

Parents, Mothers, Fathers Who Give Birth: Sex Stereotyping, Gender Nonconformity, and Protection Under the Pregnancy Discrimination Act

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INTRODUCTION

In June 2019, Shaun Simmons told his Amazon supervisor that he was pregnant.¹ His supervisor then allegedly spread the news to Simmons' coworkers, who used what should have been confidential information to harass him.² Some coworkers congratulated him on his pregnancy, while another asked him accusingly, "Aren't you pregnant?" on his way into the men's bathroom.³ In response, Simmons filed a complaint in New Jersey state court, alleging that his supervisors at a Princeton, New Jersey Amazon warehouse criticized his work performance after he disclosed his pregnancy, retaliated against him by demoting him to a non-management position, and denied his requests for pregnancy work accommodation.⁴ He went to human resources twice to report the harassment and was placed on administrative leave both times.⁵ After his second leave, he was involuntarily transferred to a different facility to work as an "item picker" where he was required to lift heavy bags of dog food—a painful activity because of his pregnancy.⁶ When he told human resources that the heavy lifting caused him abdominal pain, he was again placed on administrative leave.⁷ When he returned from leave, he submitted a formal request, with support from his doctor, for a pregnancy accommodation to avoid heavy lifting.⁸ Instead of granting his accommodation request, Amazon rescinded his offer for a supervisory position at one of the other facilities and placed him on unpaid leave until he gave birth.⁹

Simmons sued under New Jersey's state antidiscrimination laws,¹⁰ but his story illustrates a new frontier for claims under federal employment antidiscrimination statutes: What protection does the law provide to pregnant transgender and nonbinary employees? As the law stands, not much. Both research and the law have lagged in this area, leaving pregnant transgender and nonbinary employees with little help navigating uncharted territory. Even medicine has only recently begun to explore the unique issues and circumstances transgender men and nonbinary people face with pregnancy. On the whole, little attention has been paid to pregnant

1. Complaint at 2, *Simmons v. Amazon.com Servs. Inc.*, No. MER-L-001578-20 (N.J. Super. Law Div. Sept. 4, 2020) *proceedings removed to federal court and then dismissed in Simmons v. Amazon.com Servs. Inc.*, No. 3:20-cv-13865 (D.N.J. Oct. 5, 2020).

2. *Id.* at 2–3.

3. *Id.* at 3.

4. *Id.* at 6.

5. *Id.* at 4.

6. *Id.*

7. *Id.* at 4–5.

8. *Id.* at 5.

9. *Id.*

10. *Id.* at 7.

individuals who do not identify as female and the unique obstacles that come with it.¹¹

Federal law does not provide obvious reprieve for pregnant employees who are transgender or gender nonconforming. While Title VII of the Civil Rights Act of 1964 prohibits, among other things, discrimination on the basis of sex with respect to “compensation, terms, conditions, or privileges of employment,”¹² the Supreme Court did not confirm that discrimination on the basis of sex under Title VII includes discrimination on the basis of sexual orientation and gender identity until 2020.¹³ In *Bostock v. Clayton County*, the Court reasoned that it was impossible to discriminate against an individual for their sexual orientation or transgender status “without discriminating against that individual based on sex.”¹⁴ The decision was confined to Title VII, leaving open the question of whether this interpretation of “sex” applies to other federal antidiscrimination laws.¹⁵

In 1976, the Supreme Court clearly stated that Title VII’s protections for sex discrimination did not include pregnancy.¹⁶ Just two years later, Congress enacted the Pregnancy Discrimination Act (“PDA”), disagreeing with the Court’s decision that sex did not include pregnancy.¹⁷ The PDA

11. See, e.g., Jessi Hempel, *My Brother’s Pregnancy and the Making of a New American Family*, TIME (Sept. 12, 2016, 7:48 A.M. EDT), <https://time.com/4475634/trans-man-pregnancy-evan/> [<https://perma.cc/H7XB-WG55>]; Guy Trebay, *He’s Pregnant. You’re Speechless.*, N.Y. TIMES (June 22, 2008), <https://www.nytimes.com/2008/06/22/fashion/22pregnant.html> [<https://perma.cc/2KLH-MVWR>]. These are two of the only articles this author could find about a transgender man’s pregnancy. Similarly, nonbinary pregnancies have received little attention. For some of the few articles describing pregnancy for nonbinary individuals, see Samantha Schmidt, *A Mother, But Not A Woman*, WASH. POST (Aug. 16, 2019), <https://www.washingtonpost.com/dc-md-va/2019/08/16/non-binary-pregnant-navigating-most-gendered-role-all-motherhood/> [<https://perma.cc/GVL2-VN48>], S.E. Smith, *For Nonbinary Parents, Giving Birth Can Be Especially Fraught*, REWIRE NEWS GRP. (Jan. 25, 2018, 8:58 AM), <https://rewirenewsgroup.com/2018/01/25/nonbinary-parents-giving-birth-can-especially-fraught/> [<https://perma.cc/BBB3-A3YP>], and *My Story: Becoming Pregnant As a Nonbinary Person*, OURBODIESOURSELVES.ORG (Oct. 27, 2022), <https://www.ourbodiesourselves.org/story/my-story-becoming-pregnant-as-a-nonbinary-person/> [<https://perma.cc/DN45-TA3R>].

12. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

13. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020).

14. *Id.* at 1741.

15. The majority in *Bostock* made clear that the interpretation of but-for causation was based on the text of Title VII itself. See *Bostock*, 140 S. Ct. at 1739. There have been numerous law review articles written on whether and how the reasoning in *Bostock* should apply to other federal antidiscrimination statutes, but so far, the Court has not applied it beyond Title VII. For one example, see D’Andre Millsap Shu, *The Coming Causation Revolution in Employment Discrimination Litigation*, 43 CARDOZO L. REV. 1807, 1837–43 (2022) (arguing that *Bostock*’s reasoning and application of but-for causation should apply to other federal antidiscrimination statutes even though *Bostock* was decided in the Title VII context).

16. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

17. Deborah L. Blake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL’Y 67, 67 (2014).

expressly defines “because of sex” under Title VII as including “because of or on the basis of pregnancy, childbirth, or related medical conditions[.]”¹⁸ However, it is not clear who, beyond cisgender women, benefit from the PDA’s protection. In December 2022, Congress passed a new pregnancy discrimination law. The Pregnant Workers Fairness Act (“PWFA”) requires that employers “grant reasonable accommodation to pregnant workers.”¹⁹ But given how new the law is, it is unclear what this duty means in practice or what it means for transgender or nonbinary pregnant employees. Like other federal antidiscrimination statutes, the PWFA does not provide explicit protections for transgender or nonbinary pregnant employee. The question of whether Simmons, a transgender man, is protected from pregnancy discrimination under the PDA or the PWFA remains unanswered. But the answer should be yes.

This Article provides the first overview of the issues involving discrimination against pregnant transgender and nonbinary employees. It surveys the contemporary legal terrain, including the PWFA, and argues that a pregnant transgender man or nonbinary person who is discriminated against on the basis of his or their pregnancy can prevail by relying on a sex stereotyping theory. In either case, that employee faces discrimination because he or they do not fit into the stereotype of who gets pregnant: a cisgender woman. Nor does a transgender man fit the stereotype of how a man should look and behave: not being pregnant. In Simmons’ case, if supporting facts had come out in the litigation, he could have argued that he was discriminated against by his supervisors at Amazon because he was being held to a sex stereotype that men do not get pregnant or, conversely, only those who identify as women should get pregnant. The sex stereotyping theory may be especially promising for transgender and nonbinary pregnant employees because it provides a compelling argument for discrimination no matter which sex the pregnant employee is compared to. Whether a transgender pregnant employee is compared to a female-identifying pregnant employee assigned female at birth or a male-identifying employee assigned male at birth, they fail to conform. The same goes for a nonbinary pregnant employee.

This Article proceeds as follows. Part I provides background information on Title VII and the theory of sex stereotyping discussed in the Supreme Court’s decision in *Price Waterhouse v. Hopkins*.²⁰ This Part

18. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

19. J. Edward Moreno, *Accommodating Pregnant Workers: New Workplace Law Explained*, BLOOMBERG LAW (Jan. 3, 2023, 10:00 AM), <https://news.bloomberglaw.com/daily-labor-report/accommodating-pregnant-workers-new-workplace-law-explained> [<https://perma.cc/4FEN-MK2W>].

20. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

also discusses the repercussions of the Court’s decision in *Bostock v. Clayton County*, which held that discrimination on the basis of sexual orientation and gender identity falls under Title VII “sex” discrimination.²¹ It then goes on to discuss the PDA, the protections it provides, and the gaps in its coverage. Additionally, this Part includes a brief discussion of the newly enacted PWFA. Finally, Part I lays a detailed foundation of transgender and nonbinary discrimination in the workplace, as well as discrimination generally, and explores how pregnancy might make this discrimination worse. Part II sets out a proposal. Here, this Article argues that the theory of sex stereotyping creates an innovative avenue for pregnant transgender and nonbinary employees to succeed in their claims for pregnancy discrimination under the PDA. By using this theory, employees can argue successfully that they were discriminated against for not conforming to the sex stereotype of who gets pregnant and who does not. This Part includes examples of how this argument would play out in a situation where a pregnant transgender man and a pregnant nonbinary person are discriminated against in the employment context. Part III argues that the rationales for enactment of the PDA and its goal apply equally to transgender and nonbinary pregnant persons, warranting expanding PDA protection. Finally, Part IV concludes with a push to advance greater protections for pregnant transgender and nonbinary individuals.

I. SEX STEREOTYPING AND THE STRUGGLES OF TRANSGENDER AND NONBINARY EMPLOYEES

When Title VII of the Civil Rights Act of 1964 was debated and passed, gender roles ran deep in America. In fact, protecting entrenched traditional gender roles motivated opposition to adding “sex” as a protected class in the landmark bill.²² Opposition was rooted in “enforcing conventional sex and family roles” where women were mothers and wives first, perpetuating the assumption that women would eventually leave the workforce for motherhood.²³ Simply put, there was an assumption about who became pregnant. However, sex was not supposed to be included. In a very last-minute effort to tank the entire bill, Representative Howard W. Smith of Virginia moved to add “sex” to Title VII.²⁴ He failed—it passed

21. *Bostock*, 140 S. Ct. at 1743.

22. See Carly Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1324 (2012) (“Legislators who opposed adding ‘sex’ to Title VII argued that it would alter laws and customs governing wife- and motherhood, and in so doing wreak havoc on the home.”).

23. *Id.* at 1366–67.

24. Jo Freeman, *How Sex Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, *We Will Be Heard: Women’s Struggle for Political Power in the United States*, <https://www.jofreeman.com/lawandpolicy/titlevii.htm> [<https://perma.cc/7LEB-AWHS>].

168 to 133.²⁵ By 1964, sex was a protected class. But what did “sex” mean? How far did legal protection for “sex” go? Did “sex” only protect cisgender women from wage discrimination or sex-based employment policies? How would a plaintiff prove they were discriminated on the basis of sex? What did “on the basis of sex” mean? Did it include conditions or phenomena experienced by only one sex? It would take decades for the courts and Congress to figure it out.

A. Title VII and the Theory of Sex Stereotyping

Title VII provides:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.²⁶

Its protections are expansive but when it comes to sex discrimination, the inquiry often comes down to the question of whether the employment outcome would be different but-for the employee’s sex.²⁷

For the first twenty years of Title VII litigation, plaintiffs were boxed in to using certain evidence to prove disparate treatment and disparate impact.²⁸ Disparate treatment claims require the plaintiff to show that their employer intentionally discriminated against them on the basis of a protected class, using direct or circumstantial evidence.²⁹ Disparate impact claims, alternatively, do not require proof of intent to discriminate. Rather, a plaintiff must show that a facially neutral employment policy or practice disproportionately harms employees in a protected class.³⁰ This was the lay of the land until 1986 when the Supreme Court recognized a new theory of proving discrimination for disparate treatment claims under Title VII. In *Meritor Savings Bank v. Vinson*, the Court held that sexual harassment is discrimination on the basis of sex when it creates a hostile

25. *See id.* (discussing the last-minute inclusion of “sex” to Title VII as in part the product of/backlash to the fight for the Equal Rights Amendment).

26. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

27. *See Bostock*, 140 S. Ct. at 1739 (establishing the but-for causation test used in sex discrimination cases).

28. Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 928 (2016).

29. *Id.*

30. *Id.*

work environment.³¹ Sexual harassment that is so “severe and pervasive” to create a hostile work environment can be used as evidence of sex discrimination.³² It, however, wasn’t until three years later that the Supreme Court recognized sex stereotyping as another theory for proving sex discrimination.³³

Title VII had been on the books for over twenty years when Ann Hopkins sued the accounting firm Price Waterhouse for sex discrimination. This case prompted the Supreme Court to recognize sex stereotyping as an possible avenue for showing impermissible sex discrimination.³⁴ In *Price Waterhouse v. Hopkins*, Hopkins was denied a promotion to partner at the accounting firm based on her failure to conform to her employer’s notion of how a woman in her position should act.³⁵ As part of the process for promoting an employee to partner, the firm solicited evaluations and comments from current partners.³⁶ Some evaluations suggested that Hopkins did not—but should—conform to expectations of feminine behavior, stating that her “aggressive” behavior required “a course at charm school,” and that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”³⁷ The Court found these comments to be evidence that Hopkins’s sex was a motivating factor in the firm’s decision not to promote her to partner.³⁸ She exhibited behavior that likely would have been tolerated if she were a man, but was not seen as how a woman should act. She failed to conform to a stereotype that women are not aggressive, but rather feminine and agreeable.³⁹

Sex stereotyping extended protection against sex discrimination. This is an avenue for employees whose failure to conform with their employer’s sex stereotype is the reason for an adverse employment action against them.⁴⁰ Sex stereotyping did not constitute a new cause of action under

31. *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399, 2405 (1986).

32. *Id.*

33. See Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591, 605–09 (2011).

34. See *Price Waterhouse*, 490 U.S. at 251.

35. *Id.* at 256.

36. *Id.* at 233, 256.

37. *Id.* at 235.

38. *Id.* at 258.

39. See *id.* at 256 (“If an employee’s flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.”).

40. Adverse employment actions include firing, failing to hire, failing to promote, demote, harassment, retaliation, or reassignment to a role with significantly different responsibilities. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (both noting that an abusive work environment is actionable discrimination under Title VII).

Title VII; it created a new way to prove discrimination in the workplace when an employee is treated differently “based on assumptions about how people will or should behave because of their sex.”⁴¹ As evidence, plaintiffs can use stray comments made by coworkers or supervisors and/or a comparator to show that an employee of the opposite sex was treated differently than the plaintiff.⁴² However, stray comments as evidence of sex stereotyping are not enough for a successful sex discrimination claim. The plaintiff must also show that the employer relied on their sex in making the employment decision.⁴³

For over forty years after *Price Waterhouse*, transgender and nonbinary employees were still without legal protection if their employer discriminated against them on the basis of their sexual orientation, gender identity, or failure to conform to a sex stereotype. All circuit courts have recognized that a plaintiff’s failure to conform “to gender expectations can constitute a form of . . . sex-based discrimination” under Title VII.⁴⁴ The Supreme Court, however, has not recognized the theory of sex stereotyping as applying to LGBTQ+ plaintiffs. It was not until 2020 in the Supreme Court’s decision in *Bostock v. Clayton County* that the Supreme Court extended Title VII protection against sex discrimination to transgender and queer employees at all.

The issue before the Court in *Bostock* was whether the meaning of “sex” under Title VII included sexual orientation and gender identity.⁴⁵ Put another way: Did Title VII’s prohibition on sex discrimination include discrimination on the basis of sexual orientation and gender identity? Justice Gorsuch, writing for the majority, concluded yes.⁴⁶ He explained that sex discrimination does include discrimination on the basis of sexual orientation and gender identity.⁴⁷ Relying on past interpretations of Title VII, Justice Gorsuch interpreted “because of” in “because of sex” as “but-for” causation, framing the question as: But for the employee’s sex, would the employer have discharged the employee?⁴⁸

41. Bornstein, *supra* note 28, at 937.

42. See Carly Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1367 (2012) (discussing how in “most circumstances, courts in Title VII cases continue to require that sex discrimination plaintiffs adduce opposite-sex comparators . . .”).

43. *Price Waterhouse*, 490 U.S. at 251.

44. Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL’Y 205, 219 (2007).

45. *Bostock*, 140 S. Ct. at 1739.

46. *Id.* at 1743.

47. *Id.*

48. *Id.* at 1741.

Justice Gorsuch reasoned that discrimination against a transgender or gay employee is discrimination on the basis of sex because the employer is treating an employee of one sex differently for traits or behaviors it tolerates in an employee of the opposite sex.⁴⁹ For example, an employer who fires a gay female employee because of their sexual orientation is not tolerating a behavior—being in a relationship with a female—that the employer tolerates in men.⁵⁰ A female employee cannot have a relationship with another female, but a male employee can. But for the female employee’s sex, the employer would not have discriminated against them for being in a relationship with a female. Pregnancy—more specifically, who gets pregnant—is similar to the traits an employer tolerates. A transgender employee who does not present as their sex assigned at birth is exhibiting behavior or characteristics that the employer would tolerate in someone who did present as their assigned sex. This might come up when, for example, an employee assigned male at birth wears nail polish, skirts, and makeup to work. The employer—whether it be in response to a queer employee or transgender employee—is not tolerating certain behavior that they would tolerate in an employee assigned female at birth.

While not discussed in Justice Gorsuch’s opinion, the assumptions around how someone should act is also a sex stereotype. The difference between a heterosexual employee and a queer or transgender employee is, among other things, whom they choose as a romantic partner and how they present their gender. Stereotypes are based on the notion of what “behaviors, traits, and attitudes” society associates with discrete groups of people.⁵¹ Behaviors, traits, or attitudes outside of these stereotypes would not conform to what society or an individual person would believe to be correct for a member of that group. We stereotype romantic partners, attraction, clothing, and appearance based on a person’s assigned or perceived sex. Society’s stereotype of a relationship is a heterosexual relationship. Society’s stereotype of someone who looks like a man is that they have male reproductive organs or present themselves to the world as a man, without the nail polish, skirt, and makeup.

After *Bostock*, it is still not clear whether the sex stereotype theory is available for transgender or queer plaintiffs because Justice Gorsuch opted to use “but-for” reasoning instead of the sex stereotype theory put forth by the plaintiffs in *Bostock*.⁵² It is also not clear how far protection for discrimination based on sexual orientation and gender identity extends, or

49. *Id.*

50. *See Id.* (laying out the legal basis for the outcome of this hypothetical).

51. 33Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591, 593 (2011).

52. Brief for Petitioner at 23-29, *Bostock*, 140 S. Ct. at 1731.

if it extends to the PDA at all. The question remains: Does the PDA only apply to women, or does it apply to any pregnant person, regardless of their gender identity and expression?

B. The Pregnancy Discrimination Act

Prior to 1978, there was no federal protection for pregnancy discrimination in the workplace and the Supreme Court had confirmed as much. The Pregnancy Discrimination Act was enacted in response to the Supreme Court's decision in *General Electric Co. v. Gilbert* in 1976.⁵³ In *Gilbert*, the Court held that even though only females could get pregnant, "legislative classifications concerning pregnancy" are not a "sex-based protection."⁵⁴ Gilbert challenged General Electric's employee disability plan that provided all employees with nonoccupational sickness and accident benefits but excluded disabilities that arise from pregnancy, arguing that the plan discriminated on the basis of sex by excluding disabilities relating to pregnancy.⁵⁵ Comparing General Electric's disability plan to California's state disability program in *Geduldig v. Aiello*, the Court stated the program in *Geduldig* "[did] not exclude anyone from benefit eligibility because of gender but merely remove[d] one physical condition—pregnancy—from the list of compensable disabilities."⁵⁶ Without evidence that the exclusion was pretext for sex discrimination, excluding pregnancy was as reasonable as excluding "any other physical condition."⁵⁷ In the Court's opinion, simply because one sex experiences pregnancy does not mean classifications on the basis of pregnancy are discriminatory on the basis of sex, and the mere exclusion of conditions that only affect one sex does not constitute sex discrimination.⁵⁸

Congress disagreed. In response to the case, Congress passed the PDA to override the Court's interpretation of "sex" under Title VII by expressly defining "because of sex" or "on the basis of sex" as including "because

53. Joanna Grossman, *Forceps Delivery: The Supreme Court Narrowly Saves the Pregnancy Discrimination Act in Young v. UPS*, VERDICT, <https://verdict.justia.com/2015/03/31/forceps-delivery-the-supreme-court-narrowly-saves-the-pregnancy-discrimination-act-in-young-v-ups> (Mar. 31, 2015) [<https://perma.cc/K3YD-G8GA>].

54. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 134 (1976).

55. *Id.* at 128.

56. *Id.* at 134 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496, n. 20 (1974)).

57. *Id.*

58. See Michelle A. Travis, *The PDA's Causation Effect: Observations of an Unreasonable Woman*, 21 YALE J. L. & FEMINISM 51, 58 (2009) (discussing the Court framing the issue in *Gilbert* as the employer "failing to include the unique condition of pregnancy related disabilities," not as discrimination based on that unique condition).

of or on the basis of pregnancy, childbirth, or related medical conditions.”⁵⁹ Congress adopted the position of the dissenters in *Gilbert* that “distinctions based on pregnancy are *per se* violations of Title VII.”⁶⁰ In the legislative history, Congress makes clear that the PDA expressly—and unequivocally—included pregnancy-related claims within Title VII’s sex-based claims.⁶¹

Under the PDA, two types of claims are available to pregnant employees. First, an employee can bring an individual disparate treatment claim, for which the pregnant person has to show that their “employer intentionally discriminated against [them] because of pregnancy, childbirth, or a related medical condition.”⁶² These claims take mainly two forms: (1) Where an employer treats a pregnant employee adversely because of their pregnant status; or (2) an employer refuses to accommodate a pregnant employee, like Shaun Simmons, the same as they accommodate other employees who request similar accommodations.⁶³ Second, an employee can bring a disparate impact claim to challenge an employer’s facially neutral policy as “imposing a substantial burden on employees because of pregnancy, childbirth, or a related medical condition.”⁶⁴ Disparate impact claims do not require proof of discriminatory intent, only that the burden of a policy falls disproportionately on pregnant employees.

Since its inception, legal protection under the PDA has been framed as protection for women.⁶⁵ Throughout the legislative history, Congress refers to those protected by the PDA as “women” and “pregnant workers.”⁶⁶ Only when applying the Family and Medical Leave Act (“FMLA”) to a man did the Supreme Court recognize the role of sex stereotypes in pregnancy. In *Nevada Department of Human Resources v. Hibbs*, the Court recognized that men are also harmed by stereotypes surrounding family caregiver responsibilities, allowing a male father and husband to recover for his employer’s FMLA violation.⁶⁷ The Court stated the FMLA was enacted to address the significant impact of “mutually

59. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

60. H.R. REP. NO. 95–948, at 3 (1978).

61. *Id.* at 3–4.

62. Jeanette R. Blair, *Pregnancy Discrimination*, 2 GEO. J. GENDER & L. 595, 602 (2001).

63. Travis, *supra* note 58, at 64.

64. Blair, *supra* note 62, at 607.

65. Saru M. Matambanadzo, *Reconstructing Pregnancy*, 69 SMU L. REV. 187, 206 (2016) (discussing the Supreme Court’s decision in *Newport News Shipbuilding & Dry Dock Co. v. EEOC* where the Court struck down an employer insurance plan that provided “fewer health insurance benefits to married male employees than to married female employees”).

66. *See generally*, H.R. REP. NO. 95–948.

67. *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003).

reinforcing stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities.”⁶⁸ However, the Court limited its invocation of sex stereotypes to the FMLA, leaving the application of sex stereotyping in the PDA undecided.

This ambiguity leaves open an important question: Is it just pregnant women and their partners who are protected under the PDA?⁶⁹ Or does the PDA broadly protect discrimination on the basis of pregnancy, childbirth, or related medical conditions unrelated to the person’s sexual orientation or gender identity? Given how bound up pregnancy is with biological sex, there is a strong argument that “motherhood” is also bound up with biological sex, creating stereotypes around who stays home with the kids and who brings those kids into the world in the first place.

C. The Brand New Pregnant Workers Fairness Act

Prior to January 2023, the law did not guarantee a pregnant worker’s right to reasonable accommodation. The PDA only required that pregnant employees receive “temporary job modifications” provided to a non-pregnant employee who is similar in their ability or inability to work.⁷⁰ If there is no other employee who fits that description, then the employer could deny a pregnant employee the accommodations without fear of being sued under the PDA. The Pregnant Workers Fairness Act (“PWFA”) clarifies when an employer must reasonably accommodate a pregnant employee and how those accommodations must look.

The PWFA requires employers to provide reasonable accommodations to a pregnant employee unless doing so would impose an undue hardship on the business’s operation.⁷¹ As part of the law, an employer cannot deny employment to a “qualified employee” if the reason for the denial is because the employer would have to make reasonable accommodations for the pregnant employee.⁷² Essentially, the PWFA requires employers to make the same accommodations to pregnant

68. *Id.* at 722–23.

69. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, the Supreme Court struck down an employer’s health insurance plan that gave female employees pregnancy coverage but did not provide pregnancy coverage for married male employees. The Supreme Court found this violated Title VII and the PDA because it discriminated against male employees. 462 U.S. 669, 673, 684 (1983).

70. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

71. Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. (2021) (enacted) [hereinafter PWFA]. The PWFA was passed into law on December 29, 2022, as part of the Consolidated Appropriations Act. WOLTERS KLUWER, HR COMPLIANCE P. 35872, ¶ 35,872 (2023), WL 317913.

72. PWFA, H.R. 1065. *See* 42 U.S.C. § 2000gg(6) (defining a qualified employee as “an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position.”).

employees as the Americans with Disabilities Act (“ADA”) requires employers to make for employees with disabilities.⁷³ It also prohibits an employer from requiring a pregnant employee to take paid or unpaid leave if a reasonable accommodation could be made available to the employee to allow them to continue to work.⁷⁴ Even the PWFA, however, appears to only prevent discrimination against pregnant women. More specifically, the bill states that the PWFA aims “[t]o eliminate discrimination and promote *women’s* health and economic security.”⁷⁵ The Fact Sheet provided by the House Committee on Education & Labor on a prior version of the bill also framed the PWFA as a law to protect women, stating in its first sentence that women have “increasingly become the primary breadwinners in American households.”⁷⁶ If the law is interpreted as a law for cisgender women, then Shaun Simmons would be left out of its protection.

It took decades of litigation to interpret and expand the PDA’s legal protections and determine the scope of an employer’s duty to a pregnant employee. The PWFA is a significant step forward in guaranteeing job security to pregnant employees and preventing discrimination on the basis of pregnancy and its related conditions. What remains unclear is how the PWFA will apply to non-female identifying pregnant persons, if at all. Will an individual similarly situated to Simmons be able to claim coverage under the new law? If so, it would spare the pregnant employee the need to find another employee who receives accommodations and is similar in their ability or inability to work, as would be required under the PDA. Nevertheless, for Simmons, finding a similarly situated employee may not have been difficult. There were likely dozens of employees at the Amazon warehouse where Simmons worked. He likely could have found another employee who received reasonable accommodations that he could use as a comparator for a successful PDA claim. However, if an employee was denied an accommodation and could not find relief under the PWFA, they could attempt to bring a sex discrimination claim under the PDA using a theory of sex-stereotyping. It likely would not be hard to find an opposite sex and same sex comparator to argue that the reason an employee, like Simmons, was discriminated against was because of their sex as a pregnant person. This may ultimately be the best avenue for equal treatment. Because while the PWFA is imperative to guaranteeing protections for

73. *The Pregnant Workers Fairness Act: Making Room for Pregnancy on the Job*, NWLC (Aug. 2, 2021), <https://nwlc.org/resource/pregnant-workers-fairness-act-making-room-pregnancy-job/> [<https://perma.cc/3J58-FU3T>].

74. 71PWFA, H.R. 1065.

75. *Id.* 71(emphasis added).

76. *Fact Sheet, Pregnant Workers Fairness Act (H.R. 2694)*, COMM. ON EDUC. & LAB., [<https://perma.cc/WD6M-WF89>] (URL no longer available).

pregnant employees, it may be too new for Simmons or other nonbinary or transgender pregnant employees to use as protection against pregnancy discrimination.

D. The State of Being Transgender or Nonbinary at Work

1. Transgender Employees, Pregnancy, and Employment

Transgender pregnancy is, perhaps unsurprisingly, incredibly understudied. “Transgender” is a general term for “people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth.”⁷⁷ As this definition notes, a transgender person might have a gender expression different from their sex assigned at birth.⁷⁸ Gender expression is the “[e]xternal appearance of one’s gender identity, usually expressed through behavior, clothing, body characteristics or voice”⁷⁹ For example, a transgender man is “someone who identifies as a man, but whose sex assigned at birth was female.”⁸⁰ Since not all transgender men elect to have gender affirming surgeries to remove their female reproductive organs, there are transgender men who are capable of getting pregnant.⁸¹ Despite maintaining their female reproductive organs, they live out their lives and present themselves to the world as male or masculine.

When it comes to transgender employment broadly, the picture is bleak. According to a 2021 McKinsey study, “[t]ransgender adults are twice as likely as cisgender adults⁸² to be unemployed,” “[c]isgender

77. *Glossary of Terms*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/glossary-of-terms> (last visited Nov. 2, 2022) [<https://perma.cc/M57P-98SB>]. It is important to note that the transgender community does not have complete agreement on what the term “transgender” encompasses. David Baboolall, et al., *Being Transgender at Work*, MCKINSEY (Nov. 10, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/being-transgender-at-work> [<https://perma.cc/TL4Q-D6FA>].

78. “Sex” is the label of male or female that a person is assigned at birth based on their genitals. *Sex and Gender Identity*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity> (last visited Nov. 13, 2022) [<https://perma.cc/K7SP-RLJF>]. “Gender” is “a social and legal status, and set of expectations from society, about behaviors, characteristics, and thoughts [I]t’s more about how you’re expected to act, because of your sex.” *Sex and Gender Identity*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity> (last visited Nov. 13, 2022) [<https://perma.cc/K7SP-RLJF>].

79. *Glossary of Terms*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/glossary-of-terms> (last visited Nov. 2, 2022) [<https://perma.cc/M57P-98SB>].⁷⁷

80. Juno Obedin-Maliver & Harvey J. Makadon, *Transgender Men and Pregnancy*, 9 OBSTETRIC MED. 4, 5 (2016).

81. *Id.*

82. “Cisgender” refers to a person “whose gender identity aligns with those typically associated with the sex assigned to them at birth.” *Glossary of Terms*, HUM. RTS. CAMPAIGN

employees make thirty-two percent more money a year than transgender employees,” and transgender employees “feel far less supported in the workplace than their cisgender colleagues do.”⁸³ According to McKinsey, “only [seventy-three] percent of transgender adults are in the workforce, compared with [eighty-two] percent of cisgender people.”⁸⁴ The relative lack of representation of transgender people in the workforce might have something to do with the low rates of health coverage among transgender people— “[twenty-two] percent of transgender adults, and [thirty-two] percent of transgender adults of color, have no form of health coverage.”⁸⁵ Even if they do have health insurance, their employer may not provide health coverage that adequately covers their needs. In fact, less than two-thirds of all Fortune 500 companies offer trans-inclusive healthcare coverage.⁸⁶

Even when transgender people are employed, the data suggests they continue to struggle. Only one-third of transgender employees in the McKinsey study reported feeling safe being open about their transgender status.⁸⁷ Overall, transgender employees feel disengaged at the workplace, which makes them feel unstable in their jobs.⁸⁸ There is good reason for this feeling. The 2015 U.S. Transgender Survey Report (“Transgender Survey”)—the largest survey of its kind—reported that seventy-seven percent of transgender respondents who held a job in the last year took active steps to avoid mistreatment in their workplace, including hiding their gender identity, delaying gender transition, or quitting their job altogether.⁸⁹ Of the same group (those who had held a job within the last year), fifteen percent reported being verbally harassed, physically attacked, and/or sexually assaulted at work.⁹⁰ Astonishingly, almost a

(last visited Nov. 2, 2022), <https://www.hrc.org/resources/glossary-of-terms> (last visited Nov. 2, 2022) [<https://perma.cc/M57P-98SB>].

83. David Baboolall, et al., *Being Transgender at Work*, MCKINSEY (Nov. 10, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/being-transgender-at-work> [<https://perma.cc/TL4Q-D6FA>].⁷⁷

84. *Id.*

85. *Id.*

86. Peter Bailinson, et al., *LGBTQ+ Voices: Learning From Lived Experiences*, MCKINSEY (June 25, 2020), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/lgbtq-plus-voices-learning-from-lived-experiences> [<https://perma.cc/T8XT-QPC2>].

87. *Being Transgender at Work*, *supra* note 77.

88. *Id.* (noting that “so many transgender employees can’t bring their whole selves to work” and “they experience a constant feeling of stress that can inhibit them from fully participating in the workplace”).

89. NAT’L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE U.S. TRANSGENDER SURVEY 148* (2015), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/U9ED-U4D4>] [hereinafter *U.S. Transgender Survey*].

90. *Id.*

quarter of those who reported one of these types of mistreatment also reported other types of mistreatment “such as being told by their employer to present as the wrong gender in order to keep their job or . . . employers or coworkers shar[ing] private information about their transgender status with others without permission.”⁹¹ All of this data suggests that Shaun Simmons’s experience is not unique, making the need for legal protection all the more urgent.

On top of the existing discrimination transgender people experience at work, pregnancy can add yet another layer of hardship. Pregnancy is not easy to hide, especially if you are a transgender man presenting as a man. Given that reports of discrimination increase with how visible someone’s transgender status is,⁹² it would not be outlandish to assume transgender pregnancy would lead to additional discrimination. In fact, sixteen percent of respondents to the Transgender Survey reported that they lost a job because of their gender identity or gender expression.⁹³ Data collected on the experiences of pregnant transgender men found that “[s]ome men chose physical isolation as a strategy” to hide that they were “a visibly-pregnant man” to avoid “being socially misperceived as a pregnant cis woman . . . or needing to conceal the pregnancy.”⁹⁴ Since pregnancy is so visible, it is highly likely that the more a pregnant transgender man physically shows, the more likely it is they would be discriminated against in the workplace based on that pregnancy.⁹⁵

However, the lack of data on pregnancy discrimination makes it difficult to assess just how prevalent it is, even for cisgender women. Since a majority of women who face pregnancy discrimination do not file a formal claim with the Equal Employment Opportunity Commission

91. *Id.*

92. Survey Respondents said that others can “always or usually tell” that they are transgender were more likely to be verbally harassed than those who said that other people can “sometimes,” “rarely,” or “never” tell that they are transgender. *Id.*

93. *Id.*

94. Mari Greenfield & Zoe Darwin, *Trans and Non-Binary Pregnancy, Traumatic Birth, and Perinatal Mental Health: A Scoping Review*, 22 INT’L J. TRANSGENDER HEALTH 203, 208 (2021).

95. There does not appear to be any statistics on transgender pregnancy discrimination in the workplace. The lack of studies and data on transgender pregnancies and births seems to be well known. See 80Obedin-Maliver & Makadon, *supra* note 80, at 5 (noting that though no studies “document the number of transgender men who have had pregnancies,” anecdotal reports suggest that the number of transgender people seeking to become parents “could certainly be quite large.”); see also Alexis D. Light, et al., *Transgender Men Who Experience Pregnancy After Female-to-Male Gender Transitioning*, 124 OBSTETRICS GYNECOLOGY 1120, 1120 (2014) (stating “there is little scientific literature describing experiences among transgender men or the effects of exogenous administration of testosterone on fertility, pregnancy, and neonatal outcomes.”).

(“EEOC”),⁹⁶ rates of discrimination are difficult to ascertain and those that are available are most certainly underestimates.⁹⁷ Given that transgender and pregnant employees are each subject to workplace discrimination, pregnant transgender men are likely to face discrimination for both statuses.

2. Nonbinary Pregnancies and Employment

Nonbinary individuals face similar—although not identical—discrimination as transgender people. Nonbinary is a term used for individuals who do “not identify exclusively as a man or a woman” or “identify as being both a man and a woman.”⁹⁸ The term “nonbinary” is an imperfect one. Nonbinary, similar to the term “transgender,” is an umbrella term that can include a number of other identities, such as genderqueer, genderfluid, gender neutral, trigender, agender, gender nonconforming, pangender, and more.⁹⁹ Moreover, not all transgender people identify with the male or female sex. In fact, about thirty-two percent of the transgender adult population in the United States identify as nonbinary.¹⁰⁰ However, while nonbinary individuals are often assumed to be transgender, less than half of nonbinary adults identify as transgender.¹⁰¹ A majority of nonbinary people—seventy-three percent—report their “assigned sex at birth as female and identify[] on the

96. See Carly McCann & Donald Tomaskovic-Devey, *Pregnancy Discrimination at Work: An Analysis of Pregnancy Discrimination Charges Filed with the U.S. Equal Employment Opportunity Commission*, CTR. FOR EMPL. EQUITY 8–9 (May 26, 2021).

97. A report from the National Partnership for Women and Families provides important insight. Making up almost one-third of charges from 2010 to 2015, the most common reason women filed pregnancy discrimination charges with the EEOC was for being fired from their job. The “next most common issues raised were discriminatory terms and conditions of employment (12.1 percent), harassment (7.2 percent), and disciplinary action (4.8 percent). Women reported pregnancy discrimination in every industry, every state, and every race and ethnicity. NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, *BY THE NUMBERS: WOMEN CONTINUE TO FACE PREGNANCY DISCRIMINATION IN THE WORKPLACE* 2–3 (2018), <https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/by-the-numbers-women-continue-to-face-pregnancy-discrimination-in-the-workplace.pdf> [<https://perma.cc/NU3N-8NE5>].

98. *Glossary of Terms*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/glossary-of-terms> [<https://perma.cc/M57P-98SB>].

99. See Kelly K. Dray, et al., *Moving Beyond the Gender Binary: Examining Workplace Perceptions of Nonbinary and Transgender Employees*, 27 GENDER, WORK & ORG. 1181, 1182 (2020); Jack Harrison, et al., *A Gender Not Listed Here: Genderqueers, Gender Rebels, and Otherwise in the National Transgender Discrimination Survey*, 2 LGBTQ POL’Y J. HARV. KENNEDY SCH. 13, 14 (2011–12).

100. Bianca D.M. Wilson & Ilan H. Meyer, *Nonbinary LGBTQ Adults in the United States*, UCLA SCH. OF L., WILLIAMS INST. 1, 2 (June 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Nonbinary-LGBTQ-Adults-Jun-2021.pdf> [<https://perma.cc/CY5Q-GYTC>].

101. *Id.*

transmasculine spectrum.”¹⁰² Only twenty-seven percent reported being assigned male at birth and identifying as transfeminine.¹⁰³ This means many nonbinary people are born with female reproductive organs, making them capable of pregnancy if they choose to keep their reproductive organs and maintain the possibility of having children.

Nonbinary individuals make up about eleven percent of LGBTQ+ identifying adults in the United States, somewhere around 1.2 million people.¹⁰⁴ One study from the Williams Institute at the University of California, Los Angeles (“UCLA”) found that forty-eight percent of nonbinary individuals were employed full time, with about seven percent unemployed and eleven percent not in the workforce.¹⁰⁵ A different UCLA study published by the Harvard Kennedy School found that despite having higher levels of educational attainment compared to the general population, twenty-one percent of nonbinary persons have a household income of less than \$10,000.¹⁰⁶ Additional statistics demonstrate the broader issue of discrimination in the employment space. The Williams Institute study states that 17.7 percent of nonbinary respondents reported being fired or laid off from a job, 37.8 percent “were unemployed or looking for a job for more than a month,” and nearly forty percent reported having trouble with their boss or a coworker.¹⁰⁷ However, it was difficult or impossible for nonbinary employees to formally report employment discrimination until recently. In March 2022, the EEOC announced it would add a nonbinary “X” gender marker on discrimination charge forms.¹⁰⁸ The EEOC’s failure to acknowledge nonbinary identity is likely one of the reasons for the current lack of information on the experiences of nonbinary employees. Similar to pregnancy statistics in the transgender

102. Jack Harrison, et al., *A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey*, 2 LGBTQ POL’Y J. HARV. KENNEDY SCH. 13, 18 (2011–12).

103. *Id.*

104. Wilson & Meyer, *supra* note 100.

105. *Id.*

106. Harrison, *supra* note 102, at 18.

107. Wilson & Meyer, *supra* note 100.

108. *EEOC to Add Non-Binary Gender Option to Discrimination Charge Intake Process*, EEOC (Mar. 31, 2022), <https://www.eeoc.gov/newsroom/eeoc-add-non-binary-gender-option-discrimination-charge-intake-process> [<https://perma.cc/ADW9-A3XP>].

community, information on nonbinary pregnancy is difficult to find, often anecdotal,¹⁰⁹ and severely understudied and underdiscussed.¹¹⁰

The breadth and depth of discrimination against transgender and nonbinary people is staggering. Adding another layer of difference—pregnancy—opens these communities to more discrimination for not conforming with societal stereotypes.

II. TRANSGENDER MALE PREGNANCY AND NONBINARY PREGNANCY FAIL TO CONFORM WITH SEX STEREOTYPES

A. Transgender Male’s Nonconformity With Who Gets Pregnant

In law and beyond, pregnancy is highly stigmatized, gendered, and stereotyped as a female condition.¹¹¹ When a transgender man who presents as a man comes into work with a baby bump, he fails to “conform to the stereotypical notions of how a person of his sex should appear and behave” on two different stereotypes.¹¹² First, he fails to conform to the stereotype that only women get pregnant. Second, he fails to conform to the stereotype that men do not get pregnant. This failure to conform with stereotypes offers the opportunity to compare a transgender man’s treatment against employees who do conform to pregnancy stereotypes.

For a pregnant transgender man to argue he is being discriminated against because of his pregnant status, he will likely have to use a pregnant employee of the opposite sex or gender identity as a comparator. Under federal antidiscrimination law, including the PDA, comparator evidence—

109. See, e.g., S.E. Smith, *For Nonbinary Parents, Giving Birth Can Be Especially Fraught*, REWIRE NEWS GRP. (Jan. 25, 2018, 8:58 AM), <https://rewirenewsgroup.com/2018/01/25/nonbinary-parents-giving-birth-can-especially-fraught/> [<https://perma.cc/BBB3-A3YP>] (discussing the experiences of several nonbinary pregnant persons); Rory Mickelson, *I’m Pregnant, But I’m Not a Woman*, ADVOCATE (Nov. 13, 2018, 5:02 AM EST), <https://www.advocate.com/commentary/2018/11/13/im-pregnant-im-not-woman> [<https://perma.cc/4QFJ-XNBZ>] (detailing the experience of a pansexual, agender, nonbinary, and trans masculine individual who got pregnant).

110. See S.E. Smith, *supra* note 109 (discussing the experiences of several nonbinary pregnant persons) 109 (“Most conversations surrounding trans birth and parenting—when they exist at all—center on the struggles of trans men.”).

111. See Saru M. Matambanadzo, *Reconstructing Pregnancy*, 69 SMU L. REV. 187, 235 (2016) 65 (discussing how the law’s development has cast pregnancy as a “natural aspect of what happens to women and women alone”). Justice Bradley stated in his concurring opinion in the 19th century case *Bradwell v. Illinois*, “The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things and cannot be based upon exceptional cases.” *Bradwell v. Illinois*, 83 U.S. 130, 141–42 (1872) (Bradley, J. concurring). The PDA sought to reject this very notion.

112. Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 468 (2004).

which a plaintiff must use to compare how their employer treats them to how their employer treats another employee or group of employees—can be critical to proving discrimination.¹¹³ The difference in treatment can be used as circumstantial evidence that the employer discriminated against the plaintiff based on some prohibited characteristic, like sex or pregnant status. Based on what discrimination a pregnant transgender man experienced at work, there are two different analogies that can be drawn.

1. Failure to Conform to the Stereotype that Only Women Become Pregnant

First, a pregnant transgender male employee can argue that he failed to conform with the stereotype that only women get pregnant. Under this scenario, the employee would use a pregnant female employee as a comparator, if available.¹¹⁴ The pregnant transgender employee would argue he is being discriminated against because he does not conform with the stereotype that only women get pregnant and thus, he is treated differently for being a pregnant man.

The stereotype that only women get pregnant is so deeply ingrained in our societal and medical understandings of reproduction that it feels like society does not realize it is a stereotype. This stereotype, however, is evidenced in the treatment and experience of transgender men in reproductive healthcare settings. In one study, pregnant transgender men reported several themes in their reproductive care that reflect entrenched societal ideas of pregnancy. One of those themes is “lack of cultural competency.”¹¹⁵ When men went to receive pregnancy care, they reported being addressed as “miss” and “her,” gendered pronouns that reflect who care providers assume get pregnant—women.¹¹⁶ A second theme was “transphobia.”¹¹⁷ Here, the men in the study reported being perceived as “too masculine to get pregnant” and not capable of caring for their child. In an encounter with Social Services, one patient was deemed a risk to their child, and the agency threatened to take the child “on the basis of neglect.”¹¹⁸ These comments typify the stereotype that to be pregnancy is

113. See Carly Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1367 (2012) 22 (discussing how in “most circumstances, courts in Title VII cases continue to require that sex discrimination plaintiffs adduce opposite-sex comparators . . .”).

114. See Kramer, *supra* note 112, at 474.

115. Alexis Hoffkling, et al., *From Erasure to Opportunity: A Qualitative Study of the Experiences of Transgender Men Around Pregnancy and Recommendations for Providers*, 17 BMC PREGNANCY & CHILDBIRTH 7, 12 (2017).

116. *Id.*

117. *Id.*

118. *Id.*

feminine and only women can properly carry and care for a child. When we see a pregnant person who does not conform to our traditional idea of a pregnant person—female with feminine attributes—society perceives that person as a threat because the person is so far outside of what is thought of as “true” of a pregnant person. The pregnant person does not look like a pregnant woman, so something must be wrong.

A third theme was “inappropriate medical care,” stemming from doctors and providers not knowing how to treat or care for a man with female reproductive organs, which led to transgender patients sometimes being treated as medical oddities rather than future parents.¹¹⁹ Multiple pregnant individuals reported doctors giving them “unnecessary physical exams,” mostly pelvic exams, and being asked questions about their genitals that were irrelevant to their visit.¹²⁰ Medical professionals’ use of inappropriate care for pregnant men indicates medical professionals are not being taught how to care for pregnant transgender men. This could be due to the underlying assumption in medicine that only women get pregnant; thus, pregnant transgender men fall outside of general medical understanding and stereotypes of pregnancy. Finally, and perhaps most importantly in showing how society genders pregnancy, participants reported the theme of “institutional erasure.”¹²¹ Participants reported that “[m]any OB/GYN spaces ‘feel like they only cater to women giving birth,’” information systems “did not have the capacity to account for a man needing services traditionally ascribed to female-only patients,” and the general feeling that providers were confused about how someone who does not look like a woman was pregnant.¹²²

While these findings come from the medical field, they provide context for society’s deeply held assumptions about pregnancy. As the above study shows, medical professionals too often operate under the assumption that only women can get pregnant. When a pregnant transgender man enters their offices—offices usually self-described as providing “women’s health services”—medical professionals struggle to care for someone who does not conform to the stereotypical pregnant person.¹²³ The PDA, as it is currently enforced, also assumes that a pregnant employee is a cisgender female. Even the U.S. Department of Labor’s (“DOL”) guidance for pregnancy discrimination for DOL

119. *Id.*

120. *Id.*

121. *Id.* at 13.

122. *Id.* One participant described the experience of providers making assumptions about gender and sex, explaining that providers often say things such as, “[i]f someone’s pregnant, then they must be a woman.” *Id.*

123. Heidi Moseson, et al., *The Imperative for Transgender and Gender Nonbinary Inclusion: Beyond Women’s Health*, 135 *OBSTETRICS & GYNECOLOGY* 1059, 1060 (2020).

employees and applicants uses female pronouns. For example, the DOL states: “An agency must permit a pregnant employee to do *her* job for as long as *she* is capable of performing the job.”¹²⁴ EEOC enforcement guidance is similar, framing pregnancy and employment as a female issue, using phrases like “*her* pregnancy” and “*her* capacity to become pregnant.”¹²⁵ If a pregnant employee is not a “her,” they fall outside of the law’s gendered assumption and stereotype.

To see how using a pregnant female comparator plays out, take Shaun Simmons, the transgender man that sued Amazon for discrimination. Simmons could have argued that when his coworker asked him, “Aren’t you pregnant?” as he walked into the men’s bathroom, his coworker was holding him to a stereotype—women (those who stereotypically get pregnant) do not use the men’s bathroom. If there were a pregnant female employee in the same or similar position as Simmons, the question would be whether Simmons was treated differently than the female employee. If yes, then Simmons could have made a strong argument that he was treated differently because he was a pregnant *man*. In this hypothetical, Simmons would benefit from highlighting the following facts so as to draw an effective comparison: (1) A supervisor did not share confidential information about the female employee’s pregnancy with the employee’s coworkers, as the supervisor did in Simmons’ situation; (2) the female employee’s coworkers did not harass her for her pregnant status while Simmons’ coworkers did; and (3) the female employee was provided requested work accommodations because of her pregnancy while Simmons’ had been denied. If the female employee was treated differently (better) than Simmons, he would have a strong argument that he was treated differently because he was not the stereotypical pregnant person.

An additional argument Simmons could have made when using a female comparator is a straightforward but-for causation argument. But-for him being a man, he would not have been discriminated against for being pregnant. This argument echoes the theory endorsed by Justice Gorsuch in *Bostock*: The employer is not tolerating a trait—pregnancy—in a member of one sex that it would have tolerated in someone of the opposite sex.¹²⁶ Although the but-for causation theory is different from a sex stereotyping theory, both theories rely on the premise that because of

124. *What to Expect When You’re Expecting (And After the Birth of Your Child) . . . at Work*, DEP’T OF LABOR (emphasis added), <https://www.dol.gov/agencies/oasam/civil-rights-center/internal/policies/pregnancy-discrimination> [<https://perma.cc/FU6Y-6BUX>].

125. *Enforcement Guidance on Pregnancy Discrimination and Related Issues*, EEOC, (June 25, 2015) (emphasis added), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues> [<https://perma.cc/D6W3-4QDB>].

126. *Bostock*, 140 S. Ct. at 1740.

employers' stereotypes about pregnancy, they would not tolerate pregnancy in a man as they would a woman.

2. Failure to Conform to a Stereotypical Male Employee

A pregnant transgender male employee can also use a stereotypical male as their comparator to show he was discriminated against because he does not conform to “how a stereotypical person of the same [biological] sex should look and act.”¹²⁷ Here, a pregnant transgender male employee fails to conform to the stereotype of how a male should look and act because a stereotypical male does not get pregnant and consequently does not ask for pregnancy-related work accommodations. This argument is similar to the stereotype that only women get pregnant. Here, the stereotype that men do not get pregnant is deeply embedded in society. The entrenchment of this stereotype might be best shown through reactions in popular culture to pregnant men. In the same study mentioned above, a nurse providing reproductive health services reportedly told a pregnant male patient that “he should be on Oprah.”¹²⁸ The presence of a pregnant man was so outside the realm of this nurse’s understanding of pregnancy that they suggested the patient should be on television for a common condition. The nurse’s comment could be a reference to a 2008 story about Thomas Beatie, America’s “first ‘pregnant father,’” who underwent an ultrasound on Oprah’s show and subsequently became the subject of media interest and spectacle.¹²⁹ Pregnant men are treated as the subject of fascination: picked out for newspaper articles, talk shows, and comments in the doctor’s office. A pregnant woman would not receive equivalent attention for a typical pregnancy.

Again, turn to Shaun Simmons as an example of how this comparison could be made. Simmons could have argued a theory of discrimination where he contended that his Amazon supervisor was discriminating against him because he did not conform with the stereotypical male employee. A stereotypical male employee would not get pregnant, does not ask for work accommodations because of abdominal pain resulting from his pregnancy, and would not eventually give birth, take time off, or be regarded as not dedicated enough to work once he has a child. As one author states: “[Transmasculine people] simply do not exist in so many spaces. We are the men who become pregnant, need gynecological care,

127. Kramer, *supra* note 112, at 485.

128. Alexis Hoffkling, et al., *From Erasure to Opportunity: A Qualitative Study of the Experiences of Transgender Men Around Pregnancy and Recommendations for Providers*, 17 *BMC PREGNANCY & CHILDBIRTH* 7, 12 (2017).

129. Guy Trebay, *He’s Pregnant. You’re Speechless.*, N.Y. TIMES (June 22, 2008), <https://www.nytimes.com/2008/06/22/fashion/22pregnant.html> [<https://perma.cc/QCK7-ST5X>].

want abortions . . . the men, women, and nonbinary people who may need care that defies every expectation of how bodies look, perform, and have sex.”¹³⁰ A pregnant man defies the expectations of what a male body does by functioning like a female body. Pregnancy does not conform to someone’s masculine gender expression or male gender identity or what society imagines and accepts as a stereotypical man.

With either comparator, the transgender male employee can argue that they conform with neither the stereotypical behavior and appearance of a man nor woman. Their nonconformity would be the reason for the discrimination.

B. Nonbinary Pregnant Persons Fail to Conform With the Stereotype That Only Women Get Pregnant, Similar to Transgender Men

Like transgender men, nonbinary pregnant persons also fail to conform to the stereotype that only women get pregnant and the feminine stereotypes of pregnancy. “Nonbinary,” by its very definition, is nonconformance to the two-gender framework. Someone who is nonbinary might not identify as either a man or woman, or might identify as both, but have biologically female or male sex organs.¹³¹ In fact, nonbinary individuals assigned as female at birth are more likely than transgender men to keep their reproductive organs,¹³² and society is sure to see an increase in this different kind of pregnancy.

Nonbinary pregnant people disrupt the assumptions of pregnancy. A study conducted by Professor Olivia J. Fischer of the University of British Columbia had nonbinary individuals assigned female at birth discuss their experiences with pregnancy in a world that heavily genders the reproductive process.¹³³ In the study, participants were asked to describe their experiences at different stages of the pregnancy process: conception, pregnancy, birth, and parenthood.¹³⁴ The participants described how they failed to fit into the female pregnancy experience and expectations. Overwhelmingly, these individuals framed their experiences in terms of

130. Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 224 (2016).

131. Note, nonbinary is not an exclusive term for people “whose gender is not of a woman or man.” Other terms include agender, bigender, genderqueer, among others, “with nonbinary being one of the most common.” Heidi Moseon, et al., *The Imperative for Transgender and Gender Nonbinary Inclusion: Beyond Women’s Health*, 135 OBSTETRICS & GYNECOLOGY, 1059, 1060 (2020).

132. See Olivia J. Fischer, *Non-Binary Reproduction: Stories of Conception, Pregnancy, and Birth*, 22 INT’L J. TRANSGENDER HEALTH, 77, 77–78 (2021) (noting nonbinary individuals are more likely to keep the reproductive organs that match their sex assigned at birth because nonbinary individuals assigned female at birth “are less likely to seek medical procedures.”).

133. *Id.* at 77.

134. *Id.* at 77, 79.

“how the gendered nature of being pregnant impacted their experiences” of pregnancy.¹³⁵ When it came to conception, one participant stated that many of the problems they experienced socially were “about how other people see you when you’re pregnant . . . as a woman.”¹³⁶ They went on to describe transitioning after conception as “only ever really a circus . . . because at that point it’s like you’re invalidating societ[y’s] ideas about gender.”¹³⁷ A separate participant advised that they were misgendered by their transgender friends, who “would slip up and gender me female” because “it’s just such a deeply subconscious association for so many people.”¹³⁸

When discussing pregnancy, participants voiced concern that they had to present as more feminine in order to conform with expectations, mainly when receiving medical care.¹³⁹ Similar to the experiences of transgender men, nonbinary people are often misgendered by their medical providers who assume they are female. To combat this, nonbinary people sometimes choose to present as more female than they would otherwise in order to get “better” reproductive health care.¹⁴⁰ A participant from another study, Braiden, serves as an example. Braiden was twenty-six when they got pregnant with their son, Owen.¹⁴¹ When Braiden went in to the “Women’s Hospital” at Inova Fairfax medical campus, the nurse called out, “Miss Schirtzinger?” in the waiting room.¹⁴² Braiden replied yes, even though they had repeatedly asked the doctor’s office staff to call them “B” instead of Brittany, their dead name.¹⁴³ Braiden was tired of correcting the office staff and had resigned to being referred to as “Brittany,” “mom,” “Miss Schirtzinger.”¹⁴⁴ If medical professionals make these assumptions, even after being corrected or instructed, what’s to say an employer would be any different?

Although the experience of nonbinary pregnant people in the workplace has yet to be studied, given the discrimination nonbinary parents experience in the healthcare context, it is reasonable to assume they would experience discrimination in their employment because of

135. *Id.* at 77, 81.

136. *Id.* at 77, 80.

137. *Id.*

138. *Id.* at 77, 82.

139. *Id.*

140. *Id.*

141. Samantha Schmidt, *A Mother, But Not a Woman*, WASH. POST (Aug. 16, 2019), <https://www.washingtonpost.com/dc-md-va/2019/08/16/non-binary-pregnant-navigating-most-gendered-role-all-motherhood/> [<https://perma.cc/GVL2-VN48>].

142. *Id.*

143. *Id.*

144. *Id.*

their nonconforming pregnancy. In the context of a nonbinary pregnant person experiencing discrimination in the workplace, sex stereotyping may provide an avenue for legal remedy for workplace discrimination because nonbinary people's nonconformity or identity with either sex disrupts the notion that pregnancy is a solely female condition.

1. A Non-Binary Pregnant Employee's Comparators

Comparator evidence is as important to nonbinary employees as transgender employees in succeeding in a discrimination claim under the PDA. Given the gendered nature of pregnancy, it is likely an employer would compare the nonbinary pregnant employee to a pregnant woman—the stereotypical pregnant person. Under this theory, a nonbinary pregnant person who is discriminated against on the basis of their pregnancy can argue they are being impermissibly held to a sex stereotype by using a female pregnant employee as a comparator, if available, in addition to any comments made by the employer regarding the employee's pregnancy and/or gender identity.

Take K, a hypothetical nonbinary pregnant employee at the same Amazon warehouse as Shaun Simmons. K, like Simmons, tells their supervisor that they are pregnant only to have that supervisor tell K's coworkers, violating their confidentiality. Their coworkers start to harass K and make comments to K on their way to the bathroom, which is already a fraught place for someone who does not conform with a person who typically uses a men's or a women's restroom. Perhaps K uses the women's room in an effort to conform more with feminine expectations of them during their pregnancy. When they twice report the harassment to human resources, K is placed on leave. Then K gets moved to another facility to be an "item picker," lifting heavy bags of dog food, which puts a strain on their abdomen. They, like Simmons, go to their supervisor with support from their doctor to ask for pregnancy accommodations to avoid heavy lifting for the remainder of their pregnancy. K, like Simmons, is denied the accommodation and placed on unpaid leave until they give birth.

K, like Simmons, can use a female pregnant employee as a comparator to argue that they were treated differently than similarly situated cisgender women. If an employer provides pregnancy accommodation for a cisgender woman but not K, the employer is discriminating against K based on their failure to conform to the sex stereotype that only feminine-presenting, female-identifying persons get pregnant. If K identified as a female, their employer may not have discriminated against them on the basis of their pregnancy, and they may not have experienced harassment at work. The employer is not tolerating behavior or characteristics it would

tolerate in a pregnant employee who presented femininely and held themselves out to the world as a woman.

K's, and non-fictitious nonbinary employees', failure to conform with stereotypical ideas of gender means they will fail to conform with stereotypical ideas of pregnancy. To hold a nonbinary employee to the stereotype that only women get pregnant discriminates against nonbinary employees based on their nonconformity with that stereotype. The PDA was intended to combat pervasive stereotypes surrounding pregnancy and a child-bearer's family role. To combat those stereotypes, the PDA must be applied to all who get pregnant.

III. THE RATIONALES FOR THE PDA APPLY EQUALLY TO TRANSGENDER PREGNANT MEN AND NONBINARY PREGNANT PERSONS

The PDA was enacted to combat assumptions and stereotypes of a woman's role in the workforce—that a pregnant woman would leave the workforce upon starting a family, be less dedicated to her work, and less capable of performing her job during pregnancy. The reasons motivating the PDA apply equally to transgender and nonbinary employees as they do cisgender women, warranting the expansion of PDA protection to transgender and nonbinary employees.

The PDA works against employer stereotypes around the behaviors and needs of pregnant women. The stereotypes about childbearing and child-rearing have been articulated as roles of cisgender women, but they apply equally to transgender men and nonbinary individuals who become parents. These stereotypes include assumptions about the pregnant person's abilities when they are pregnant, like having “baby brain,”¹⁴⁵ having limited physical capacity, taking time off for medical appointments, taking time off to give birth and recover from giving birth,¹⁴⁶ taking on family responsibility at the expense of their dedication

145. “Baby brain” refers to supposed cognitive changes pregnant people experience during their pregnancy, which fuel “the existence and promotion of negative stereotypes about pregnant women, such as that they ‘are warm but incapable’ or ‘incompetent throughout pregnancy.’” Madeleine Pownall, *The Effects of Activating a “Baby Brain” Stereotype on Women’s Cognitive Functioning*, J. APPLIED SOC. PSYCH. 809, 810 (2021).

146. See Joan C. Williams & Stephanie Bornstein, *The Evolution of “FRED”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L. J. 1311, 1329–30 (2008) (noting that “women who use family-friendly policies at work encounter stigma that leads to lower wage rates” and “stigma associated with the use of flexible schedules.”).

to work,¹⁴⁷ and leaving the workforce altogether.¹⁴⁸ When a cisgender female employee is pregnant, their employer will make assumptions about her dedication to their work and that after she has her child, her primary responsibility and priority will be at home, not work.¹⁴⁹ This reflects what has been coined the “maternal wall bias”—a kind of workplace discrimination where “colleagues view mothers—or pregnant women—as less competent and less committed to their jobs.”¹⁵⁰ Mothers are “overlooked” because employers assume they lack the desire or dedication to commit to their work in favor of being at home with their children.¹⁵¹

There is little research on how these same assumptions apply to transgender or nonbinary parents, but common sense dictates they would also be subject to such stereotypes and maybe to a heightened degree. A pregnant transgender man and nonbinary pregnant person experience many of the same physical changes as a pregnant woman and require much of the same medical care during their pregnancy and after. They experience secondary conditions like back pain, have medical appointments associated with their pregnancy, and will need to take off work immediately following the birth of their child. While the same assumptions regarding a woman’s “traditional” role in the family might not apply as neatly, an employer could still assume that any employee who gives birth would be more consumed with child-rearing and family life after the birth. Such stereotyping may be compounded by employers misgendering pregnant employees and identifying them as female because of their pregnancy, just as nonbinary and transgender pregnant persons experience with healthcare. Discriminating on the basis of these assumptions violates the PDA, since an employer cannot discriminate on the basis of pregnancy or childbirth.¹⁵²

147. *See id.* at 1328 (discussing cases “where an employer denied a female employee a promotion or desirable assignments based on the assumption that she would be unwilling or unable to relocate or to travel for work because she had young children . . .”).

148. *See* Carly Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1366 (2012).

149. *See Hibbs*, 538 U.S. at 736 (“Historically, denial or curtailment of women’s employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women’s roles has in turn justified discrimination against women when they are mothers or mothers-to-be.” (quoting The Parental and Medical Leave Act of 1986 Joint Hearing before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the Committee on Education and Labor, 99th Cong., 2d Sess., 100 (1986))).

150. Lesley Evans Odgen, *Working Mothers Face a ‘Wall’ of Bias—But There Are Ways to Push Back*, SCIENCE.ORG (Apr. 10, 2019), <https://www.science.org/content/article/working-mothers-face-wall-bias-there-are-ways-push-back> [<https://perma.cc/739P-72Z4>].

151. *Id.*

152. 42 U.S.C. § 2000e(k).

Also similar to female pregnancies, transgender men and nonbinary individuals experience secondary conditions as the result of their pregnancies. Put differently, pregnancy isn't the only physical change transgender men and nonbinary individuals experience. In a small study—one of the only studies on transgender male experience with pregnancy—twelve percent of transgender men experienced hypertension, ten percent had preterm labor, ten percent had placental abruption, and seven percent suffered from anemia during their pregnancies.¹⁵³ In addition to these conditions, there are conditions unique to the transgender and nonbinary pregnancy experience, mostly gender dysphoria, sometimes combined with postpartum depression.¹⁵⁴ Gender dysphoria is defined as “distress, discomfort, and discordance that many but not all trans people feel with relation to their body or gender presentation being incongruent with the sex or gender they see themselves as.”¹⁵⁵ Pregnancy brings a number of physical changes that are associated with femininity, changes that some transmasculine pregnant or non-female identifying persons do not welcome.¹⁵⁶ Gender dysphoria caused by pregnancy, as well as the other physical conditions mentioned, would be considered a condition related to pregnancy under the PDA, providing protection from discrimination.¹⁵⁷

Just as women were stereotyped about their impending motherhood and the family roles they would take on, transgender men and nonbinary individuals are stereotyped about their pregnancy and the “right” societal or legal role of a mother or father, even if someone is neither a mother nor a father. The concerns the U.S. Supreme Court had in *Hibbs*¹⁵⁸ regarding employers' assumptions about a mother's role in the workplace apply equally to transgender and nonbinary parents, compounded by the pre-existing discrimination transgender and nonbinary persons experience even when they do not have a baby bump.

153. Alexis D. Light, et al., *Transgender Men Who Experience Pregnancy After Female-to-Male Gender Transitioning*, 124 *OBSTETRICS GYNECOLOGY* 1120, 1123 (2014).

154. *Id.*; S.E. Smith, *For Nonbinary Parents, Giving Birth Can Be Especially Fraught*, *REWIRE NEWS GRP.* (Jan. 25, 2018, 8:58 AM) (discussing Zöe Williams's experience with gender dysphoria after giving birth as a gender nonconforming person).

155. Trevor K. MacDonald, et al., *Disrupting the Norms: Reproduction, Gender Identity, Gender Dysphoria, and Intersectionality*, 22 *INT'L J. TRANSGENDER HEALTH* 18, 21 (2021).

156. *See id.* at 21–22; Anna Malmquist, et al., *How Norms Concerning Maternity, Femininity and Cisgender Increase Stress Among Lesbians, Bisexual Women and Transgender People With a Fear of Childbirth*, 93 *MIDWIFERY* (2021), <https://www.sciencedirect.com/science/article/pii/S0266613820302606> [<https://perma.cc/845M-62E7>].

157. 42 U.S.C. § 2000e(k).

158. *See Hibbs*, 538 U.S. at 721.

CONCLUSION

We stereotype pregnancy like we stereotype partnerships, behaviors, appearances, and societal roles. By their very existence, transgender and nonbinary individuals do not conform to stereotypes about sex. A man can carry a baby to term. Someone who is neither a man nor a woman can deliver a baby. Shaun Simmons should have been able to get accommodations exempting him from lifting heavy bags of dog food during his pregnancy, just as a female pregnant employee would be able to receive. His failure to conform to what a “man” looks like in the workplace or what a pregnant woman looks like in the workplace should not justify discriminatory treatment. A pregnant man or person should be protected from what feels like almost inevitable discrimination on the basis of their nonconformity.

The transgender and nonbinary communities experience startling discrimination in almost every aspect of their lives, from housing¹⁵⁹ to medical care¹⁶⁰ and employment.¹⁶¹ The discrimination is piled on top of already extreme rates of domestic and sexual violence committed against transgender and nonbinary individuals.¹⁶² Federal antidiscrimination laws

159. See *U.S. Transgender Survey*, *supra* note 89 (reporting that almost “one-quarter (23%) of respondents experienced some form of housing discrimination in the past year.”); Human Rts. Campaign Found., *Understanding the Transgender Community*, HUM. RTS. CAMPAIGN (last visited Nov. 13, 2022), <https://www.hrc.org/resources/understanding-the-transgender-community> [<https://perma.cc/K7NV-H4FF>] [hereinafter *Understanding the Transgender Community*] (“Only 30% of women’s shelters are willing to house trans women.”). A report from the National Alliance to End Homelessness found that “[t]he largest percentage of shelterless, homeless adults based on gender were nonbinary or genderqueer” Lu Zhao, *Homeless Trans and Non-Binary People are Unsheltered At Higher Rates*, SOJOURNERS (July 3, 2019), <https://sojo.net/articles/homeless-trans-and-non-binary-people-are-unsheltered-higher-rates> [<https://perma.cc/ARV2-658D>]. To read the full report, see *Trans and Gender Non-Conforming Homelessness*, NAT’L ALLIANCE TO END HOMELESSNESS (last visited Dec. 4, 2022), <https://endhomelessness.org/trans-and-gender-non-conforming-homelessness/> [<https://perma.cc/76FE-J9AB>].

160. See Jo Yurcaba, *Nearly Half of Trans People Have Been Mistreated By Medical Providers, Report Finds*, NBC NEWS (Aug. 18, 2021, 3:52 AM PDT), <https://www.nbcnews.com/nbc-out/out-health-and-wellness/nearly-half-trans-people-mistreated-medical-providers-report-finds-rcna1695> [<https://perma.cc/D4NU-AWRX>] (“[N]early half of transgender people — and [sixty-eight percent] of transgender people of color — reported having experienced mistreatment at the hands of a medical provider”); Jack Harrison, et al., *A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey*, 2 LGBTQ POL’Y J. HARV. KENNEDY SCH. 13, 22 (2011-12) (survey respondents “reported being refused medical care due to bias at a rate of [fourteen percent]” and “are more likely to avoid care altogether when sick or injured because of the fear of discrimination . . .”).

161. See *supra* Part I.

162. According to the Human Rights Campaign, forty-seven percent “[of trans people] have been sexually assaulted in their lifetime and nearly one in ten were physically assaulted between 2014 and 2015.” *Understanding the Transgender Community*, *supra* note 159. Likewise, the Williams Institute found that thirty-two percent of those who identified as nonbinary,

do not provide explicit legal protections for these communities; expanding PDA protection for transgender and nonbinary pregnancies is a small step in the ever-present struggle of moving these communities out of the legal and societal shadows. By “unsexing pregnancy,” as Jessica Clarke puts it, we work to delink “gender identity from pregnancy,”¹⁶³ gender identity from discrimination, and parenthood from sex.

genderqueer, “have been physically assaulted due to bias” and fifteen percent reported “having been sexually assaulted due to bias” Jack Harrison, et al., *A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey*, 2 LGBTQ POL’Y J. HARV. KENNEDY SCH. 13, 23 (2011–12).

163. Jessica Clarke, *Pregnant People?*, 119 COLUM. L. REV. FORUM 173, 179 (2019).