548–49 (7th Cir. 2011); *Reeves v. Swift Transp. Co., Inc.*, 446 F.3d 637, 642 (6th Cir. 2006); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312–13 (11th Cir. 1999); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998).

⁴² See 29 C.F.R. § 1630.2(h), app. § 1630.

⁴³ See, e.g., *Williams et al.*, *supra* note 34, at 101, 101 n.16, 108–09, 125–27 (discussing and critiquing this case law).

⁴⁴ See U.S. Equal Emp. Opportunity Comm'n, *Meeting of February 15, 2012—Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*, EEOC, <https://www.eeoc.gov/meetings/meeting-february-15-2012-unlawful-discrimination-against-pregnant-workers-and-workers> [<https://perma.cc/5RDW-US7R>].

⁴⁵ See *id.*

⁴⁶ See U.S. Equal Emp. Opportunity Comm'n, *Written Testimony of Peggy Mastroianni Legal Counsel, EEOC*, EEOC, <https://www.eeoc.gov/meetings/meeting-february-15-2012-unlawful-discrimination-against-pregnant-workers-and-workers/mastroianni> [<https://perma.cc/P8PU-BQM6>] (testimony of Peggy Mastroianni, Legal Counsel, EEOC); U.S. Equal Emp. Opportunity Comm'n, *Written Testimony of Emily Martin Vice President and General Counsel National Women's Law Center*, EEOC, <https://www.eeoc.gov/meetings/meeting-february-15-2012-unlawful-discrimination-against-pregnant-workers-and-workers/martin> [<https://perma.cc/5BJ7-3ZMH>] (testimony of Emily Martin, Vice President and General Counsel, National Women's Law Center); U.S. Equal Emp. Opportunity Comm'n, *Written Testimony of Joan C. Williams Professor of Law UC Hastings Foundation Chair Director, Center for Worklife Law*, EEOC, <https://www.eeoc.gov/meetings/meeting-february-15-2012-unlawful-discrimination-against-pregnant-workers-and-workers/williams> [<https://perma.cc/T95U-KMCD>] (testimony of Joan Williams, Distinguished Professor of Law, U.C. Hastings).

⁴⁷ See U.S. EQUAL EMP. OPPORTUNITY COMM'N, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013–2016, at sec. III.B.3 (2012), <https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fy-2013-2016> [<https://perma.cc/N38U-PLQ9>].

⁴⁸ See Feldblum, *supra* note 21, at 6 (providing a time table of the EEOC's action on the issue).

In July 2014, as the EEOC was finalizing its guidance, the Supreme Court granted certiorari in *Young v. United Parcel Service, Inc.*, a case concerning the denial of a pregnancy accommodation.⁴⁹ Peggy Young, a driver for the company, was restricted in her ability to lift because of pregnancy. Although she felt that her limitation could be informally accommodated with the help of a coworker, UPS refused to let her keep working in her regular position or to transfer her to a position that wouldn't require lifting.⁵⁰ She was instead forced to go on unpaid leave.⁵¹ The refusal was particularly galling as UPS routinely provided accommodations for anyone injured on the job, anyone who had an ADA-qualifying disability, and drivers whose Department of Transportation certifications were temporarily suspended, including for infractions such as driving under the influence.⁵² As one of the witnesses in the case asserted, it seemed like the only persons who were denied light duty were "women who were pregnant."⁵³ Nonetheless, when Peggy Young brought a law suit, the lower courts granted summary judgment in favor of UPS, reasoning that the company's policies were "pregnancy-blind" and therefore permissible.⁵⁴

Two weeks after certiorari was granted in the case, the EEOC released its guidance on how the PDA and the amended ADA applied in the context of pregnancy.⁵⁵ It largely adopted the interpretation of the PDA that had been urged by pregnant workers and advocates. Specifically, the EEOC interpreted the PDA's same-treatment language as meaning an employer would need to offer light duty positions to pregnant workers on the "same terms that light duty is offered to employees injured on the job," and that employees accommodated pursuant to the ADA could also serve as comparators.⁵⁶ It further took the position that if such differential treatment was shown, there was no need to prove "intentional" discrimination through a judicially-created burden-shifting pro-

⁴⁹ See *Young v. United Parcel Serv., Inc.*, 575 U.S. 957 (2014).

⁵⁰ See *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 441 (4th Cir. 2013), *vacated and remanded*, 135 S. Ct. 1338 (2015).

⁵¹ See *id.*

⁵² See *Young*, 135 S. Ct. at 1345, 1347.

⁵³ See Brief of Petitioner at 8, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (No.12-1226), 2014 WL 4441528, at *9 (quoting shop steward who testified that "the *only* light duty requested restrictions that became an issue" were "with women who were pregnant").

⁵⁴ See *Young*, 707 F.3d at 446, 450–51.

⁵⁵ See U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE NO. 915.003, ENFORCEMENT ON GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES (2014). A copy of the guidance, as released in 2014, is available at https://web.archive.org/web/20141219193255/http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm [<https://perma.cc/T929-JDAT>]. The EEOC has since updated this guidance to conform to the Court's holding in *Young*. See U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE NO. 915.003, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues> [<https://perma.cc/FH93-8ENY>].

⁵⁶ U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE NO. 915.003, ENFORCEMENT ON GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES, at I.C.1.b & I.C.1.c (2014).

cess, known as *McDonnell Douglas* burden-shifting, that is often used to assess circumstantial evidence in individual employment discrimination cases.⁵⁷ The United States subsequently filed an amicus brief in the *Young* case likewise arguing for this interpretation of the PDA.⁵⁸ The EEOC guidance also affirmed that although pregnancy itself would not be considered a disability, many pregnancy-related complications could qualify.⁵⁹

When the Supreme Court issued its decision in *Young*, it held that the guidance did not merit deference.⁶⁰ It rejected the EEOC's interpretation, which was also the interpretation pushed by the petitioner, Peggy Young, but it also rejected the lower courts' approach of categorically accepting any "pregnancy-blind" justification for a distinction.⁶¹ Instead, the Court modified the standard *McDonnell Douglas* test in light of the PDA's language. It specified that a worker could make out a prima facie case of discrimination by showing that she was pregnant, had requested an accommodation, and that an employer had denied the request while granting similar accommodations to other employees.⁶² An employer would then have an opportunity to justify the distinction, but it could not simply point to additional cost or inconvenience as a reason to deny the claim.⁶³ Courts were to probe any claimed justification to assess whether discriminatory bias played a role.⁶⁴

Peggy Young was a winner in her case. Many advocates and experts celebrated the decision as a major step forward for pregnant women, as it made clear that pregnancy accommodations would at least sometimes be required.⁶⁵ But, even at the time of the decision, it was evident that requiring a fact-based inquiry into an employer's intent would create uncertainty for both workers and

⁵⁷ *Id.* at I.C.1.c (asserting that where there was evidence a pregnant employee was denied a light duty position provided to other employees who were similar in their ability or inability to work, a plaintiff "need not resort" to the burden-shifting process, but also discussing how it should apply if used). Elsewhere, I've discussed how *McDonnell Douglas* imposes evidentiary burdens on plaintiffs that are not justified by the relevant statutory language. See Deborah A. Widiss, *Proving Discrimination by the Text*, 106 MINN. L. REV. 353, 379–96 (2021).

⁵⁸ See Brief for the United States as Amicus Curiae Supporting Petitioner at 7, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (No. 12-1226) 2014 WL 4536939, at *10.

⁵⁹ See U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE NO. 915.003, ENFORCEMENT ON GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES, at II.A (2014).

⁶⁰ See *Young*, 135 S. Ct. at 1352.

⁶¹ See *Young*, 135 S. Ct. at 1347, 1355–56 (vacating and remanding so lower court could assess whether UPS's claimed justifications for distinction were pretextual).

⁶² See *id.* at 1354.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See, e.g., Liz Morris et al., *What Young v. UPS Means for Pregnant Workers and Their Bosses*, HARV. BUS. REV. (Mar. 26, 2015), <https://hbr.org/2015/03/what-young-vs-ups-means-for-pregnant-workers-and-their-bosses> [<https://perma.cc/6CX5-RCFF>] ("The U.S. Supreme Court case decided this week makes it significantly more likely that pregnant women denied workplace accommodations will succeed in their legal claims.").

managers as to when accommodations are required.⁶⁶ Additionally, the PDA same-treatment standard is comparative rather than absolute. This means that to succeed, a worker generally must be able to identify an employee with similar limitations who did receive an accommodation, which can be a major barrier.

After *Young*, management attorneys began to emphasize to their clients that denying accommodations to pregnant workers could open them to liability.⁶⁷ But in the years since the decision, it is clear that many employers continue to deny such requests and that courts often deem such denials permissible.⁶⁸ Often, this is because an employee cannot identify a comparator that the court deems to be sufficiently similar. There is language in the *Young* decision that suggests the comparator requirement can be satisfied by showing an employer *would* be required to provide a comparable accommodation pursuant to its own policies or other laws, such as the ADA.⁶⁹ The federal Department of Labor, which enforces an executive order prohibiting sex discrimination by federal contractors, promulgated regulations shortly after *Young* was decided that adopt this interpretation explicitly by indicating the key question is whether an employer's policies or other laws would require accommodation of limitations similar to those experienced by the pregnant worker.⁷⁰ Some courts—including,

⁶⁶ See, e.g., Dina Bakst, *Peggy Young's Victory is Not Enough*, U.S. NEWS (Mar. 26, 2015), <https://www.usnews.com/opinion/economic-intelligence/2015/03/26/peggy-young-supreme-court-victory-is-not-enough-for-pregnant-workers> [<https://perma.cc/MW4P-9D58>] (arguing legislation explicitly providing a right to pregnancy accommodations was essential to clarify employers' obligations and protect employees).

⁶⁷ See, e.g., Joseph P. Harkins et al., *The Heavy Burden of Light Duty: Young v. UPS*, LITTLER: INSIGHT (Mar. 25, 2015), <https://www.littler.com/heavy-burden-light-duty-young-v-ups> [<https://perma.cc/QU4W-QKP8>] (concluding “employers excluding pregnant employees from discussions about available reasonable accommodations—when other employees remain eligible for such accommodations—run a significant liability risk”); Sonya Rosenberg, *Employers Take Note: The Supreme Court's Game-Changing Decision in Young v. UPS Requires Review of Pregnancy Accommodation Policies and Practices*, THE NATIONAL LAW FORUM (Mar. 26, 2015) <https://nationallawforum.com/2015/03/26/employers-take-note-the-supreme-courts-game-changing-decision-in-young-v-ups-requires-review-of-pregnancy-accommodation-policies-and-practices/> [<https://perma.cc/J93P-LLYL>] (denial of accommodations to pregnant employees will be “scrutinized and may well be deemed unlawful”).

⁶⁸ See, e.g., Grossman & Thomas, *supra* note 20 (cataloguing and critiquing recent case law); Nicole B. Porter, *Accommodating Pregnancy Five Years After Young v. UPS: Where We Are & Where We Should Go*, 14 ST. LOUIS U. J. HEALTH L. & POL'Y 73 (2020) (similar); Dina Bakst et al., *Long Overdue: It Is Time for the Federal Workers Fairness Act*, A BETTER BALANCE (May 2019), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf> [<https://perma.cc/GYY6-CVTZ>] [hereinafter ABB, *Long Overdue*] (reviewing post-*Young* pregnancy accommodation cases and finding pregnant workers lost two-thirds of all cases).

⁶⁹ See Widiss, *Interaction After Young*, *supra* note 21, at 1439–40.

⁷⁰ See 41 C.F.R. § 60-20.5(c) (prohibition on sex discrimination is violated if an employer fails to accommodate a pregnant employee if it “provides, or is required by its policy or by other relevant laws to provide, such . . . accommodations” to other employees with similar limitations).

importantly, the Eleventh Circuit—have signaled support for this approach,⁷¹ but many have applied the comparator requirement extremely rigidly.⁷² And in the absence of a clear comparator or other strong evidence of animus, courts have held employers may lawfully deny even the most inexpensive of accommodations, such as allowing a pregnant cashier to sit on a stool.⁷³

More generally, there is a high level of confusion about how these various federal provisions interact. These developments have helped bolster advocacy for legislation that would replace the patchwork of protections provided by the PDA and the ADA with a single, clear mandate for accommodations for pregnancy.

II. STATE AND LOCAL LAWS

In early 2012, when *Young* was advancing through the lower courts, and a few weeks before the EEOC held its hearing on the subject, Dina Bakst, the co-founder and co-president of the advocacy organization A Better Balance: The Work and Family Legal Center, wrote an opinion piece in the *New York Times*: “Pregnant, and Pushed Out of a Job.”⁷⁴ In the column, she described how pregnant women’s requests for accommodations could fall through the cracks under the relevant federal laws and urged support for a pending New York State bill that would address the issue by explicitly requiring employers to provide accommodations for pregnant workers.⁷⁵ Her piece referenced earlier state laws that likewise required accommodations in at least some circumstances.⁷⁶

The column crystalized the failings of federal law, and it humanized them with stories of real women fired from their jobs after requesting small accommodations.⁷⁷ The following year, A Better Balance and the National Women’s

⁷¹ See *Durham v. Rural/Metro Corp.*, 955 F. 3d 1279, 1286–87 (11th Cir. 2020) (*per curiam*) (pointing to evidence that an employer had a policy of accommodating some employees who were disabled off the job as sufficient to satisfy the *Young* test, even though the plaintiff had not identified specific employees who benefited from the policy); see also Grossman & Thomas, *supra* note 20, at 337–38 (collecting other cases that take a flexible approach to the comparator requirement).

⁷² See Grossman & Thomas, *supra* note 20, at 339–40 (collecting cases that have required plaintiffs to not only identify specific individuals who received an accommodation but also that they worked for the same supervisor, or had very similar limitations); see also ABB, *Long Overdue*, *supra* note 68, at 14–16 (cataloguing numerous cases in which employee lost because court held that the plaintiff had not identified adequate comparators).

⁷³ See *Portillo v. IL Creations, Inc.*, No. CV 17-1083 (RDM), 2019 WL 1440129, at *6 (D.D.C. Mar. 31, 2019).

⁷⁴ Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES (Jan. 30, 2012), <https://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html> [<https://perma.cc/5VEA-HYX3>].

⁷⁵ See *id.*

⁷⁶ See *id.*; see also *Fact Sheet*, *supra* note 4 (describing older laws, such as Alaska, California, and Hawaii).

⁷⁷ See Bakst, *supra* note 74.

Law Center released a joint report that expanded on these themes.⁷⁸ Experts at both organizations began working with advocates on the ground across the country pushing for state and local laws explicitly mandating accommodations for pregnant workers.⁷⁹ They also (as discussed in Part IV) pushed for a federal law that would do the same.

State and local legislatures proved receptive—and notably, not just in traditionally “liberal” jurisdictions. In 2013 and 2014 alone, Delaware, Maryland, Minnesota, New Jersey, and West Virginia, as well as New York City, Philadelphia, and Providence (Rhode Island), passed new laws.⁸⁰ By 2014, bills had also been proposed in (at least) Georgia, Missouri, New York, Pennsylvania, Rhode Island, Wisconsin, and the District of Columbia.⁸¹ They continued to spread quickly. Ultimately, in the space of less than a decade, twenty-five states and the District of Columbia passed laws generally requiring employers to make accommodations for pregnant workers.⁸² All of these laws were passed on a bipartisan basis, and many were passed with unanimous support.⁸³ About one-third of the states generally vote Republican in presidential elections, and most of these had state legislatures that were entirely controlled by Republicans when they enacted their PWFA law.⁸⁴

The laws are relatively straightforward. Borrowing from disability law and from the language of the PDA, they generally require employers to make “reasonable accommodations” for medical needs arising from “pregnancy, childbirth, or related medical conditions,” unless doing so would be an “undue hardship” on the employer.⁸⁵ There are some small differences among the laws, such as whether small employers are exempted from coverage and how the provisions are enforced.⁸⁶ But, in general, the different state laws are quite sim-

⁷⁸ See NATIONAL WOMEN’S LAW CENTER & A BETTER BALANCE, IT SHOULDN’T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS (2013), <https://www.abetterbalance.org/resources/it-shouldnt-be-a-heavy-lift/> [<https://perma.cc/G7T5-X4Z3>].

⁷⁹ See ABB, *Long Overdue*, *supra* note 68, at 29–52 (providing details about campaigns in several different states).

⁸⁰ See *Fact Sheet*, *supra* note 4.

⁸¹ See Schulte, *supra* note 1.

⁸² See *Fact Sheet*, *supra* note 4.

⁸³ See *id.*

⁸⁴ The Republican-leaning states that passed PWFAs during the past decade are Kentucky, Louisiana, Nebraska, North Carolina, North Dakota, South Carolina, Tennessee, Utah, and West Virginia. In each of these states except West Virginia, both houses of the state legislature were controlled by Republicans in the year they passed their PWFA; most also had Republican governors at the time. See Chart on PWFA adoptions (unpublished chart on file with author). The Democratic-leaning states are Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington. See *id.*

⁸⁵ See, e.g., S.C. Code Ann. §§ 1-13-30(T), (U) (2018); S.C. Code Ann. §§ 1-13-80 (2018).

⁸⁶ See Bakst, *supra* note 68, at 30 (comparing recently-enacted state laws, and showing range of employee-size thresholds, from one employee up to 21 employees, and that most

ilar to each other and to the model first referenced in Dina Bakst's opinion piece published in 2012.

How did progressive laws advancing workers' rights pass in so many states, including several Republican-controlled states? To be sure, pregnant women are a relatively sympathetic group to help, and the basic point—that pregnant women should not need to choose between their financial security and their health—is easy to grasp and compelling. Nonetheless, legislators, particularly Republican legislators, are generally opposed to increased workplace regulation. I worked with advocates lobbying for PWFA legislation in Indiana. During the relevant years, Republicans held a super-majority in both houses of our state legislature, and we had a Republican governor.⁸⁷ Ultimately, our state passed a weak law (not included in the count above) that specifies a pregnant worker can request a reasonable accommodation but does not mandate the employer provide it. This is, at best, a half win—but negotiations over the bill offer a window into what the advocacy looked like on the ground in a solidly red state.

In Indiana, a local nonprofit, the Indiana Institute for Working Families, served as the informal leader of a coalition of organizations and individuals pushing for the bill.⁸⁸ The coalition was diverse, with key members ranging from organizations representing businesses, such as the Indianapolis Chamber of Commerce and the Indianapolis chapter of National Association of Women Business Owners, to professional associations representing ob-gyns and pediatricians, to Hoosier Action, a “homegrown, independent community organization based in rural and small-town Indiana.”⁸⁹ Other more “lefty” groups, such as the Indiana Civil Liberties Union and the state chapter of Planned Parenthood, were supportive of the effort but understood that the bill would be more likely to advance if they were *not* the primary voices advocating for it. While all the on-the-ground lobbying was done by local organizations and individuals, experts from A Better Balance provided important support. This included help drafting a bill to share with potential sponsors, researching how the proposed language would fit within the Indiana code and administrative en-

allow a private right of action as well as administrative enforcement, but a few rely only on administrative enforcement).

⁸⁷ In the 2021-22 legislature, which ultimately enacted a weak accommodation law, Republicans hold a 71-29 majority in the House, a 39-11 majority in the Senate, and Eric Holcomb, a Republican, is governor. See *Indiana House of Representatives*, BALLOTPEDIA, https://ballotpedia.org/Indiana_House_of_Representatives [https://perma.cc/Z3YN-D8H2]; *Indiana Senate*, BALLOTPEDIA, https://ballotpedia.org/Indiana_State_Senate [https://perma.cc/E2WZ-8VEY]. For earlier assemblies, click on the embedded links.

⁸⁸ I was an active participant in the coalition pushing for the bill. The account that follows draws on my personal experiences as part of this working group. Where possible, I have added citations providing additional support for this history, but the more general strategy and trajectory of our advocacy efforts is based primarily on my own memory and personal records of calls and meetings.

⁸⁹ See *Building the Indiana We Deserve*, HOOSIER ACTION, <https://www.hoosieraction.org> [https://perma.cc/GP3G-W93G].

forcement structure, providing studies that helped demonstrate the need for legislation, and helping craft talking points to respond to potential objections.

In Indiana, the first bill explicitly requiring accommodations for pregnant workers was introduced in the 2018 general assembly.⁹⁰ The lead author was a Democrat, although a Republican representative later signed on as co-author.⁹¹ As is typical for bills authored by Democrats in our state, it failed to gain any traction, never advancing out of the committee. In the following year, the coalition prioritized identifying Republican legislators who would be willing to champion the cause, ideally Republican legislators with leadership positions in the relevant committees. In making this pitch, and then selling the bill more generally, it was enormously helpful to have other Republican-leaning states to point to as models. We referenced our neighbor Kentucky, as well as South Carolina and West Virginia, far more frequently than our neighbor Illinois, let alone New York or California. The coalition also worked to identify local women who had needed a workplace accommodation during a pregnancy and not received it; their stories, often heartbreaking, played an important role in building support. And we sought to identify business leaders who would speak in favor of the bill.

These efforts were successful. In 2020, the lead author of the new iteration of the bill was a Republican senator, and several additional Republican senators were later added as additional authors and co-authors.⁹² Several Republican representatives in the House also served as sponsors as the bill.⁹³ Some of the early sponsors championed the issue because they themselves had needed pregnancy accommodations or had close family members who had needed accommodations.⁹⁴ And the Republican governor, Eric Holcomb, included pregnancy accommodations in the package of bills the administration was pushing.⁹⁵ This was in part because Indiana has a distressingly high maternal and infant mortal-

⁹⁰ See H.B.1344, 120th Gen. Assemb., 2nd Reg. Sess. (Ind. 2018).

⁹¹ See *House Bill 1344 Authors*, IND. GEN. ASSEMB. 2018 SESS., <http://iga.in.gov/legislative/2018/bills/house/1344> [<https://perma.cc/U4QR-9R3E>] (listing Rep. Robin Shackleford, Democrat, as author and Rep. Karen Engleman, Republican, as co-author).

⁹² See *Senate Bill 342 Authors*, IND. GEN. ASSEMB. 2020 SESS., <http://iga.in.gov/legislative/2020/bills/senate/342> [<https://perma.cc/3MT5-ZUCY>] (the lead sponsor was Sen. Ron Alting and the bill also included two more Republican senators as authors, and an additional six Republican and eight Democratic senators as co-authors).

⁹³ See *id.* (listing three Republican and one Democratic representatives as sponsors).

⁹⁴ Emailed comments from Erin Macey, Senior Researcher, Grassroots MCH Initiative; formerly Senior Policy Analyst, Indiana Institute for Working Families (Dec. 26, 2021) (on file with author).

⁹⁵ See Press Release, Gov. Holcomb Unveils 2020 Next Level Agenda with Emphasis on Improving Hoosiers' Lives (Dec. 10, 2019), <https://www.in.gov/gov/next-level-agenda/2020-next-level-agenda/> [<https://perma.cc/7E4A-8CSM>].

ity rate, and the state was prioritizing public health measures to address the problem.⁹⁶

The bill received a hearing in the relevant Senate committee.⁹⁷ The state's Health Commissioner, herself an obstetrician, provided powerful testimony arguing for the health benefits of the bill.⁹⁸ Individual women told their stories of needing accommodations.⁹⁹ A representative from the Indianapolis Chamber of Commerce explained why businesses would benefit from clearer standards.¹⁰⁰ Greater Louisville, Inc., a bi-state chamber of commerce representing businesses in both Indiana and Kentucky, spoke in favor of the bill, directly referencing their positive experience with PWFA in Kentucky.¹⁰¹ I also testified, highlighting the gaps and confusion caused by the federal laws on point.¹⁰² There was, however, also substantial opposition to the bill, led by the state Chamber of Commerce and the Indiana Manufacturers Association. They argued that it was unnecessary because most businesses provided accommodations and (somewhat contradictorily) that it would be too burdensome on small businesses.¹⁰³ Ultimately the committee advanced the bill on a bipartisan basis.¹⁰⁴ On the floor of the Senate, however, it was gutted by an amendment that replaced the substantive mandate with a recommendation that the legislature study the issue over the summer;¹⁰⁵ this relatively empty bill failed to advance in the House, and the subject ultimately was not selected for summer study.¹⁰⁶

⁹⁶ See Shari Rudavsky, *Indiana's Maternal and Infant Death Rates are High. This Bill May Help Change That*, INDY STAR (Jan. 27, 2020), <https://www.indystar.com/story/news/health/2020/01/27/indiana-senate-consider-more-bathroom-breaks-pregnant-workers/4591971002/> [<https://perma.cc/3W9T-C9JT>] (describing testimony by state health commissioner Kris Box and Family and Social Services Secretary Jennifer Sullivan on the health benefits of enacting the bill).

⁹⁷ See *Indiana Senate Committee On Family and Children Services*, IND. GEN. ASSEMB. 2020 SESS. (Jan. 27, 2021), http://iga.in.gov/information/archives/2020/video/committee_family_and_children/ [<https://perma.cc/6Q55-MH2M>].

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.*; see also GLI Advocacy, *Indiana Senate Committee Approves Pregnant Workers Bill*, GREATER LOUISVILLE INC. (Jan. 27, 2020, 05:44 PM) <https://www.greaterlouisville.com/advocacy-and-legislation/indiana-senate-committee-approves-pregnant-workers-bill/> [<https://perma.cc/NN45-7XLE>] (including GLI's statement of support).

¹⁰² See Ind. S. Comm. on Family and Children Servs., IND. GEN. ASSEMB., *supra* note 97.

¹⁰³ See *id.*

¹⁰⁴ See (S) *Family and Children Services*, IND. GEN. ASSEMB. 2020 SESS., http://iga.in.gov/legislative/2020/committees/family_and_children [<https://perma.cc/T3YM-G8Q6>] (showing S.B. 342 passed 7-2).

¹⁰⁵ See *Actions for Senate Bill 342*, IND. GEN. ASSEMB. 2020 SESS., **Error! Hyperlink reference not valid.** <http://iga.in.gov/legislative/2020/bills/senate/342> [<https://perma.cc/NY7T-G5CK>].

¹⁰⁶ See Legis. Council Res. 20-02, Interim Sess. (Ind. 2020) (listing topics selected for summer study).

In 2021, the coalition that had been pushing the pregnancy accommodation bill was ready to build on the momentum from 2020. Those who were opposed were also ready, and they had adopted a new strategy: water down the bill. Accordingly, when the session began, three different pregnancy “accommodation” bills were introduced.¹⁰⁷ Two were similar to the bill that had been debated in 2020 and to other state PWFAs, in that they would require employers to provide reasonable accommodations for pregnant workers, unless doing so would be an undue hardship.¹⁰⁸ The third—sold as a so-called compromise bill and supported by the state Chamber of Commerce and other business interests—replaced the *requirement* that employers provide accommodations with a right of employees to *request* an accommodation.¹⁰⁹ The draft language did specify that employers must respond promptly to such requests, and it prohibited retaliation against workers who asked for support, but it did not create any new substantive rights.¹¹⁰ The coalition that had been pushing for the PWFA, worried that passing the weak compromise would sap all energy for reform, opposed the bill.¹¹¹ However, some of the legislators who had been authors of the earlier, stronger bills agreed to support the “compromise” bill, taking the position that even a small step forward was better than no step at all.¹¹² The coalition’s

¹⁰⁷ H.B. 1309, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); H.B. 1245, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); H.B. 1358, 122nd Gen. Assemb., 1st Reg. Sess.; S.B. 246, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021).

¹⁰⁸ See H.B. 1245, *supra* note 107; H.B. 1358, *supra* note 107; S.B. 246, *supra* note 107.

¹⁰⁹ See H.B. 1309, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021) (enacted as P.L. 87).

¹¹⁰ *Id.*

¹¹¹ H. Comm. Emp., Lab. & Pensions, *Tuesday, Feb. 9 – 8:30am Meeting*, IND. GEN. ASSEMB. 2021 SESS., http://iga.in.gov/information/archives/2021/video/committee_employment_labor_and_pensions_0600/ [https://perma.cc/S6K4-TKUR]; S. Pensions & Lab. Comm., *Wednesday, Mar. 31 – 10:00am Meeting*, IND. GEN. ASSEMB. 2021 SESS., http://iga.in.gov/information/archives/2021/video/committee_pensions_and_labor_4500/ [https://perma.cc/9BAT-X7HM].

¹¹² The author, Rep. Karen Engleman, was the Republican representative who co-authored the 2018 bill; Senator Ron Alting, who sponsored this bill, was the Republican senator who was the lead author on the 2020 bill. *Representative Karen Engleman*, IND. GEN. ASSEMB. 2018 SESS., http://iga.in.gov/legislative/2018/legislators/legislator_karen_engleman_1/ [https://perma.cc/EVG9-E2QA]; Senator Ron Alting, IND. GEN. ASSEMB. 2021 SESS., http://iga.in.gov/legislative/2021/legislators/legislator_ron_alting_538/ [https://perma.cc/57UX-TKNE].

opposition had some effect,¹¹³ but the weaker bill ultimately passed with bipartisan support, and it is now law in Indiana.¹¹⁴

While not fully representative of the experience in other states, Indiana's efforts to pass a PWFA highlight some key factors that can help a civil rights bill move in a deep red state, and also what can stand in the way. The issue gained traction thanks to a broad-based coalition; models of enacted legislation from other red states; business support; a public health and pro-family frame; and a successful pairing of on-the-ground activism and national expertise. In other more conservative states, religious leaders have also taken a prominent role in supporting PWFAs.¹¹⁵ But in Indiana, opposition from key business groups derailed the stronger bills, and a weak bill was enacted instead. That said, as discussed in Part IV, even the failed effort to pass a strong law in Indiana ultimately helped enact federal legislation.

III. EMPLOYER POLICY CHANGE

While litigation over *Young* was making its way to the Supreme Court, and then as courts began to apply the new *Young* standard, and while state campaigns picked up steam, employers increasingly found themselves in the uncomfortable position of defending policies that forced pregnant women to risk harm in order to keep their jobs. This was unpopular, if not necessarily illegal. Employers began to modify their policies even without court orders or new laws requiring them to.

¹¹³ In response to concerns I and others raised regarding confusing language in the bill, it was amended on the floor of the House to clarify that it would not preempt federal law on point. See H.B. 1309, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021) (amendment 1). Additionally, it almost failed to advance out of the relevant Senate committee, where some Senators opposed it for doing too little and some opposed it for doing too much. See S. Pensions & Lab. Comm., *supra* note 108; (*S*) *Pensions and Labor*, IND. GEN. ASSEMB. 2021, http://iga.in.gov/legislative/2021/committees/pensions_and_labor_4500 [<https://perma.cc/W4C2-2FDL>] (reporting vote as 6 in favor, 4 opposed).

¹¹⁴ *Actions for House Bill 1309*, IND. GEN. ASSEMB. 2021, <http://iga.in.gov/legislative/2021/bills/house/1309#document-c757d3d7> [<https://perma.cc/D2PG-JJMW>] (reporting House vote as 95-2 in favor of the bill and Senate vote as 31-19 in favor of the bill).

¹¹⁵ For example, in Kentucky, the state's Catholic bishops endorsed the bill as a "pro-family and pro-life" bill that might reduce abortions. Jacob Comello, *Kentucky Bishops Voice Approval for Bill that Protects Pregnant Women*, AMERICA: THE JESUIT REV. (Feb. 21, 2019), <https://www.americamagazine.org/faith/2019/02/21/kentucky-bishops-voice-approval-bill-protects-pregnant-women> [<https://perma.cc/Q7BR-W7G9>]. Similarly, in South Carolina, an advocacy organization devoted to "persuasively present[ing] biblical principles . . . on issues affecting the family" offered key support. See *Mission*, PALMETTO FAMILY, available at <https://www.palmettofamily.org/our-values> [<https://perma.cc/L3MR-H9BB>]; *Palmetto Family Council statement on support for the South Carolina Pregnancy Accommodations Act*, available at <https://web.archive.org/web/20190805140821/https://www.palmettofamily.org/the-sc-pregnancy-accommodations-act-explained/> [<https://perma.cc/GT5M-8YA9>].

For example, in 2013, two years before the Supreme Court's decision in *Young*, attorneys at A Better Balance wrote a letter to Walmart asserting its regular failure to accommodate pregnant workers violated federal law.¹¹⁶ When the company refused to modify its practice, lawyers at the organization, along with the National Women's Law Center and a private law firm, helped workers file an EEOC charge.¹¹⁷ Walmart workers were also actively organizing on the issue. They founded a campaign known as "Respect the Bump" that called for a new policy, using social media and the press coverage that comes from a challenge to one of the country's largest employers, as well as the law suits, to press their case.¹¹⁸ In response to this advocacy, Walmart gradually improved its policies to provide better support for pregnant workers.¹¹⁹ Pregnant women who had worked at Walmart during 2013 and 2014 brought a class action lawsuit as well, and in 2020, they secured a sizable settlement, although the company refused to admit legal wrongdoing.¹²⁰

More companies changed their policies in the glare of press coverage associated with *Young* being heard at the Supreme Court. When UPS, the defendant in the case, submitted its brief on the merits, it made the surprising announcement that it had begun offering accommodations to pregnant workers, even while continuing to argue that its refusal to accommodate Ms. Young was le-

¹¹⁶ See Lydia DePillis, *Under Pressure, Wal-Mart Upgrades its Policy for Helping Pregnant Workers*, WASH. POST (Apr. 5, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/04/05/under-pressure-walmart-upgrades-its-policy-for-helping-pregnant-workers/> [https://perma.cc/ZQZ7-3B2X] (reporting on the letter sent by A Better Balance and follow-up advocacy).

¹¹⁷ Letter from A Better Balance, Mehri & Skalet, PLLC, and National Women's Law Center to Rebecca Tenbrook, Cynthia Scott (July 31, 2014), https://nwlc.org/wp-content/uploads/2015/08/riggins_candis_letter_7-31-14_final.pdf [https://perma.cc/X9DC-3KVV] (describing how the organizers had filed a pattern-and-practice pregnancy discrimination charge with the EEOC on behalf of a class of female employees).

¹¹⁸ *Whose Walmart? Our Walmart*, UNITED FOR RESPECT AT WALMART, <https://united4respect.org/campaigns/walmart/> [https://perma.cc/9FS7-873T] (describing this advocacy); Ellen Bravo, *Respect the Bump Gets Results as Well as Respect*, HUFF. POST (Sept. 29, 2014, 12:13 PM), https://www.huffpost.com/entry/respect-the-bump-gets-res_b_5881338 [https://perma.cc/3Z26-42VU] (describing the advocacy).

¹¹⁹ There were actually at least two steps in improving the policy. First, in 2014, Walmart agreed to provide accommodations to pregnant workers who experienced a "temporary disability caused by pregnancy." See DePillis, *supra* note 116. Later, in 2018, the company rolled out a more generous policy. See *Walmart Enacts a New Policy for Pregnant Workers: What You Need to Know to Stop Pregnancy Discrimination*, A BETTER BALANCE (June 15, 2018), <https://www.abetterbalance.org/breaking-walmart-enacts-a-new-policy-for-pregnant-workers-what-you-need-to-know-to-stop-pregnancy-discrimination/> [https://perma.cc/EW39-6R9W].

¹²⁰ Samantha Schmidt, *Judge Approves \$14 million settlement in Walmart Pregnancy Discrimination Case*, WASH. POST (Apr. 29, 2020), <https://www.washingtonpost.com/dc-md-va/2020/04/29/walmart-pregnant-workers-discrimination-settlement/> [https://perma.cc/72ES-MALD]. The class was represented by A Better Balance, the National Women's Law Center, and Mehri & Skalet, PLLC. *Id.*

gally permissible.¹²¹ The *Wall Street Journal*, whose editorial page generally has a pro-business slant, took a similar position: it was legally permissible to deny accommodations but a bad business practice (in short, as the editorial put it, the “UPS managers acted like dunderheads”).¹²² And human resources departments and management side lawyers began to educate clients on the heightened risk of liability if companies denied accommodations.¹²³

The Court’s decision in *Young* accelerated policy change. As described in Part I, *Young* makes clear that an employer may be required to provide a pregnant worker with an accommodation if an employer has provided comparable support to other employees with similar limitations. While an employer may be able to justify differences in treatment by pointing to a legitimate non-discriminatory rationale, there will often be factual questions as to whether such claimed justifications may be infected by discriminatory bias. Human resources professionals and lawyers increasingly suggested that employers begin to provide some accommodations as a matter of course, rather than risk a lengthy lawsuit.¹²⁴ The Center for WorkLife Law did significant work to help educate employers on their responsibilities and to increase compliance.¹²⁵ That said, other businesses did not modify their policies, and even policies that look good on the books may not be implemented effectively.

Employees who were denied accommodations also began to bring more lawsuits. In 2015 alone, workers filed 650 charges with the EEOC alleging they were denied workplace accommodations they needed because of pregnancy.¹²⁶ National organizations, including prominently the ACLU Women’s Rights Pro-

¹²¹ Brigid Schulte, *With Supreme Court Case Pending, UPS Reverses Policy on Pregnant Workers*, WASH. POST (Oct. 29, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/10/29/with-supreme-court-case-pending-ups-reverses-policy-on-pregnant-workers/> [https://perma.cc/PV2K-3DRF].

¹²² See Editorial, *Pregnancy at the Court*, WALL. ST. J. (Dec. 3, 2014, 7:00 PM), <https://www.wsj.com/articles/pregnancy-at-the-court-1417564814> [https://perma.cc/W3HE-4DPC].

¹²³ See, e.g., Adrienne Fox, *How to Accommodate Pregnant Employees*, SHRM (Feb. 1, 2014), <https://www.shrm.org/hr-today/news/hr-magazine/pages/0214-pregnancy-accommodation.aspx> [https://perma.cc/WSR3-X7R8].

¹²⁴ See, e.g., Kathryn Moody, *An Employer’s Compliance Guide to Pregnancy Accommodation*, HR DIVE (Jan. 29, 2018), <https://www.hrdiver.com/news/an-employers-compliance-guide-to-pregnancy-accommodation/515172/> [https://perma.cc/GBT4-9T6P] (“For example, it’s debatable whether severe morning sickness is a disability covered by ADA, but many employers opt to allow leave because they feel it’s the right thing to do.”); see also *supra* note 67.

¹²⁵ See *Accommodating Pregnant Employees: Ensuring Your Company is in Compliance*, PREGNANT@WORK, <https://pregnantatwork.org/accommodating-pregnant-employees/> [https://perma.cc/33T8-EJNS].

¹²⁶ See *The Pregnant Workers Fairness Act: Fact Sheet*, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES (Feb. 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/fact-sheet-pwfa.pdf> [https://perma.cc/KU22-AVC2].

ject,¹²⁷ A Better Balance,¹²⁸ and the Center for WorkLife Law,¹²⁹ provided support to workers and attorneys bringing these cases. Litigation spurred by these efforts helped develop favorable case law applying *Young* and the ADAAA; it also highlighted the shortcomings of federal law and bolstered claims for new legislation on point.¹³⁰

The rapid growth of state laws also helped change company practices. In states that passed PWFAs, employers were required to begin making accommodations. Employers that operated in multiple states often modified their policies company-wide. Thus, even in non-PWFA states, it became more common for employers to offer accommodations on a voluntary basis. The myriad of similar but slightly different legal standards imposed by these state laws also poses compliance challenges for employers, which in turn helps build business support for a federal standard.¹³¹

IV. FEDERAL PWFA

At virtually the same time the state campaigns began, and while *Young* was still in the lower courts, advocates began pushing for a federal analogue to the state laws. The Pregnant Workers Fairness Act was first introduced in the 2011–2012 Congress.¹³² In substance quite similar to the state bills discussed in Part II, the federal version, as initially introduced back in 2012, and as ultimately passed in 2022, requires employers with at least fifteen employees to make “reasonable accommodations” to “known limitations related to pregnancy, childbirth, or related medical conditions,” unless the employer can demonstrate that doing so would impose an “undue hardship” on the operation of the busi-

¹²⁷ See *ACLU Statement for Hearing on Pregnant Workers Fairness Act*, ACLU (Oct. 22, 2019), <https://www.aclu.org/letter/aclu-statement-hearing-pregnant-workers-fairness-act-hr-2694> [<https://perma.cc/T9GC-X4Q3>] (describing key cases litigated by the ACLU on the issue).

¹²⁸ See *Our Issues: Pregnant Workers Fairness*, A BETTER BALANCE, <https://www.abetterbalance.org/our-issues/pregnant-workers-fairness> [<https://perma.cc/N8SR-JNLB>] (describing high-profile law suits it helped bring against Walmart, Amazon, XPO Logistics, and others); see also *Workplace Rights Hub*, A BETTER BALANCE <https://www.abetterbalance.org/know-your-rights/> [<https://perma.cc/FR33-4VBY>] (providing state specific know-your-rights materials).

¹²⁹ See *Pregnancy Accommodations: Learn More About Your Workplace Rights*, PREGNANT@WORK, <https://pregnantatwork.org/pregnant-women-pregnancy/> [<https://perma.cc/SLA7-2K8E>] (providing resources aimed at workers); *Plaintiffs’ Attorneys*, PREGNANT@WORK, <https://pregnantatwork.org/plaintiffs-attorneys/> [<https://perma.cc/M5UG-ESFE>] (providing resources for plaintiffs’ attorneys).

¹³⁰ See generally sources cited *supra* note 72.

¹³¹ The federal law, discussed in Part IV *infra*, does not preempt stronger state or local laws. However, as a practical matter, it’s likely that states would follow federal interpretations of key language when interpreting their own laws, even if the state law reached smaller employers than federal law, so the substantive rules would likely become more uniform.

¹³² See H.R. 5647, 112th Cong. (2012).

ness.¹³³ It also prohibits employers from forcing workers to take a leave, if another accommodation can meet the worker's needs.¹³⁴ The first iteration, and a substantially identical bill introduced in the following Congress, were sponsored only by Democrats.¹³⁵ In June 2014, just after certiorari had been granted in *Young*, President Obama endorsed the bill at a White House Summit on Working Families.¹³⁶ But with only Democratic support in a divided Congress, these early bills had little chance of advancing.¹³⁷

In 2015, after Walmart and UPS had adopted new policies, after the Supreme Court had decided *Young*, and after some Republican-leaning states had enacted PWFAs, the first Congressional Republicans signed on as sponsors of the federal bill.¹³⁸ The National Women's Law Center wrote a blog post celebrating the shift, headlined "Now there's really no excuse."¹³⁹ Despite now qualifying as "bipartisan" legislation, the federal PWFA failed to advance in that Congress. A new iteration was introduced in the 2017–2018 Congress, again with some bipartisan support, but again the federal bill went nowhere.¹⁴⁰

PWFA was reintroduced in the 2019–2020 Congress.¹⁴¹ By this point, almost thirty states mandated accommodations in at least some circumstances.¹⁴² Pregnant workers had also successfully challenged employers' denial of accommodations; while there were gaps in federal law, it was also increasingly clear that workers could and would win some of these cases. Strengthened by these developments, advocacy groups supporting the legislation engaged in extensive negotiations with the U.S. Chamber of Commerce regarding the bill, ultimately resulting in a bill that was jointly endorsed.¹⁴³ The basic requirement to make reasonable accommodations unless they posed an undue hardship remained unchanged.¹⁴⁴ A joint letter of support submitted by the Chamber and

¹³³ See Consolidated Appropriations Act, 2023, Pub. L. 117-328, div. II, § 103(1), 136 Stat. 4459, 6085 (2022) (Pregnant Workers Fairness Act); H.R. 5647, 112th Cong. at § 2(1).

¹³⁴ See Consolidated Appropriations Act, 2023, Pub. L. 117-328, div. II, § 104(4), 136 Stat. 4459, 6085 (2022) (Pregnant Workers Fairness Act); H.R. 5647, 112th Cong. at § 2(4).

¹³⁵ See H.R. 1975, 113th Cong. (2013); H.R. 5647, 112th Cong. (2012); see also Schulte, *supra* note 1 (quoting advocate discussing the difficulty of securing Republican support).

¹³⁶ *FACT SHEET: The White House Summit On Working Families*, THE WHITE HOUSE (June 23, 2014) (indicating President Obama will "urge Congress to pass the Pregnant Workers Fairness Act").

¹³⁷ See Schulte, *supra* note 1.

¹³⁸ See H.R. 2654, 114th Cong. (2015).

¹³⁹ See Abigail Bar-Lev, *Now There's Really No Excuse: Pass the PWFA!*, NAT'L WOMEN'S LAW CTR. (June 24, 2015), <https://nwlc.org/blog/now-theres-really-no-excuse-pass-pwfa/> [<https://perma.cc/DP3U-X42C>] (reporting that for the first time PWFA had Republican support in both the House and the Senate).

¹⁴⁰ See H.R. 2417, 115th Cong. (2017).

¹⁴¹ See H.R. 2694, 116th Cong. (2019).

¹⁴² See *Fact Sheet*, *supra* note 4.

¹⁴³ See Letter to Hon. Bobby Scott & Hon. Virginia Foxx from A Better Balance et al., (Jan. 13, 2020), <https://www.abetterbalance.org/resources/u-s-chamber-of-commerce-womens-groups-support-the-pregnant-workers-fairness-act/> [<https://perma.cc/SKY8-JKDF>].

¹⁴⁴ See H.R. 2694, at § 2.

the advocacy groups explained that there was “considerable confusion about what employers are required to do to accommodate pregnant workers,” and that businesses would therefore benefit from a federal bill that “clarified” obligations; it urged the relevant Committee to advance the bill.¹⁴⁵ This version passed the House with broad bipartisan support,¹⁴⁶ but it stalled in the Republican-controlled Senate.

In 2021, with Democrats (barely) in control of both houses on Congress, PWFA was introduced again.¹⁴⁷ In both the House and the Senate, the original co-sponsors were balanced between Republicans and Democrats.¹⁴⁸ There was also much broader business support for the bill than there had been for previous iterations. Now, not only was the U.S. Chamber of Commerce on board, but so too was the Society of Human Resources Management, H.R. Policy Association, National Retail Federation, Associated Builders and Contractors, and other influential business groups.¹⁴⁹ A separate letter, signed by several dozen large companies, including Adobe, Gap, Johnson & Johnson, MasterCard, Microsoft, and Salesforce, also urged passage.¹⁵⁰ Key letters of support were also provided by coalitions representing persons with disabilities, organizations working to improve maternal health, faith groups, racial justice groups, worker’s rights groups, unions, and women’s rights groups, among others.¹⁵¹

The bill again passed the House with large bipartisan margins, even as there was significant debate over whether the law should include explicit religious exemptions.¹⁵² Almost half of the House Republican caucus, as well as

¹⁴⁵ See Letter to Hon. Bobby Scott, *supra* note 143.

¹⁴⁶ See H.R. 2694, Roll Call vote in House, <https://clerk.house.gov/Votes/2020195> [<https://perma.cc/226A-ZUNP>] (indicating the bill passed the House 329-73, with 226 Democrats and 103 Republicans voting yea and 72 Republicans and 1 Independent voting nay).

¹⁴⁷ See H.R. 1065, 117th Cong. (2021).

¹⁴⁸ The House bill included 2 Republicans and 2 Democrats as original cosponsors. The Senate Bill included 3 Republicans and 2 Democrats as original cosponsors. Sponsors lists, including asterisks to identify original co-sponsors, are available on Congress.gov for each bill.

¹⁴⁹ See Associated Builders and Contractors, *Coalition Letter on S. 1486, the “Pregnant Workers Fairness Act,”* U.S. CHAMBER OF COMMERCE, (Aug. 2, 2021), <https://www.uschamber.com/workforce/education/coalition-letter-s-1486-the-pregnant-workers-fairness-act> [<https://perma.cc/X7JJ-YB28>].

¹⁵⁰ See Adobe et. al., *Open Letter in Support of the Pregnant Workers Fairness Act from Leading Private-Sector Employers*, NATIONAL PARTNERSHIP (Feb. 14, 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/coalition/an-open-letter-in-support-of-PWFA-from-private-sector-employers.pdf> [<https://perma.cc/V6AW-KRHR>].

¹⁵¹ See *Organizational Letters of Support for the Pregnant Workers Fairness Act*, A BETTER BALANCE (Mar. 3, 2022), <https://www.abetterbalance.org/resources/organizational-letters-of-support-for-the-pregnant-workers-fairness-act/> [<https://perma.cc/EXD5-Y44Z>] (gathering up multiple letters of support). Several of these were entered into the record during debate on the bill. See Congressional Record-House, H. 2321-2342 (May 14, 2021).

¹⁵² Congressional Record-House, H. 2321-2342 (May 14, 2021).

virtually all Democrat representatives, voted for the bill.¹⁵³ In important ways, unsuccessful state campaigns may have helped bolster the bipartisan support for federal bill. For example, in Indiana, four of Indiana's seven Republican representatives, as well as the state's two Democratic representatives, voted in favor of the bill.¹⁵⁴ This relatively robust Republican support may be because the coalition that had been pushing for the state law—and were disappointed by the weak bill that ultimately passed—orchestrated a flurry of lobby visits and hundreds of calls in support of the federal bill.¹⁵⁵ There are several other Republican-leaning states where state level PWFAs have been proposed but not passed where there was likewise relatively significant Republican support for a federal PFWA;¹⁵⁶ this may likewise reflect the impact of coalitions formed to lobby at the state level that successfully pivoted to lobby their congressional representatives. By contrast, in several Republican-leaning states that had *already* passed a PFWA, Republican support for the federal bill was far less robust;¹⁵⁷ this may suggest that state level advocacy groups in those states prioritized other issues, since they already enjoyed state-level protections.

After passing the House, the companion bill in the Senate was advanced by the relevant Senate committee with strong bipartisan support.¹⁵⁸ It then stalled, waiting for a floor vote for more than a year. Advocates and the sponsors of the legislation continued to push: they lobbied Senators, organized rallies, placed

¹⁵³ See House Roll Call 143, Bill No. H.R. 1065, <https://clerk.house.gov/Votes/2021143> [<https://perma.cc/38HG-6K86>] (indicating the bill passed 315-101, with 216 Democrats and 99 Republicans voting yea and 101 Republicans voting nay; 2 Democrats and 12 Republicans did not vote).

¹⁵⁴ See *id.*

¹⁵⁵ See, e.g., *Hoosier Action August Newsletter*, HOOSIER ACTION, (Aug. 2021), <https://www.hoosieraction.org/august-2021> [<https://perma.cc/7B3A-6RRA>] (indicating that after “fighting for [pregnancy accommodations] at the state level for over 3 years without success . . . [the group] has taken the fight to Congress, making hundreds of calls and meeting with our federal representatives” in support of PFWA).

¹⁵⁶ For example, all 3 of Iowa's Republican representatives; 4 of Michigan's 6 Republican representatives; 8 of Ohio's 12 Republican representatives; and 4 of Oklahoma's 5 Republican representatives voted in favor of the federal bill. See House Roll Call, *supra* note 153. State level PWFAs have been proposed in each of these states but have not (yet) passed.

¹⁵⁷ For example, only 2 of North Carolina's 8 Republican representatives; 1 of South Carolina's 6 Republican representatives; 2 of Tennessee's 5 Republican representatives; and 1 of Virginia's 4 Republican representatives voted yes. This was not a uniform pattern (for example, in Utah, which has a PFWA, all 4 Republican representatives voted for the federal bill) and it's obviously a relatively small sample size—but it also is rather striking. In most Democratic-leaning states with PWFAs, there was unanimous or close to unanimous support by the states' (often few) Republican representatives.

¹⁵⁸ See S. 1486, Actions; see also Senate HELP Committee Advances Bipartisan Bills to Improve Suicide Prevention, Protect Pregnant Workers, and Support People with Disabilities, U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR & PENSIONS (Aug. 3, 2021), <https://www.help.senate.gov/chair/newsroom/press/senate-help-committee-advances-bipartisan-bills-to-improve-suicide-prevention-protect-pregnant-workers-and-support-people-with-disabilities> [<https://perma.cc/V72Q-TU58>] (reporting the committee advanced PFWA by a vote of 19-2).

stories in the media highlighting the need for the law, and even took out a full-page ad in the *New York Times* specifically calling on Majority Leader Chuck Schumer to bring it up for a vote.¹⁵⁹ In the final days of the 117th Congress, PWFA was folded into an omnibus spending bill appropriating funds to keep the government open through the current fiscal year.¹⁶⁰ This sprawling bill passed both houses and was signed by President Biden on December 29, 2022.¹⁶¹ The PWFA provisions take effect on June 29, 2023, and the EEOC is charged issuing regulations by December 2023 that provide examples of reasonable accommodations that might address needs related to pregnancy, childbirth, and related medical conditions.¹⁶²

It has been just over ten years since Dina Bakst's opinion piece in the *New York Times* kickstarted the campaign to pass legislation requiring reasonable accommodations for pregnant workers. Now, thanks to the new federal law, and all of the efforts that laid the groundwork for it, workers in every state will be able to receive the support they need to stay healthy and economically secure through a pregnancy.¹⁶³

CONCLUSION

Passing new legislation is incredibly arduous—yet, in less than a decade, half of the states enacted new laws making it possible for pregnant employees to work safely through a pregnancy. Even more strikingly, the policies advanced in red states as well as blue states, and they paved the way for bipartisan federal legislation. There are many reasons for this success. Tireless organizing by grassroots organizations across the country, as well as key strategic support from national advocacy organizations. Early adoption in Republican-leaning states that provided workable models for other red states. Key wins in the courts and agencies that helped businesses understand that a clearer standard might reduce liability exposure. But perhaps the most important reason for the widespread support of pregnancy accommodation bills is simply that, as Delaware Senator Bethany Hall-Young put it in the epigraph I used at the beginning of this Essay, pregnancy is “not a Democratic issue or a Republican issue. It affects us all.”¹⁶⁴ She's right. When read a description of the basic PWFA law,

¹⁵⁹ See Eleanor Mueller, *Crunch Time for Dems is Holding up Bipartisan Bill to Protect Pregnant Workers*, POLITICO (Nov. 28, 2022) (describing range of advocacy efforts to push the bill).

¹⁶⁰ See Consolidated Appropriations Act, 2023, Pub. L. 117-328, div. II, 136 Stat. 4459, 6084 (2022) (Pregnant Workers Fairness Act).

¹⁶¹ See *id.*

¹⁶² See *id.* at §§ 105 & 109.

¹⁶³ State laws will continue to play a key role for workers who work for small businesses, as the federal PWFA only applies to private employers with at least 15 employees and certain government employers. See *id.* at § 102.

¹⁶⁴ See *supra* note 1.

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it is supported by large majorities of Republican and Democratic voters.¹⁶⁵ Pregnancy accommodations are a progressive policy and a pro-equality policy; they are also a pro-family policy, a pro-health policy, and a pro-business policy. A lot of other progressive policies share these characteristics. The problem is that it is incredibly difficult to look beyond the partisan labels and recognize common interests. The success of state PWFA laws, and now the federal PWFA law, makes clear it is still possible.

¹⁶⁵ See Memo from Brian Nienaber and Ed Goetas to ACLU and Interested Parties *re* Key Findings from a National Survey of Voters (2020), https://www.aclu.org/sites/default/files/field_document/pwfa_survey_memo_2-20-20_1_1_2.pdf [<https://perma.cc/4KTT-8SK6>] (reporting that 81% of Republican voters, 86% of independent voters, and 96% of Democratic voters support the bill).

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