SUPREME COURT OF NEW JERSEY
NO. 084022 (A-68-19)

KATHLEEN J. DELANOY, Plaintiff-Respondent, v. **TOWNSHIP OF OCEAN, ANDREW BRANNEN, STEVEN PETERS, NEIL INGENITO, WILLIAM LARKIN, CHRISTOPHER SICILIANO, W. MICHAEL EVENS, WILLIAM GAROFALO AND DONNA SCHEPIGA**, Defendants-Petitioners.	**Civil Action** **On Appeal from the Superior Court of New Jersey, Appellate Division** App. Div. Docket No. A-2899-17T4 <u>Sat Below</u>: Hon. Jack M. Sabatino, P.J.A.D. Hon. Thomas W. Summers, J.A.D. Hon. Richard J. Geiger, J.A.D.

BRIEF AND APPENDIX OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, A BETTER BALANCE, GARDEN STATE EQUALITY, GLOUCESTER COUNTY NAACP, NATIONAL COUNCIL OF JEWISH WOMEN, ESSEX COUNTY SECTION, NATIONAL ORGANIZATION FOR WOMEN OF NEW JERSEY, NEW JERSEY ABORTION ACCESS FUND, PLANNED PARENTHOOD ACTION FUND OF NEW JERSEY, SPEAKING OF BIRTH, STANTON STRONG INC., WOMEN FOR PROGRESS

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Interest of *Amici*

Proposed *amici* are twelve organizations that work with a broad range of New Jersey residents on issues that promote gender equity and reproductive health, rights, and justice through policy change and advocacy. As further set forth in the certification accompanying this brief, *amici* support the goals of the New Jersey Pregnant Workers Fairness Act, and advocate to ensure that people are empowered to make decisions about their pregnancies and families free from discrimination.

The organizations signing on to the brief include: the American Civil Liberties Union ("ACLU"); the American Civil Liberties Union of New Jersey; A Better Balance, Garden State Equality; Gloucester County NAACP; National Council of Jewish Women, Essex County Section; National Organization for Women of New Jersey; New Jersey Abortion Access Fund; Planned Parenthood Action Fund of New Jersey; Speaking of Birth; Stanton Strong Inc; and Women for Progress.

Preliminary Statement

The New Jersey Pregnant Workers Fairness Act ("NJPWFA") was enacted to expand New Jersey's anti-discrimination protections in order to remedy the persistent and significant harms that pregnant workers faced from employers unwilling to provide them the temporary job adjustments they needed to continue

working safely. The NJPWFA amended the New Jersey Law Against Discrimination ("LAD") to address shortcomings in federal law by requiring that employers affirmatively accommodate pregnancy, thereby ensuring that pregnant workers are not forced to leave the workplace and risk their economic security in order to maintain a healthy pregnancy. (Point 1)

The Defendants-Petitioners created a separate policy for pregnant officers that treated them differently than other officers eligible for light duty and required Plaintiff to use up her accrued paid time off in advance of her due date. Even under federal law, which lacks NJPWFA's affirmative accommodation mandate, such, a policy arguably would be unlawful. But coupled with the mandate, as well as the directive that the accommodation be "reasonable" and not result in a "penalty" against pregnant workers, Defendants-Petitioners disparate policy unquestionably violates the NJPWFA. (Point II.A-C).

Moreover, because preventing discrimination is New Jersey's unambiguous public policy, municipalities and other public employers should be held to the highest standards when assessing the burden a given accommodation places on an employer. In line with this policy, the LAD should prevent police officers and other public employees from being treated differently solely because they work for a smaller political subdivision. (Point II.D).

Finally, the NJPWFA and the protections it provides to pregnant police officers is critical to addressing the extreme gender disparities in New Jersey law enforcement agencies. Plaintiff's experience as one of three women officers in a department of more than fifty is not an aberration and she is one of many New Jersey officers who have experienced pregnancy discrimination. The NJPWFA should be read expansively to ensure that officers – as well as any other worker in New Jersey whose pregnancy necessitates some modification of their job duties – can trust that they will not be forced to choose between their job and a healthy pregnancy. (Point III).

Statement of Facts/Procedural History

Amici accept the facts and procedural history set forth by the Appellate Division in its opinion below. *Delanoy v. Twp. of Ocean*, 462 N.J. Super. 78 (App. Div. 2020).

Argument

The purpose of the New Jersey Law Against Discrimination is "nothing less than the eradication 'of the cancer of discrimination.'" *Fuchilla v. Layman*, 109 N.J. 319, 334 (1988) (quoting *Jackson v. Concord Co*., 54 N.J. 113, 124 (1969)). [1]

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[1] This year marks the 75th anniversary of the New Jersey Law Against Discrimination. Signed into law in April 1945, it became the first modern civil rights law to take effect. Press Release, *AG Grewal: On the 75th Anniversary of the New Jersey Law Against Discrimination, Our Division on Civil Rights Is More*

In the decades since its enactment, the LAD has been amended dozens of times "as part of a gradual legislative response directed toward eliminating forms of discrimination not theretofore banned by statute." *Peper v. Princeton Univ. Bd. of Trs.*, 77 N.J. 55, 68 (1978). The NJPWFA is just one recent example of our state being on the forefront of expanding the reach and protections offered by the LAD.[2]

Through the LAD and its amendments, the New Jersey legislature has made clear time and again that New Jersey has a strong public policy against discrimination because it "menaces the institutions and foundation of a free democratic State." N.J.S.A. 10:5-3. This Court has pointed out that "prevention of unlawful discrimination vindicates not only the rights of individuals but also the vital interests of the State." *David v. Vesta Co.*, 45 N.J. 301, 327 (1965) (describing such discrimination as "a public wrong and not merely the basis of a private grievance"). To ensure that these twin harms are adequately remedied, the Court has instructed that the LAD be "construed with that high degree of liberality which comports with the preeminent social significance of its purposes and objects." *Andersen v. Exxon Co.*, 89 N.J. 483, 495 (1982) (internal citation and quotation

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Critical Than Ever, N.J. Off. of the Att'y Gen. (Apr. 16, 2020), https://www.nj.gov/oag/newsreleases20/pr20200416a.html

[2] New Jersey was also a national leader on protecting people based sexual orientation (fifth state in 1992), Daniel LeDuc, *Gays Get Florio's Support*, Philadelphia Inquirer, Jan. 20, 1992 at B.1, and gender identity (ninth state in 2006).

marks omitted); *see also Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 13 (2002) (holding that the overarching goals of the LAD are to be achieved through a liberal construction of its provisions); *Lehmann v. Toys 'R' Us*, 132 N.J. 587, 609 (1993) (rejecting narrow application of the LAD "[g]iven the breadth of individual and societal harms that flow from discrimination and harassment").

This history, and the generous rules of construction that have emerged from it, should inform this Court's evaluation of the NJPWFA.

I. The New Jersey Pregnant Workers Fairness Act Was Intended to Ensure that Pregnant Workers Remain in the Workforce and Have Healthy Pregnancies.

Like the 29 other states[3] that have a pregnant worker fairness statute on the books, New Jersey enacted the NJPWFA to strengthen protections for pregnant workers who need temporary "accommodations" to keep working safely. Such laws fill critical gaps in coverage caused by negative precedent under the federal Pregnancy Discrimination Act ("PDA") which has resulted in far too many employers denying pregnant workers the accommodations they need, even when routinely providing them to non-pregnant comparators.

[3] *See* Chris Marr, *Tennessee Enacts Pregnant Worker Accommodation Law*, Bloomberg Law (June 23, 2020), https://news.bloomberglaw.com/daily-labor-report/tennessee-enacts-pregnant-worker-accommodations-law.

As discussed further below, the Appellate Division correctly held that Defendants-Petitioners' policy facially violates the NJPWFA. The arguments to the contrary put forward by Defendants-Petitioners are unavailing; indeed some even are reminiscent of employer arguments traditionally deployed under the PDA, which lacks the NJPWFA's express protection for accommodation. In so doing, Defendants-Petitioners seek to render the NJPWFA as a second-tier civil rights statute – a favor granted to pregnant workers that demands a "trade-off" – a view that is wholly antithetical to the statute's unequivocal text and expansive purpose and should be rejected.

A. The NJPWFA fills critical gaps in federal law created by narrow judicial interpretations of the Pregnancy Discrimination Act.

Congress enacted the Pregnancy Discrimination Act ("PDA") in 1978 to dismantle the stereotype that pregnant women's labor force participation is contingent, temporary, and dispensable, and to outlaw the employer policies based on that assumption.[4] The statute comprises two clauses: First, it makes explicit that discrimination "because of sex" includes discrimination "because of . . . pregnancy, childbirth, and related medical conditions," and second, it expressly

[4] *See, e.g.*, Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 *Harv. C.R.-C.L. L. Rev*. 415, 484 (2011); Joanna Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 *Geo. L.J.* 567 (2010).

mandates that pregnant workers "be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." *Id.* Accordingly, the PDA offers only a comparative right of accommodation: Did the employer accommodate non-pregnant workers, such as by offering light duty? If so, are those individuals "similar" enough to the pregnant worker that the employer is obligated to accommodate the pregnancy-related needs, too?

The PDA advanced women's workplace equality in myriad ways,[5] but in the context of pregnancy accommodation, beginning in the mid-1990s courts routinely ruled against women who brought such claims.[6] In one line of cases, courts ruled against pregnant workers who could not point to a non-pregnant peer treated better than they were; that is, if an employer did not accommodate non-pregnant workers, then it could treat pregnant workers equally poorly without running afoul of the

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[5] *See, e.g.*, Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as it Approaches Full Term*, 52 *Idaho L. Rev*. 825, 831-50 (2016).

[6] *Id.* at 850-52; Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 *Yale J.L. & Feminism* 15 (2009). Indeed, in 2014, the same year that New Jersey enacted the NJPWFA, one study estimated that as many as 250,000 women a year did not receive the accommodations they needed to remain on the job. National Partnership on Women and Families, *Listening to Mothers: The Experiences of Expecting and New Mothers in the Workplace* (Jan. 2014), http://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf.

PDA.[7] But, the most common fact pattern concerned an employer that maintained a policy of accommodating only employees whose impairments arose from on-the-job injuries – a definition that necessarily excluded pregnant workers. In most cases, courts determined that such workers were insufficiently "similar" to pregnant workers to warrant the "same" treatment.[8]

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[7] *See*, *e.g.*, *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 735-36, 738 (7th Cir. 1994) (affirming summary judgment against department store clerk fired for excessive tardiness due to morning sickness, because she could not identify any non-pregnant employee whose comparable lateness was excused; "The [PDA] does not . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . . Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees . . . .").

[8] *Compare Ensley-Gaines v. Runyon*, 100 F. 3d 1220, 1226 (6th Cir. 1996) (reversing summary judgment for employer, finding favorable treatment of employees with on-the-job injuries sufficient to satisfy fourth prong of *prima facie* case) *with Serednyj v. Beverly Healthcare, LLC*, 656 F. 3d 540, 547, 552 (7th Cir. 2011) (affirming summary judgment where policy accommodated only workers injured on the job or workers qualifying for accommodation under the ADA; plaintiff could not make out fourth prong); *Reeves v. Swift Transp. Co.*, 446 F. 3d 637, 640, 643 (6th Cir. 2006) (affirming summary judgment; reserving accommodations for employees with occupational injuries showed no intent to discriminate); *Spivey v. Beverly Enterprises, Inc.*, 196 F. 3d 1309, 1312, 1314 (11th Cir. 1999) (affirming summary judgment where on-the-job injuries accommodated; plaintiff neither was "qualified" nor could show she was treated less well than co-workers with impairments incurred off-the-job); *Urbano v. Continental Airlines, Inc.*, 138 F. 3d 204, 206, 208 (5th Cir. 1998) (same).

Additionally, with respect to lactating workers' need to pump breast milk at work, several courts even declined to find lactation a "medical condition" that is "related" to pregnancy under the PDA. *See*, *e.g.*, *Ames v. Nationwide Mutual*, No. 4:11-cv-00359, 2012 U.S. Dist. LEXIS 197045 (S.D. Iowa Oct. 16, 2012), *aff'd* 747 F.3d 509 (8th Cir. 2014); *Martinez v. NBC,* 49 F. Supp. 2d 305, 309-10 (S.D.N.Y. 1999); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869-70 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (table), No. 90-6259, 1991 U.S. App. LEXIS 30157 (6th Cir. 1991) (*per curiam*); *see also* Stephanie Bornstein, *Work,*

The Supreme Court's decision in *Young v. United Parcel Service, Inc.*, 575 U.S. 206 (2015), rejected such prohibitively narrow interpretations of the PDA's comparator requirement. It announced a new burden-shifting framework that lowered the evidentiary bar for plaintiffs in identifying more-favored comparators, and increased employers' burden to justify their denials of pregnancy accommodation. As the Court put it, the inquiry should be driven by both feasibility and fairness: "[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?" *Id.* at 231.

Since *Young*, courts' reflexive approval of employer policies favoring workers with occupational injuries has largely ended, and many have applied *Young*'s more generous evidentiary standards to the benefit of pregnant plaintiffs, as well as breastfeeding plaintiffs needing to pump at work.[9] But several other

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Family, and Discrimination at the Bottom of the Ladder, 19 Geo. J. on Poverty L. & Pol'y 1, 8, 11 (Winter 2012). And even when a landmark appellate decision rejected such precedent, it still stopped short of finding that the PDA required employers to *accommodate* lactating employees. *E.E.O.C. v. Houston Funding II Ltd.*, 717 F.3d 425, 429 n.6 (5th Cir. 2013).

Pursuant to *R.*1:36-3, *amici* include the unpublished opinions cited here in their Appendix (Aa01- Aa28). Counsel cites the opinions to illustrate the existence of particular fact patterns and knows of no contrary precedent.

[9] *See, e.g.*, *Durham v. Rural/Metro Corp.*, 955 F.3d 1279, 1286-87 (11th Cir. 2020); *Legg v. Ulster Cty.*, 820 F.3d 67, 74 (2d Cir. 2016) ; *Bray v. Town of Wake Forest*, No. 5:14-CV-276, U.S. Dist. LEXIS 44731, at *13-16 (E.D.N.C. Apr. 6, 2015); *Bonner-Gibson v. Genesis Eng'g Grp.*, No. 3:18-cv-298, U.S. Dist. LEXIS 137446, at *31 (M.D. Tenn. Aug. 14, 2019) (quoting *Huffman v. Speedway LLC*, 21 F. Supp. 3d 872, 877 (E.D. Mich. 2014)); *Brown v. Aria Health*, No. 17-1827, 2019 U.S. Dist. LEXIS 66266, at *14-16 (E.D. Pa. Apr. 17, 2019); *Boyne v. Town*

courts, from multiple circuits, continue to scrutinize the plaintiff's comparator evidence to a degree that contravenes *Young*, still deferring to employers' own definitions as to who is sufficiently "similar in the ability or inability to work" to pregnant workers.[10] Indeed, a recent review of post-*Young* precedent found that more than two-thirds of relevant court rulings since *Young* was handed down have resulted in adverse rulings against pregnant workers, including those denied accommodations.[11] News reports also confirm that some of the nation's largest employers still continue to refuse to extend even the most basic job modifications.[12]

& Country Pediatrics & Family Med., No. 3:15-CV-1455, 2017 U.S. Dist. LEXIS 17321, at *9-11 at *4 (D. Conn. Feb. 7, 2017); *Allen-Brown v. District of Columbia*, 174 F. Supp. 3d 463, 480 (D.D.C. 2016).

Pursuant to *R*.1:36-3, *amici* include the unpublished opinions cited here in their Appendix (Aa29-Aa77). Counsel cites the opinion to illustrate the existence of particular fact patterns and knows of no contrary precedent.

[10] *See*, *e.g.*, Joanna L. Grossman & Gillian Thomas, *Making Sure Pregnancy Works: Accommodation Claims after* Young v. United Parcel Service, Inc., 14 *Harv. L. & Pol'y Rev*. 301 (2020) (forthcoming); *cf*. Reva Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 *Wm. & Mary L. Rev*. 971 (2019).

[11] Dina Bakst, Elizabeth Gedmark, and Sarah Brafman, *Long Overdue: It is Time for the Federal Pregnant Workers Fairness Act*, A Better Balance (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf.

[12] *See*, *e.g*., Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. Times (Oct. 21, 2018), https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html; Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination is Rampant Inside America's Biggest Companies*, N.Y. Times (June 15, 2018), https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html.

The pregnant worker who is denied accommodation faces a Hobson's choice: continue working under conditions that violate their health provider's directives, or leave the job temporarily or permanently. Both of these alternatives harm women's health and equality. For women forced to stay on the job without accommodation, they face a wide range of negative outcomes, including miscarriage, preterm delivery, and low birth weight.[13] And for women coerced into taking unpaid leave or quitting altogether, a loss of income at a time of increased financial need can have catastrophic economic consequences. These occur in the immediate term – particularly in light of women's role as sole or primary breadwinner in over 60 percent of families, a figure that is even higher for women of color[14] – and over the course of a woman's life.[15]

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[13] *See generally* Wendy Chavkin, *Walking a Tightrope: Pregnancy, Parenting, and Work, in* Double Exposure: Women's Health Hazards on the Job and at Home 196, 200 (Wendy Chavkin ed., 1984); Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 *Stetson L. Rev*. 1, 3–8 (1995) (discussing scientific research about the maternal and fetal hazards in the workplace); D. Hollander, *Improving Work Situations During Pregnancy May Help Improve Outcome*, 32 *Int'l Fam. Plan. Persp*. 156, 156 (2006).

[14] *See, e.g.*, Sarah Jane Glynn, *Breadwinning Mothers Continue to be the U.S. Norm*, Center for American Progress (May 10, 2019), https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/.

[15] *See, e.g.*, Michelle Fox, *The 'Motherhood Penalty' is Real, and It Costs Women $16,000 a Year in Lost Wages*, CNBC.com (Mar. 25, 2019), https://www.cnbc.com/2019/03/25/the-motherhood-penalty-costs-women-16000-a-year-in-lost-wages.html.

The consequences of a failure to accommodate pregnancy are especially severe where, as here, the job in question is dangerous – and therefore, the need for accommodation is especially urgent[16] – and where the failure to accommodate may reinforce workforce sex segregation by causing women to exit fields in which they already were vastly underrepresented.[17]

Given these severe consequences, and given the mixed federal legal landscape both before and after *Young*, over the past decade a majority of states responded by enacting statutes that affirmatively mandate on-the-job accommodation of pregnancy. As discussed further below, New Jersey was not only one of the first to do so; the law it adopted also is one of the most expansive.

B. The NJPWFA is one of the most expansive laws of its kind.

Although 30 states now maintain a pregnancy accommodation statute of

[16] *See, e.g.*, Karen J. Kruger, *Pregnancy & Policing: Are They Compatible? Pushing the Legal Limits on Behalf of Equal Employment Opportunities*, 22 *Wis. Women's L.J.* 61, 70–71 (2007); Fabrice Czarnecki, *The Pregnant Officer*, 3 *Clinics Occupational & Envtl. Med.* 641 (2003) (citing hazards to pregnant police officers, including exposure to lead through contact with bullets, noise toxicity, and chemicals).

[17] Sex segregation in the workforce not only perpetuates stereotypes that certain jobs are inherently "women's work" or "men's work," but also has severe, systemic economic consequences. *See* Jessica Schieder & Elise Gould, *"Women's Work" and the Gender Pay Gap*, Economic Policy Institute (July 20, 2016), https://www.epi.org/publication/womens-work-and-the-gender-pay-gap-how-discrimination-societal-norms-and-other-forces-affect-womens-occupational-choices-and-their-pay/.

some kind, in early 2014, when New Jersey's law was enacted, that number stood at just six; moreover, some of those were extremely limited, applying only to public employers and/or merely mirroring the federal standard rather than imposing an affirmative right of accommodation, irrespective of the accommodation policies extended to non-pregnant workers.[18]

Though not explicitly mentioned in the LAD, claims for pregnancy discrimination under that statute had been recognized for decades. *See, e.g., Gerety v. Atlantic City Hilton Casino Resort,* 184 N.J. 391, 403 (2005) (explicitly holding that employers "may not discriminate against a female employee because she becomes pregnant"); *Rendine v. Pantzer*, 141 N.J. 292, 298 (1995) (affirming LAD liability for employer who terminated pregnant employees). Unfortunately, as was – and continues to be – the case in much of the country, existing legal protections were not sufficient to prevent unfair treatment of workers due to their pregnancies. With much public support and the backing of many advocates, Senate Bill 2995 was introduced on September 30, 2013. *See, e.g., Hearing on Senate Bill 2995 Before N.J. Senate Labor Comm.*, 215th Sess. (Nov. 7, 2013) (testimony of Ari Rosmarin, ACLU of New Jersey), https://www.aclu-nj.org/files/5713/8383/9960/2013_11_07_TestimonyS2995.pdf; New Jersey Senate Democrats, *Bill to Protect Pregnant Women from Discrimination in the*

[18] *See, e.g.,* Bakst, et al. *supra* note 11 at 30.

Workplace Gains Senate Approval, Nov. 18, 2013,

https://www.njsendems.org/bill-to-protect-pregnant-women-from-discrimination-in-the-workplace-gains-senate-approval/ (referring to the discriminatory treatment pregnant workers face in employment that forces them to choose between economic stability and their health); Emily Martin, *Law Would Ensure Fairness for Pregnant Workers*, Asbury Park Press, Jan. 10, 2014, at A14 (describing how employers across the country refuse to provide temporary accommodations for pregnant workers).

The NWJFA amended the LAD to address the wide range of pregnancy discrimination that workers experience. The bill, which passed the Senate unanimously and had only one dissenting vote in the Assembly, was signed by Governor Christie on January 17, 2014. *See* Martin, *Law Would Ensure Fairness*. In it, the Legislature used broad language to describe the scope of the discrimination targeted by the bill and the types of accommodations that would now be available to pregnant workers. *See generally*, P.L. 2013, c.220, https://www.njleg.state.nj.us/2012/Bills/PL13/220_.PDF).

The bill's opening line and definitions make clear its purpose to consider pregnancy broadly, including "childbirth, or medical conditions related to pregnancy or childbirth, including recovery from childbirth." *Id.*; *see also* N.J.S.A. 10:5-12(s) (which has since been amended to include breastfeeding via P.L. 2017

c.263). The Legislature explicitly stated its intent to ensure that pregnant workers not be forced to choose between a healthy pregnancy and a paycheck. N.J.S.A. 10:5-3.1(a) (noting that "pregnant women are vulnerable to discrimination in the workplace in New Jersey, as indicated in reports that women who request an accommodation . . . are being removed from their positions, placed on unpaid leave, or fired").[19] In addition to prohibiting pregnancy discrimination, then, the intention of the Legislature was to place new, additional, and affirmative

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[19] *Amici* observe that while the NJPWFA explicitly names women as those being vulnerable to pregnancy discrimination and afforded its protections, N.J.S.A. 10:5-3.1, -12(s), all genders are entitled to the full protections of the NJPWFA in accordance with the LAD's existing protections on the basis of gender identity. *See, e.g.,* N.J.S.A. 10:5-12(a). Some transgender men and non-binary people, like cisgender women, are also capable of becoming pregnant. *See, e.g.,* Heath Fogg Davis, *Sex-Classification Polices as Transgender Discrimination: An Intersectional Critique*, 12 Persp. on Pol. 45, 48 (2014) (rejecting the ability to become pregnant as relevant to classifying a person's sex because "some transgender men who have ovaries and uteruses can become pregnant, and some non-transgender women cannot become pregnant."); Julie Compton, *Trans Dads Tell Doctors: "You can be a man and have a baby,"* NBCNews.com (May 19, 2019), https://www.nbcnews.com/feature/nbc-out/trans-dads-tell-doctors-you-can-be-man-have-baby-n1006906 (debunking medical myth that transgender men and nonbinary people who take testosterone are effectively sterilized and noting the absence of data because medical systems do not track their pregnancies); *see also Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018) (providing gender identity terminology and defining cisgender as referring to "a person who identifies with the sex that person was determined to have at birth"). As New Jersey begins to modify its systems to recognize more than two genders, *see, e.g.,* N.J.S.A. 26:8-40.12 (authorizing birth certificates to include "undesignated/non-binary" gender marker in addition to "female" and "male"), *amici* respectfully request that the Court take the opportunity to clarify to the lower courts that pregnant workers include all genders.

obligations on employers to accommodate pregnant and postpartum workers to keep working. *Id.*; *see also* New Jersey Senate Democrats, *Bill to Protect Pregnant Women from Discrimination in the Workplace Gains Senate Approval*, (quoting sponsor Senator Weinberg as modeling the NJPWFA on the Americans with Disabilities Act and noting the benefits to employers when pregnant workers can continue in their jobs, including increased retention, morale, and productivity and reduction in training costs).

While in the Senate Labor Committee, the bill was amended to provide clarifying language about the remedies available to pregnant workers. Notably, the amendments put employers on notice that reasonable accommodations included "job restructuring or modified work schedules, and *temporary transfers to less strenuous or hazardous work*." Senate Labor Committee Statement to Senate, No. 2995, Nov. 7, 2013, https://repo.njstatelib.org/handle/10929.1/ 24717?show=full (emphasis added). The amendments also specified that employers who can demonstrate "undue hardship" on their business operations will not be required to provide an accommodation. *Id*. The amendments did not define when a burden becomes "undue," but instead provided a non-exhaustive list of factors to be considered. *Id*. Relevant to the matter at bar, the amendments make clear that the waivers of job requirements are only one factor in the hardship analysis and do not make the accommodation unreasonable. N.J.S.A. 10:5-12(s).

II. Defendants-Petitioners' Maternity Assignment Standard Operating Procedure Discriminates Against Pregnant Workers.

The disparate terms of Defendants-Petitioners' Maternity Assignment Standard Operating Procedure ("Maternity SOP") facially violate the LAD's requirements that pregnant workers receive "equal treatment," that the accommodation be "reasonable" and further, that the proffered accommodation not impose a "penalty." *Id*.

A. Defendants-Petitioners were obligated to accommodate Plaintiff-Respondent when she temporarily could not safely perform the essential functions of patrol officer.

As a threshold matter, Defendants-Petitioners' contention that they were not even obligated to accommodate Plaintiff-Respondent because she could not perform the "essential functions" of the job of police officer ignores both the NJWPFA's text – which approves "temporary transfers to less strenuous or hazardous work" and considers a waiver of essential functions as one factor in the undue burden analysis, N.J.S.A. 10:5-12(s) – and this Court's precedent in the disability context. While a permanent inability to perform police officer functions would not trigger a duty to accommodate, where, as here, the temporary transfer enables the employee to return to full duty and perform those functions, such accommodation is reasonable. *Raspa v. Office of Sheriff of County of Gloucester*, 191 N.J. 323, 340 (2007). Indeed, it is well-settled that if a temporary leave of

absence from the workplace altogether will enable the employee to return to full duty, such an accommodation can be reasonable, too. *See, e.g., Soules v. Mount Holiness Mem'l Park*, 354 N.J. Super. 569, 573-75 (App. Div. 2002).

The grave practical implications of Defendants-Petitioners' argument here cannot be ignored. If temporary reprieve from a job's essential functions is not approved under the NJPWFA, women working a wide swath of hazardous jobs – from law enforcement to firefighting to any job involving exposure to dangerous toxins[20] – will risk outright ejection from their jobs. The same fate would await women experiencing pregnancy complications that inhibit their ability to perform a wide variety of strenuous tasks, from prolonged standing to repetitive lifting.[21] This is precisely the result the NJPWFA is meant to avoid. The statute recognizes the twin realities that women comprise more half the workforce,[22] and also, that roughly 85 percent of them will become pregnant at least once in their lives.[23] It

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[20] The Comm. on Obstetric Practice, *Committee Opinion: Employment Considerations During Pregnancy and the Post-Partum Period*, *American College of Obstetricians & Gynecologists*, No. 733 (Apr. 2018), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period.

[21] *Id.*

[22] Amara Omeokwe, *Women Overtake Men as Majority of U.S. Workforce*, Wall Street Journal (Jan. 10, 2020), https://www.wsj.com/articles/women-overtake-men-as-majority-of-u-s-workforce-11578670615.

[23] *Fertility of Women in the United States: 2016*, Table 6. Completed Fertility for Women age 40 to 50 Years Old – Selected Characteristics: June 2016, U.S. Census

treats pregnancy for what it is – a normal condition of employment – and demands that employers do the same.

B. The Maternity Assignment SOP subjects pregnant officers to "unequal treatment" as compared to officers accommodated under the Light/Modified Duty SOP.

The NJPWFA's equal treatment mandate mirrors the PDA's requirement that pregnant workers be treated the "same" as others similarly situated. That phrase cannot be read in isolation, but instead, must be read in concert with the statute's other directive, *i.e.,* that, "in addition," employers "shall make available" reasonable accommodations – an express requirement not contained in the PDA. N.J.S.A. 10:5-12(s).

Where, as here, the employer has taken the step of affording accommodation to *all* employees – *i.e.,* by implementing a Light/Modified Duty SOP in addition to the Maternity Assignment SOP – it may not afford accommodations to the pregnant officers on lesser terms.[24] That the Light/Modified Duty SOP's exemption from the loss-of-leave-time provision is discretionary rather than

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Bureau (May 4, 2017) https://www.census.gov/data/tables/2016/demo/fertility/women-fertility.html#par_list_62.

[24] The fact that Defendants-Petitioners amended the Light/Modified Duty SOP in September 2016 to eliminate the waiver provision, does not diminish the importance of this Court's affirming what constitutes "equal treatment" under the NJPWFA. Moreover, even with such an amendment, the Maternity Assignment SOP still violates the statute's provisions requiring "reasonable accommodation" and prohibiting a "penalty" for workers who avail themselves of the NJPWFA's protections, as discussed further *infra*.

universal does not render it a "neutral" policy. Aside from the fact that Plaintiff-Respondent has identified two individuals who in fact benefited from the discretionary exemption, even if she had not, under the plain terms of the policy, a pregnant officer *never* will have the opportunity to seek, let alone receive that benefit. For this reason, the Maternity Assignment SOP arguably would not even satisfy the PDA, in that the two policies are facially not the "same." *See Legg*, 820 F.3d at 76 (employer county jail's policy of providing light duty to correctional officers injured on the job contributed to triable issue of pretext, even where evidence unclear as to how many non-pregnant officers had benefited from the policy; "Although it is unclear from the record whether the County accommodated a large percentage of non-pregnant employees in practice, they at least were eligible. By contrast, as one would expect, the County failed to accommodate 100% of its pregnant employees.").

C. The Maternity SOP is not a "reasonable accommodation" because it demands pregnant officers incur a "penalty" for utilizing it.

Demanding that pregnant workers deplete their accrued leave before being permitted to continue to work for Defendants-Petitioners is indisputably a "penalty," and therefore does not qualify as a "reasonable accommodation." Each hour of paid leave used up during the months leading up to an officer's due date is one fewer hour of paid leave available to that officer when she is at home recovering from childbirth. In this way, Defendants-Petitioners' Maternity

Assignment SOP helps assure that pregnancy will, in fact, result in a loss of income – a result wholly at odds with the NJWPFA's purpose. Moreover, pregnant officers are just as susceptible as others to injuries and illnesses that may require time away from work to recover. If an officer has been forced to deplete her accrued paid leave during pregnancy, such leave, too, will be unpaid.

Defendants-Petitioners are advancing an argument that the Supreme Court rejected more than four decades ago, even before enactment of the PDA. In *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), the Court considered an employer's policy of erasing a woman's accrued seniority when she took a leave of absence to give birth. It concluded that such a policy violated Title VII of the Civil Rights Act of 1964 by both depriving pregnant employees of "employment opportunities" and "adversely affect[ing] [their] status as an employee." *Id.* at 141 (quoting 42 U.S.C. § 2000e-2(a)(2)) ("It is apparent from the previous recitation of the events which occurred following respondent's return from pregnancy leave that petitioner's policy denied her specific employment opportunities that she otherwise would have obtained. . . . [P]etitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer.").[25]

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[25] After rejecting the employer's seniority policy, the Court went on to approve its policy of withholding sick leave pay from workers absent due to pregnancy, while paying such benefits to workers absent due to a wide range of other health

Defendants-Petitioners' assertion that they are entitled to ask pregnant officers to sacrifice their accrued leave during accommodation as a "trade-off" for the loss of their patrol services – purportedly on behalf of New Jersey's taxpayers – reflects precisely the sort of "archaic or stereotypical notions about pregnancy and the abilities of pregnant workers" that the NJPWFA, and the PDA before it, disavowed. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987). Defendants-Petitioners fall short of stating outright that pregnant officers should be grateful to have a paycheck during their temporary period of limitation, but that implication is clear from their submission.

The Supreme Court long ago recognized that state laws that favor pregnancy over other physical limitations are acceptable, even necessary, tools to overcome the barrier it poses to economic equality. More than 30 years ago in *Cal. Fed.*, the Supreme Court approved California's statute requiring employers to provide pregnant workers with up to four months of job-protected leave, at a time when neither state nor federal law provided such protection for others. 479 U.S. at 292. In rejecting a challenge to the statute as discriminatory against non-pregnant

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conditions, relying on its recent decision in *General Electric Corp. v. Gilbert*, 429 U.S. 125 (1976). *Satty*, 434 U.S. at 146 (citing *Gilbert*). Like *Gilbert*, however, this portion of the *Satty* holding was superseded by the enactment of the PDA. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) ("When Congress amended Title VII in 1978 [by passing the PDA], it unambiguously expressed its disapproval of both the holding and reasoning of the Court in the *Gilbert* decision.").

workers, the Court approved expansive state action that "takes pregnancy into account," *id*. at 289, concluding that "Congress intended the PDA to be a 'floor beneath which [protections for pregnant workers] may not drop – not a ceiling above which they may not rise." *Id*. at 285 (internal citation omitted).

Defendants-Petitioners' contention that sacrificing accrued paid leave is an appropriate price for pregnant officers to pay ignores the Legislature's intention that pregnancy should not place workers in a worse position than they were in prior to having a baby. Fulfilling that legislative purpose is not a favor to be repaid.

D. Under the "undue hardship" standard, public employees should not have access to inferior accommodations because of the size of the political subdivision that employs them.

Because preventing and eradicating discrimination is New Jersey's unequivocal public policy, the State and its political subdivisions should be held to the highest standards in upholding and modeling anti-discriminatory practices. As the Court has explained, "[e]mployment discrimination is not just a matter between employer and employee. The public interest in a discrimination-free work place infuses the inquiry." *Fuchilla*, 109 N.J. at 335. This public interest is at its apex when the employer is a public entity.

To that end, when a local government take the position that accommodating a pregnant worker is an "undue hardship," courts should place "size" and related factors outlined in N.J.S.A. 10:5-12(s) into the appropriate context. That is, local

governments are political subdivisions of the State and their specific headcount or the size of their budget should not dictate the outcome of whether a worker's accommodation is "reasonable" under the NJPWFA. As the Court is aware, New Jersey has many layers of local government. With 565 municipalities, 21 counties, and more than 600 school boards, plus various authorities, boards, and commissions, New Jersey's public workers are employed by a wide variety of public entities.[26] With the state's history of resistance to sharing services or consolidating,[27] local governments should not be able to undermine the State's public policy of supporting pregnant workers by comparing their own budgets to those of larger entities. The LAD's commandment for a liberal construction requires that all of the state's political subdivisions accommodate their pregnant workers similarly and not seek to shirk responsibilities by pointing to their budgets or department sizes. Simply put, a pregnant police officer in Seaside Park in need of the same job modifications as one in Jersey City should not enjoy fewer statutory protections solely because she works for a smaller community.

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[26] For decades, New Jersey policymakers have recognized that the volume of local government has created "duplication and inefficiency" as well as "administrative redundancy." Ron Marisco, *Sharing Services Has Saved Money for NJ Local Governments: Wall Street Analysis*, NJ Spotlight (Dec. 20, 2019), https://www.njspotlight.com/2019/12/sharing-services-has-saved-money-for-nj-local-governments-wall-street-analysis/ (quoting the 1994 outgoing address of then-Governor Florio who advocated for regionalization).
[27] *Id*.

The LAD can no longer countenance public employers that place pregnant police officers in the untenable position of choosing between their livelihood and their health. This Court should make clear that when a pregnant officer's health provider has recommend modified job duties, police departments are required to provide them. While a municipality may incur additional expenses related to these accommodations, they are expenses that can be anticipated and budgeted for, just as municipalities can anticipate other commitments and obligations to its workforce, *e.g.,* accommodating modified assignments for officers who experience an injury while on duty.

III. The NJPWFA is a Tool to Combat Extreme Gender Disparities in New Jersey Police Departments.

The broad remedial aims of the LAD and the NJPWFA are particularly important in the context of professions that historically have excluded women from their ranks. As discussed below, in New Jersey police departments, the disparities are sharp, recruitment and training standards have regressed, and the work environment can be difficult. If women officers manage to make it through these hurdles, the NJPWFA provides them assurances that their employers will respect their health and economic stability during and following their pregnancies – and further, that officers will not be pushed out of a field into which they only have begun to make inroads.

As the Appellate Division noted, Plaintiff was one of three women in a department of more than 50 patrol officers. *Delanoy*, 462 N.J. Super. at 84. A department comprised of six percent women is staggeringly low, considering that women make up more than half of the New Jersey's population and participate in the work force at a rate of 60 percent. U.S. Census Bureau, *Quick Facts*, July 1, 2019, https://www.census.gov/quickfacts/NJ. The Ocean Township Police Department's low number of women officers (six percent) proves even lower when placed in a statewide context: women comprise only ten percent of New Jersey's police officers. *See* Unif. Crime Reporting, State of N.J., Uniform Crime Report 174 (2016). Yet, it is unfortunately not an outlier: in 2016, one-third of police departments in New Jersey had no women officers at all. *See* Andrew Ford, *NJ Police Tests Fail Women Recruits. Here's How It Hurts Your Safety and Your Wallet*, Asbury Park Press (Feb. 25, 2020), https://www.app.com/in-depth/news/investigations/2019/07/29/new-jersey-failing-its-women-police-recruits/1819867001. When comparing the percentage of women in the law enforcement profession, New Jersey ranks behind 31 states and the District of Columbia. *Id*.

The number of women police officers in New Jersey falls below the low bar set nationally. Despite legislative efforts to encourage the participation of women in the workforce, the rate of female sworn officers in U.S. law enforcement has

stagnated at the extraordinarily low rate of approximately 11–12 percent. *See* Federal Bureau of Investigation, *Crime in the U.S. 2002* at 322-23 (Oct. 27, 2003), https://ucr.fbi.gov/crime-in-the-u.s/2002/02sec6.pdf; National Institute of Justice, Women in Policing: Breaking Barriers and Blazing a Path 3 (2019), https://www.ncjrs.gov/pdffiles1/nij/252963.pdf ("[T]he percentage of women in policing has remained relatively stagnant over the past 30 years . . . ."). The presence of women among positions of leadership is even more meager: fewer than 10 percent of first-line supervisory and 3 percent of chief-level positions are filled by women. National Institute of Justice, *supra*, at iii n.2. Experts believe there is little reason to see improvement on the horizon. Christina Asquith, *Why Aren't U.S. Police Departments Recruiting More Women?*, The Atlantic (Aug. 30, 2016), https://www.theatlantic.com/politics/archive/2016/08/police-departments-women-officers/497963 (quoting the vice president of the International Association of Women Police Officers belief that "[t]here's no energy about doing anything to recruit women or show any effort to do your best to recruit women").

As New Jersey continues to struggle with recruiting and retaining racially and ethnically diverse officers, Kate King, *N.J. Struggles for Diversity in Police,* Wall Street Journal, Apr. 5, 2016, at A.15, it must also contend with its troubling results in recruiting women officers. New Jersey's management of police academies recently has turned back the clock on women's participation in policing

through troubling recruitment practices. From 2009 through 2014, only two to four percent of women failed physical fitness tests. Andrew Ford, *NJ Police Tests Fail Women Recruits. Here's How It Hurts Your Safety and Your Wallet*. After New Jersey instituted a change in 2017 cutting the amount of time recruits have to improve test scores from five months to only two to three weeks, *31 percent of women failed*. *Id*.

Through the affirmative accommodations required by NJPWFA, pregnant law enforcement officers can continue in their career paths without the distraction, or derailment, of discrimination. Unfortunately, Officer Delanoy's experiences with both of her pregnancies is not unique. Over the decade, as direct counsel or *amicus*, *Amicus* ACLU Women's Rights Project ("WRP") has represented several police officers whose pregnancies were not accommodated by their departments, even though these same departments routinely accommodated other officers temporarily unable to perform all of their duties.

- *Lochren v. Suffolk County*[28]: In one of the earliest PDA accommodation cases and one of the few pre-*Young* victories, ACLU WRP and the New York Civil Liberties Union represented Sandra Lochren and five other police officers in a lawsuit against the Suffolk County Police Department (SCPD) for refusing to temporarily reassign pregnant officers to desk work and other non-patrol jobs, even though it did so for officers injured on the job. But for those officers who opted to keep working patrol, SCPD also failed to provide bullet-proof vests or gun belts that would fit pregnant officers. As a result, pregnant officers' only safe option was to go on unpaid leave long before

[28] No. 08-2723-cv (E.D.N.Y.).

their due date. In 2006, a federal court found SCPD's policy discriminatory. As a result, it changed its policy to cover pregnant officers.

- *Panattoni v. Village of Frankfort*[29]: ACLU WRP and ACLU of Illinois represented Jennifer Panattoni, a police officer with the Village of Frankfort Police Department (FPD). In November 2015, she became pregnant with her first child and shortly thereafter, due to the FPD's failure to accommodate her pregnancy – despite offering modified duties to officers injured on the job – she was forced to go on unpaid leave. While the litigation was pending, Officer Panattoni became pregnant again, but again was denied a full-time alternative assignment that would allow her to work safely. In April 2019, the parties reached a settlement agreement in which the Village agreed to change its policies
- *Alicea v. Cromwell Police Department*: ACLU WRP and the ACLU of Connecticut represented police officer Sarah Alicea, who sought a temporary transfer to a light duty job during her pregnancy. The department denied her request, and instead forced her to take unpaid leave for the last four months of her pregnancy. After ACLU WRP filed an E.E.O.C. administrative charge of discrimination, the parties settled. Under the settlement, the department changed its police to accommodate pregnant officers. *Cromwell Cop Settles Pregnancy Bias Suit after Being Forced to Take Unpaid Leave*, Middletown Press (Sept. 7, 2018), https://www.middletownpress.com/middlesex-county/article/Cromwell-cop-wins-pregnancy-bias-suit-after-being-13209796.php.
- *Balcastro v. Town of Wallingford*: The ACLU and ACLU of Connecticut represented Annie Balcastro, a police officer with the Town of Wallingford. In January 2012, Balcastro learned that she was pregnant and unable to continue on patrol as a police officer. Instead of making a reasonable effort to transfer her to a suitable temporary position, the Town gave her no other option than to take unpaid leave. After filing an E.E.O.C. administrative charge, the ACLU reached a settlement with the Town, which included changes in its light duty policy for pregnant officers. Kathleen Ramunni, *Wallingford to Pay Police Officer Who Filed Discrimination Complaint*, Patch.com (Mar. 27, 2013), https://patch.com/connecticut/wallingford/wallingford-to-pay-police-officer-refused-light-duty.

[29] No. 17-cv-06710 (N.D. Ill.)

- *Legg v. Ulster County*[30]: Corrections Officer Ann Marie Legg was denied temporary assignment to light duty during her pregnancy, even though Ulster County gave such assignments to guards injured on the job. In her third trimester, Legg had to intervene in an inmate fight, prompting her to go on leave rather than face future risks. After a trial, a federal judge in 2017 refused to find that the County's policy imposed a discriminatory disparate impact on pregnant workers, even though he acknowledged that under the County's policy, a pregnant officer never will qualify for light duty. On appeal, the ACLU drafted an *amicus* brief with the Center for WorkLife Law, urging reversal. The case remains pending.

- *Hicks v. City of Tuscaloosa*: Stephanie Hicks, a narcotics investigator with the Tuscaloosa Police Department in Alabama, wanted to breastfeed her new baby, but her bulletproof vest was restrictive, painful, and prone to causing infection in her breasts. She asked for a desk job so that she would not need to wear a vest for protection, but her employer refused, even though it routinely granted desk jobs to officers unable to fulfill all of their patrol duties. Instead, her employer only offered her an ill-fitting vest that put her at risk. Hicks quit her job rather than perform it unsafely. She won at trial, but her employer appealed. ACLU WRP, along with the Center for WorkLife Law, submitted an *amicus* brief arguing that accommodation of the need to pump was covered by *Young*. The Eleventh Circuit agreed, affirming the jury verdict for Hicks and becoming the first appellate court to extend *Young* to employees who are breastfeeding. *See* 870 F.3d 1253 (11th Cir. 2017).

Amici were able to identify several instances in which New Jersey police departments refused to accommodate officers with modified job responsibilities[31]:

[30] No. 17-2861 (2d Cir.).

[31] This list does not include cases alleging discrimination that do not include requests for job modifications. *See, e.g.,* Peggy Wright, *Morris Twp. Cop claims job discrimination over pregnancy*, Daily Record, Dec. 2. 2015 (The chief allegedly told [the plaintiff] he didn't want her walking around the school 'looking' four months pregnant and made a comment about not wanting to drive in a car with 'a pregnant, hormonal female,' the lawsuit said.").

- A Delaware River Port Authority officer who requested light duty per her doctor's advice "was denied because no light duty was available." *Delaware River Port Auth. v. Fraternal Order of Police Penn-Jersey Lodge No. 30*,No. A-3324-17T2 , 2019 N.J . Super. Unpub. LEXIS 694 (App. Div. 2019).[32]

- A Florence Township officer who was granted modified duty was allegedly penalized and subject to a hostile environment by the police chief. Amanda Hoover, *Police chief played hooky, discriminated against pregnant cop, union claims*, NJ.com, Aug. 3, 2017 (linking to union complaint).[33]

- A Pemberton patrol officer was denied light duty and ordered to stay home and exhaust all of her accrued time and family leave after her third month of pregnancy. Jan Hefler, *Officer returns to work after settling pregnancy suit*, Philadelphia Inquirer (Nov. 29, 2015).

- A Raritan police officer pregnant with twins alleged denial of grant of reasonable accommodations including a temporary assignment to the Police Academy, where she had been approved to teach. Sergio Bichao, *NJ lesbian cop sues, alleges discrimination during pregnancy*, Asbury Park Press (Apr. 4, 2013).

- A Wyckoff police officer was given an irregular schedule and alleged disparate treatment, harassment and discrimination because of her

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Because many workers fear that filing a complaint will derail their careers, Kruger, *supra* note 16 at 62 ("[A]n EEOC spokesperson noted that many women fear that filing complaints and initiating litigation can be a 'career killer.'"), this list only includes cases in which the officer felt secure enough to publicly share their experience. *Amici* are unaware of data collected that would provide information about the number of police officers in New Jersey that request modified job responsibilities due to pregnancy and the result of those requests.

[32] Pursuant to *R*.1:36-3, *amici* include this opinion in their Appendix (Aa78-Aa87). Counsel cites the opinion to illustrate the existence of particular fact patterns and knows of no contrary precedent.

[33] https://www.nj.com/burlington/2017/08/police_chief_on_leave_for_accusations_of_discrimin.html; union complaint available at https://drive.google.com/file/d/0B66z M58TlOVKazVfd2Fsdm1FVzA/view

pregnancy. *Groslinger v. Twp. of Wyckoff*, No. A-5861-07T2, 2010 N.J. Super. Unpub. LEXIS 125 (App. Div. 2010).[34]

- Another Ocean Township Police Department officer requested an accommodation of modified duty due to pregnancy and was initially denied. After national negative media attention about the township's position, the township reversed course. Erik Larsen, *Office duty for pregnant policewoman*, Asbury Park Press (May 15, 2008).

- A Branchburg patrol officer was denied a request for temporary light duty as advised by her doctor and forced to take unpaid leave. The department had eliminated its light duty policy the year before and the appellate division found that the department was not required to provide an accommodation for pregnant officers that it did not provide to others. The court further found that because the officer had an uncomplicated pregnancy, she could not establish disability discrimination. *Larsen v. Twp of Branchburg*, No. A-0190-05T2, 2007 N.J. Super. Unpub. LEXIS 2808 (App. Div. 2007).[35]

Each of these instances describes pregnant officers who sought to maintain a healthy pregnancy while remaining in the workforce. Instead of continuing to work, they were forced by their departments to take leave earlier than they had planned – often without pay. This Court should make clear to law enforcement

[34] Pursuant to *R*.1:36-3, *amici* include this opinion in their Appendix (Aa88-Aa96). Counsel cites the opinion to illustrate the existence of particular fact patterns and knows of no contrary precedent.

[35] Pursuant to *R*.1:36-3, *amici* include this opinion in their Appendix (Aa96-Aa104). Counsel cites the opinion to illustrate the existence of particular fact patterns and knows of no contrary precedent.

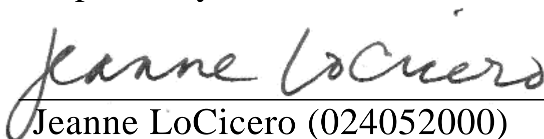
Notably, this case was brought to the attention of the New Jersey Assembly during hearings on the NJWPFA. *See Hearing on A4486 Before the N.J. Assemb. Comm. on Women and Children*, 215th Sess. (Dec. 16, 2013) (testimony of Dina Bakst & Phoebe Taubman, Co-Founder & Co-President and Senior Staff Attorney, A Better Balance), at 4-5, https://www.abetterbalance.org/ wp-content/uploads/2020/08/NJ-Pregnancy-bill-ABB-testimony.pdf.

agencies across the state that the NJPWFA requires an affirmative, inclusive approach to including pregnant officers in the workplace.

Conclusion

The NJPWFA was designed to ensure that pregnant workers would not be forced out of the workforce prematurely or forced to choose between their health and economic well-being. Because Defendants-Petitioners' policy treated pregnant workers unequally, and penalized them for seeking job modifications, and because public employers should be held to the highest standards in service of the goal of preventing discrimination, this Court should affirm the decision below.

Respectfully submitted,



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Dated: August 5, 2020

*Counsel is grateful to law students Micah Bowden, Mia Dohrmann, Lilly Hecht, and Dillon Reisman for their assistance in the preparation of this brief.