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May 12, 2021

Re. The Pregnant Workers Fairness Act (H.R. 1065)

DEAR REPRESENTATIVE:

On behalf of A Better Balance, I write to express our strong support for the Pregnant Workers Fairness Act (“PWFA”; H.R. 1065). This legislation will ensure pregnant workers, particularly low-income workers and women of color, are not forced to choose between their paycheck and a healthy pregnancy. The bill will require employers to provide reasonable accommodations for pregnant workers unless doing so would impose an undue hardship on the employer, similar to the accommodation standard already in place for workers with disabilities.

Forty-two years after the passage of the Pregnancy Discrimination Act, pregnant workers still face rampant discrimination on the job and treatment as second-class citizens, as I explained in detail in my Congressional testimony before the House Education & Labor Committee in March 2021 and October 2019, as well as in A Better Balance’s May 2019 report, *Long Overdue*.<sup>1</sup> **We urge you to support healthy pregnancies, protect pregnant workers’ livelihoods, and end the systemic devaluation of women of color and vote YES on the Pregnant Workers Fairness Act.**

A Better Balance is a national non-profit legal organization that advances justice for workers so they can care for themselves and their loved ones without sacrificing their economic security. Since our founding, we have seen day in and day out the injustices that pregnant workers continue to face because they need modest, temporary pregnancy accommodations and have led the movement at the federal, state, and local level to ensure pregnant workers can receive the accommodations they need to remain healthy and working. As I wrote in my 2012 Op-Ed in *The New York Times* “Pregnant and Pushed Out of Job,” which sparked the PWFA’s introduction in Congress, “[G]aps in our civil rights laws leave this enormous class without the right to the modest accommodations that would protect them.”<sup>2</sup> As a result, “for many women, a choice between working under unhealthy conditions and not working is no choice at all.”<sup>3</sup>

We founded A Better Balance 15 years ago because we recognized that a lack of fair and supportive work-family laws and policies – the “care crisis” – was disproportionately harming women, especially Black and Latina mothers, in low-wage jobs. As I recently shared before Congress, “This bias and inflexibility often kicks in when women become pregnant and then

snowballs into 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.”<sup>4</sup>

Through our free, national legal helpline, we have spoken with thousands of pregnant workers, disproportionately women of color, who have been fired or forced on to unpaid leave for needing accommodations, often stripping them of their health insurance when they need it most, driving them into poverty, and at times, even homelessness. Other women we have assisted were denied accommodations but needed to keep working to support themselves and their families and faced devastating health consequences, including miscarriage, preterm birth, birth complications, and other maternal health effects.

In the past year alone, we have heard from women across the country who continue to face termination or are forced out for needing pregnancy accommodations, in situations often exacerbated by the pandemic and economic crisis. Tesia, a retail store employee from Missouri called us in 2020 after she was forced to quit her job because her employer refused to let her carry a water bottle on the retail floor even though she was experiencing severe dehydration due to hot temperatures in the store this summer. A massage therapist from Pennsylvania called us in June 2020 requesting to return to work on a part-time basis on the advice of her OB-GYN after experiencing cramping in her uterus. Her employer responded that they would not accommodate her and cut off all communication with her after that, forcing her out of work just three months before she was due to give birth. A nurse we spoke with from Pennsylvania who was six months pregnant requested to avoid assignment to the COVID-19 unit. Though her hospital was not overwhelmed by the pandemic at that time, had many empty beds, and other workers were being sent home, her employer refused her request and made heartless comments mocking her need for accommodation. She decided not to jeopardize her health and lost pay for missing those shifts as a result. She also worried about being called to the COVID unit shift constantly. Without the law on their side, these women had little legal recourse because they lived in a state without a state-level pregnant workers fairness law.

Although the pandemic has shined a spotlight on these issues, the stories we heard in 2020 are in many ways similar to those we’ve been hearing for over a decade. In 2012, Armanda Legros 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 young child. As she told the Senate Health, Education, Labor, and Pensions committee in a hearing in 2014, “Once my baby arrived just putting food on the table for him and my four-year-old was a challenge. I was forced to use water in his cereal at times because I could not afford milk.”<sup>5</sup> The need for the Pregnant Workers Fairness Act preceded our current public health crisis and will remain in place beyond the pandemic, until the law is passed.

### **Current Federal Law is Failing Pregnant Workers: The Pregnant Workers Fairness Act is the Solution**

Gaps in federal law, namely the Pregnancy Discrimination Act (PDA) and Americans with Disabilities Act (ADA), mean many pregnant workers in need of accommodation are without legal protection in states that do not have statewide PWFA protections. As we explained in our report *Long Overdue*, “[w]hile the PDA bans pregnancy discrimination, it requires employers to make accommodations only if they accommodate other workers, or if an employee unearths evidence of discrimination. The Americans with Disabilities Act requires employers to provide

reasonable accommodations to workers with disabilities, which can include some pregnancy-related disabilities. However, pregnancy itself is not a disability, leaving a gap wherein many employers are in no way obligated to accommodate pregnant workers in need of immediate relief to stay healthy and on the job.”<sup>6</sup>

Original analysis we conducted for *Long Overdue* found that even though the 2015 Supreme Court *Young v. UPS* case set a new legal standard for evaluating pregnancy accommodation cases under the Pregnancy Discrimination Act, in two-thirds of cases decided since *Young*, employers were permitted to deny pregnant workers accommodations under the Pregnancy Discrimination Act.<sup>7</sup> As I shared in my recent testimony, women are continuing to lose their cases because of this uniquely burdensome standard.<sup>8</sup>

That statistic, as devastating as it is, does not account for the vast majority of pregnant workers who do not have the resources to vindicate their rights in court. Beyond being resource strapped, most pregnant workers we hear from do not have the desire to engage in time-consuming and stressful litigation. They want to be able to receive an accommodation so they can continue working at the jobs they care about while maintaining a healthy pregnancy.

The Americans with Disabilities Act is also inadequate for pregnant workers for two reasons. First, because pregnancy is not itself a disability under current disability law, a pregnant worker who has no complications but seeks an accommodation in order to avoid a complication, will not be able to get an accommodation under the Americans with Disabilities Act.<sup>9</sup> Second, even though Congress expanded the Americans with Disabilities Act in 2008, courts have interpreted the ADA Amendments Act in a way that did little to expand coverage even for those pregnant workers with serious health complications.<sup>10</sup> As one court concluded in 2018, “Although the 2008 amendments broadened the ADA’s definition of disability, these changes only have had a modest impact when applied to pregnancy-related conditions.”<sup>11</sup>

### **The Pregnant Workers Fairness Act is a Critical Economic Security, Maternal Health, and Racial Justice Measure**

Pregnant workers who are fired or forced on to unpaid leave for needing accommodations face significant economic hardship. In addition to losing their livelihood, many of these workers lose their health benefits at a time when they need them most, forcing them to switch providers, delay medical care, or face staggering health care costs associated with pregnancy and childbirth. Many workers must use up saved paid or unpaid leave they had hoped to reserve to recover from childbirth.<sup>12</sup> We worked with one woman who was eight months pregnant and whose hours were cut after she needed an accommodation which meant she also lost her health insurance. As a result, she asked her doctor if they could induce her labor early, despite the health risks in doing so, so that she would not be left facing exorbitant medical bills. In the long term, being pushed out for needing pregnancy accommodations also exacerbates the gender wage gap, as it means not only a loss of pay, but also losing out on many types of benefits such as 401K and retirement contributions, social security contributions, pensions, as well as opportunities for promotion and growth.

To be clear, most pregnant workers may not need accommodations. However, for those who do, reasonable accommodations can avert significant health risks. For instance, in a Health Impact Assessment of state level pregnant workers fairness legislation, the Louisville, Kentucky

Department of Public Health and Wellness concluded, “Accommodating pregnant workers, upon their request, is critical for reducing poor health outcomes . . . Improving birth outcomes makes a sustainable impact for a lifetime of better health.”<sup>13</sup> The report noted that those poor health outcomes can include miscarriage, preterm birth, low birth weight, preeclampsia (a serious condition and leading cause of maternal mortality), among other issues.<sup>14</sup> According to the March of Dimes, in the U.S., nearly 1 in 10 babies are born pre-term and the preterm birth rate among Black women is nearly fifty percent higher than it is for all other women.<sup>15</sup> Preterm birth/low birthweight is a leading cause of infant mortality in America.<sup>16</sup> The Pregnant Workers Fairness Act is a key measure to reduce poor maternal and infant health outcomes.

Pregnancy accommodations are also a key solution, among many, needed to address the Black maternal and infant health crisis. Systemic racism has led to the shameful reality that Black women in this country are three to four times likelier to die from pregnancy-related causes than white women, and Black babies are more than two times as likely to die in the first year of life than white babies.<sup>17</sup> At the same time, we know Black women also face devastating health consequences when they are unable to obtain needed pregnancy accommodations to maintain their health and the health of their pregnancies. When Tasha Murell, a Black woman who worked at a warehouse in Tennessee, received a doctor’s note saying she needed a lifting restriction and complained of extreme stomach pain, she was forced to continue lifting on the job. One day, she told a supervisor she was in pain and asked to leave early. Her manager said no. Tragically, she had a miscarriage the next day. Tasha was not alone. Three more of her co-workers, also Black, miscarried after supervisors dismissed their requests for reprieve from heavy lifting. As Cherisse Scott, CEO of Memphis-based SisterReach, explained “It doesn’t surprise me that this is the culture of that workplace. I think it’s important to look at the fact that since we arrived here in chains, we [Black women] were regarded as producers to fuel a labor force that couldn’t care less for us...”<sup>18</sup> The Pregnant Workers Fairness Act will ensure pregnant workers and their health are valued and that Black mothers, especially, are not treated as expendable on the job.

### **The Pregnant Workers Fairness Act is a Bipartisan Bill That Has the Support of This Country’s Largest Business Groups**

The Pregnant Workers Fairness Act is not a partisan bill. Not only does it have strong bipartisan support in Congress, but thirty states and five cities including Tennessee, Kentucky, South Carolina, West Virginia, Illinois, Nebraska, and Utah already have laws requiring employers to provide accommodations for pregnant employees.<sup>19</sup> All of the laws passed in recent years are highly similar to the federal legislation, and all passed with bipartisan, and often unanimous, support.<sup>20</sup> Many, including Tennessee’s and Kentucky’s, were championed by Republican legislators.<sup>21</sup>

Pregnant workers are a vital part of our economy. Three-quarters of women will be both pregnant and employed at some point during their lives.<sup>22</sup> Ensuring pregnant workers can remain healthy and attached to the workforce is an issue of critical importance, especially as this country faces a devastating economic crisis. That is why leading business groups like the U.S. Chamber of Commerce, Society for Human Resources Management, many major corporations, and local chambers around the country including, Greater Louisville Inc., one of Kentucky’s leading chambers of commerce, support this measure. The PWFA will provide much needed clarity in the law which will lead to informal and upfront resolutions between employers and employees

and help prevent problems before they start. Furthermore, accommodations are short term and low cost.<sup>23</sup> The Pregnant Workers Fairness Act will help employers retain valuable employees and reduce high turnover and training costs. The reasonable accommodation framework is also borrowed from the American with Disabilities Act framework so employers are already familiar with the standard. Furthermore, keeping pregnant workers employed saves taxpayers money in the form of unemployment insurance and other public benefits.

### **The Pregnant Workers Fairness Act Uses a Familiar Framework That Provides Key Protections to Pregnant Workers and Clarity to Employers**

The Pregnant Workers Fairness Act has several key provisions that will address the inequality pregnant workers continue to face at work. Employers, including private employers with fifteen or more employees, will be required to provide reasonable accommodations to qualified employees absent undue hardship on the employer. Both the term “reasonable accommodation” and “undue hardship” have the same definition as outlined in the American with Disabilities Act. Similar to the Americans with Disabilities Act, employers and employees will engage in an interactive process in order to determine an appropriate accommodation. In order to prevent employers from pushing pregnant employees out on leave when they need an accommodation, the bill specifies that an employer cannot require a pregnant employee to take leave if another reasonable accommodation can be provided. The bill also includes clear anti-retaliation language such that employers cannot punish pregnant workers for requesting or using an accommodation. This is critical as many pregnant workers often do not ask for accommodations because they are afraid they will face repercussions for requesting or needing an accommodation.

Critically, the Pregnant Workers Fairness Act is also very clear that a pregnant worker need not have a disability as defined by the Americans with Disabilities Act in order to merit accommodations under the law. Rather, the bill indicates that pregnant workers with “known limitations related to pregnancy, childbirth, and related medical conditions” are entitled to reasonable accommodations. “Known limitations” is defined 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” as set forth in the Americans with Disabilities Act. This addresses the two challenges with the ADA outlined above.

Now, more than ever, the Pregnant Workers Fairness Act is an urgent maternal health, racial justice, and economic security measure to keep pregnant workers healthy and earning a paycheck. We cannot delay justice and fairness for pregnant workers any longer. For the sake of this country’s pregnant workers and our nation’s families, we implore Congress to put aside its many differences and pass this legislation with a strong bipartisan vote. We ask every Member of Congress to vote YES on the Pregnant Workers Fairness Act. It is long overdue.

Sincerely,

Dina Bakst

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- <sup>1</sup> See *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination: Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab.*, 117th Cong. (2021), <https://www.abetterbalance.org/resources/oral-testimony-in-support-of-pregnant-workers-fairness-act-and-pump-act-for-fighting-for-fairness-congressional-hearing/> (testimony of Dina Bakst); *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), <https://edlabor.house.gov/hearings/long-over-due-exploring-the-pregnant-workers-fairness-act-hr-2694> (testimony of Dina Bakst); DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE (2019) [hereinafter LONG OVERDUE], <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>
- <sup>2</sup> Dina Bakst, Opinion, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES, Jan. 30, 2012, at A25.
- <sup>3</sup> *Id.*
- <sup>4</sup> See *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination: Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab.*, 117th Cong. (2021), <https://www.abetterbalance.org/resources/oral-testimony-in-support-of-pregnant-workers-fairness-act-and-pump-act-for-fighting-for-fairness-congressional-hearing/> (oral testimony of Dina Bakst).
- <sup>5</sup> *Economic Security for Working Women: Briefing Before the S. Comm. On Health, Educ., Labor & Pensions*, 113th Cong. (2014) (testimony of Armanda Legros, A Better Balance Community Advocate), <https://www.help.senate.gov/imo/media/doc/Legros2..pdf>.
- <sup>6</sup> DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE 3 (2019), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.
- <sup>7</sup> *Id.* at 13-16.
- <sup>8</sup> See *Fighting for Fairness Hearing, Bakst Testimony*, *supra* note 1, at 5–6.
- <sup>9</sup> *Long Over Due: Exploring the Pregnant Workers' Fairness Act: Hearing on H.R. 2694 Before the Subcomm. on C.R. & Hum. Servs. of the H. Comm. on Educ. & Lab.*, 116th Cong., at 17 n. 77 (2019) (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance).
- <sup>10</sup> *Id.*
- <sup>11</sup> *Scheidt v. Floor Covering Assocs., Inc.*, No. 16-cv-5999, 2018 WWL 4679582, at \*6 (N.D. Ill. Sept. 28, 2018).
- <sup>12</sup> See *Fighting for Fairness, Bakst Testimony*, *supra* note 1, at 12.
- <sup>13</sup> LOUISVILLE DEP'T OF PUBLIC HEALTH AND WELLNESS, PREGNANT WORKERS HEALTH IMPACT ASSESSMENT 2019, at 7 (2019).
- <sup>14</sup> *Id.*
- <sup>15</sup> MARCH OF DIMES, 2019 MARCH OF DIMES REPORT CARD (2019), [https://www.marchofdimes.org/materials/US\\_REPORTCARD\\_FINAL.pdf](https://www.marchofdimes.org/materials/US_REPORTCARD_FINAL.pdf).
- <sup>16</sup> *Infant Mortality*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm> (last visited Sept. 10, 2020).
- <sup>17</sup> *Pregnancy-Related Deaths*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-relatedmortality.htm> (last visited Sept. 10, 2020); *Infant Mortality*, CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 7.
- <sup>18</sup> Tonyaa Weathersbee, *Women Working to the Point of Miscarrying is Rooted in Callousness and Stereotypes*, MEMPHIS COM. APPEAL (Oct. 26, 2018, 5:56 PM) (quoting Cherisse Scott).
- <sup>19</sup> 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 June 29, 2020).
- <sup>20</sup> *Id.* at 15.
- <sup>21</sup> See Hearing on H.B. 986 Before the H. Subcomm. on Employee Affairs (Tenn. Mar. 19, 2019) (Statement of Rep. Jim 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/?archive&nola=WGAOS+020057&part=2>.
- <sup>22</sup> ALEXANDRA CAWTHORNE & MELISSA ALPERT, CTR. FOR AM. PROGRESS, LABOR PAINS: IMPROVING EMPLOYMENT AND ECONOMIC SECURITY FOR PREGNANT WOMEN AND NEW MOTHERS 2 (2009).
- <sup>23</sup> See JOB ACCOMMODATION NETWORK, ACCOMMODATION AND COMPLIANCE SERIES, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 4 (2015), <https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628>.