# Ironically, This Baby Needs Teeth: A Proposal for Nursing Protections in Arizona's Workplaces

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## I. INTRODUCTION

Fifty thousand years ago, a woman stands and stretches her arms, looking over America's open plains. In the distance, she sees thirty very hairy and practically naked people speaking a language that will never be heard on the planet again. She runs, careful not to jostle the baby in her arms, joining them at the crest of a small hill. She and the other mothers, who have survived predation and the dangers of pregnancy during this hostile era, work together, stopping occasionally to nurse their children. The milk produced with the help of her community's collective labors offers her baby the promise of another day.

Fast-forward to America, 2021, and the world looks very different. Today's mother puts on clothes designed in Paris, manufactured in Taiwan, and shipped to a Dillard's in Scottsdale, Arizona. She gets into a rolling machine made of aluminum and steel and rockets down a freeway at sixty-five miles per hour. She arrives at a looming tower soaring nearly five hundred feet in the air, enters a capsule that scales this distance in seconds, and begins her work on a computer that transmits subatomic particles to space and then back down to the other side of the planet.

Suddenly, she feels a pain. Cutting through all of society's noise and progress, her body alerts her of a need predating even humankind's earliest ancestors—her breasts are full of milk. Her body, as a gentle reminder of her connection to humanity's past and to its future, tells her that her biology is inescapable. This link transcends language, culture, technology, and any other metric used to distinguish ourselves from times past; it is at the core of the human experience. It represents our capacity for compassion, for selflessness, and for mutual aid. In a very real sense, it is bigger than us. Despite chasms of difference between societies fifty thousand years ago and today, our basal human functions will always persist and demand our accommodation.

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For this reason it is exceedingly important that we accommodate a woman's right to breastfeed in the workplace. If we intend to promote an egalitarian society where women participate equally, we need to plainly recognize and protect a woman's fundamental right to express this elemental need. Unfortunately, American law has struggled to provide breastfeeding protections in the workplace. Until the passage of the Affordable Care Act ("ACA") in 2010,[1] no explicit protections for lactating working women existed.[2] Instead, women trying to participate in the workplace were at the mercy of their employers who often valued the financial bottom line more than a woman's particular needs; if the two concerns conflicted, women could easily find themselves fired and replaced.[3]

Despite the passage of the ACA and its amendment to the Fair Labor Standards Act ("FLSA"), women are still vulnerable to discrimination if they choose to both work and breastfeed. While the FLSA does require that employers provide unpaid breaks for employees to nurse in a sanitary space that is not a bathroom,[4] the law is only applicable to employees owed minimum or overtime wages and leaves salaried employees without protections.[5] Further, because these breaks are unpaid and the only remedies available are resulting owed minimum or overtime wages, employees are effectively left without a legal remedy.[6] Given these weaknesses, nursing mothers in the workplace are often forced to try and seek recourse through other legal means.

Yet, Title VII protections arising out of the Civil Rights Act of 1964 are also tenuous, and circuits are split as to how to interpret the Pregnancy Discrimination Act ("PDA"), an amendment to Title VII protecting women from discrimination arising out of pregnancy and "related medical conditions."[7] Specifically, the Fourth and Sixth Circuits have denied breastfeeding mothers recourse under Title VII. By relying on overturned reasoning from the case *General Electric Co. v. Gilbert*,[8] these circuits have held that, in regard to pregnancy, breastfeeding is not a "related medical

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1. *See* 29 U.S.C. § 207(r).

2. *See Workplace Support in Federal Law*, U.S. BREASTFEEDING COMM., http://www.usbreastfeeding.org/workplace-law [https://perma.cc/JG5J-85WN].

3. *See* Allen v. Totes/Isotoner Corp., 915 N.E.2d 622, 623 (Ohio 2009) (per curiam).

4. § 207(r)(1)(A)–(B).

5. *See id.* § 216(b) ("Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation.").

6. Behan v. Lolo's Inc., No. CV-17-02095-PHX-JJT, 2019 WL 1382462, at *2 (D. Ariz. Mar. 27, 2019).

7. 42 U.S.C. § 2000e(k).

8. 429 U.S. 125 (1976).

condition" and gender discrimination claims fail for lack of a comparable subgroup of lactating men.[9] Thus, in addition to the toothless enforcement mechanisms in the FLSA, a working mother's rights under Title VII are uncertain.

Given the mental and physical health benefits that breastfeeding provides infants,[10] this unstable employment status puts women in a precarious position and forces them to make an impossible and coercive choice. On one hand, a mother can quit her job. This would ensure her child has access to breastmilk but would sacrifice her financial independence and professional development. Alternatively, a mother can forego breastfeeding, knowing her child is more likely to have a weakened immune system, decreased neural development, and higher cancer risks.[11] As a result, many women predictably choose to leave the workforce or cease breastfeeding entirely.[12]

Some states have attempted to fill in the absence of federal protections with laws of their own. Thirty-six states currently have some form of workplace law promoting pumping in the workplace.[13] These laws typically take four basic forms:

(I) A state can offer the broadest possible protections by mandating both reasonable accommodations and providing a cause of action for nursing discrimination;[14]

(II) A state can mandate reasonable accommodations but provide no cause of action for nursing discrimination;[15]

(III) A state can regulate government employers using Type (I) or (II) laws but otherwise refuse to regulate private entities;[16] or

(IV) A state can encourage accommodations through laws that either recommend employer action or allow an "infant-friendly" designation contingent on accommodations.[17]

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9. *See infra* Part II.B.2.

10. *See infra* Part II.A.

11. *See infra* Part II.A.1.

12. *See* Lindsey Murtagh & Anthony D. Moulton, *Working Mothers, Breastfeeding, and the Law*, 101 AM. J. PUB. HEALTH 217, 218 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3020209/pdf/217.pdf [https://perma.cc/VYU8-A6A4].

13. This data was collected through a survey of each states' statutory code. For the full list of state workplace nursing statutes as of September 24, 2021, see Part II.C.

14. *See infra* Part II.C.1.a.

15. *See infra* Part II.C.1.b.

16. *See infra* Part II.C.1.c.

17. *See infra* Part II.C.1.d.

The remaining eighteen states including Arizona have no workplace protections for breastfeeding mothers.[18]

Given this history and the movement among states to provide greater protections, Arizona ought to introduce its own workplace protections for breastfeeding employees. This Comment first argues that, idealistically, complete and comprehensive protections for nursing employees would prohibit workplace nursing discrimination, mandate broad accommodations that go beyond current FLSA requirements, and provide powerful enforcement mechanisms to women who have been denied these rights. However, given the practical need to contend with competing political and business interests, this Comment argues that Arizona should approach nursing-employment law with a carrot-stick approach. This approach would fuse Type (I) mandates with Type (IV) incentives and would include a tax incentive to employers who invest in resources that go beyond mandated state accommodation standards. As a sum of its parts, the carrot-stick approach would likely result in less resentment from the business community compared to more austere idealized mandates, and it would encourage even broader protections than those in place in Type (I) states.

## II. BACKGROUND

Part II of this Comment provides the scientific background justifying the promotion of breastfeeding and the national jurisprudence surrounding the development of workplace nursing protections. Section A of Part II will survey breastfeeding research and will review why it deserves protection in the workplace as a matter of policy. Section B of Part II will then discuss the development of federal workplace lactation law and the ways it has fallen short of needed protections. Finally, Section C of Part II will provide a background of state nursing law in the workplace. Specifically, it will explore the ways states have compensated for federal shortcomings and survey existing Arizona nursing law more broadly to contextualize this Comment's proposed legislation.

18. As of September 24, 2021, Alabama, Alaska, Arizona, Florida, Idaho, Iowa, Kansas, Maryland, Michigan, Missouri, New Hampshire, North Carolina, Ohio, Pennsylvania, South Dakota, West Virginia, Wisconsin, and Wyoming had no provisions protecting nursing in the workplace.

### *A. The Importance of Breastfeeding*

American lives are tremendously impacted by breastfeeding, and it is difficult to overstate the enormous and wide-reaching benefits that breastfeeding provides the child, the mother, society, and the environment.[19] Because of these benefits, the American Academy of Pediatrics, the American Medical Association, the American College of Obstetricians and Gynecologists, and the World Health Organization have all recommended that new mothers breastfeed exclusively for six months at a minimum with continued breastfeeding up to a year or more, depending on when the mother decides to ween her child.[20] Given these recommendations, a review of the science pertaining to the positive impact of breastfeeding is required to appreciate the necessity of workplace nursing protections.

#### 1. Impact to the Child

The most direct consequence of breastfeeding is the benefit to the infant. Breastmilk helps pass on immune protections, and studies have demonstrated that breastfeeding decreases the severity and frequency of infectious diseases such as "bacterial meningitis, bacteremia, diarrhea, respiratory tract infection, necrotizing enterocolitis, otitis media, urinary tract infection, and late onset sepsis" in premature babies.[21] Additionally, other studies support the conclusion that breastfeeding decreases the risk of sudden infant death syndrome, type one and type two diabetes, lymphoma, leukemia, Hodgkin's disease, obesity, asthma, and hypercholesterolemia.[22] Furthermore—and perhaps most notably—failure to breastfeed results in decreased cognitive performance and an average decreased intelligence quotient.[23] This decreased cognitive performance can result in significant downstream impediments to the child once he or she matures and enters the workforce.[24]

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19. Am. Acad. of Pediatrics, *Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496, 496 (2005), https://pediatrics.aappublications.org/content/pediatrics/115/2/496.full.pdf [https://perma.cc/9F27-YDEP].

20. Madeleine Gyory, *Medical Condition or Childcare Choice? Breastfeeding and Lactation Discrimination After* Young v. UPS, 43 N.Y.U. REV. L. & SOC. CHANGE 475, 491–92 (2019).

21. Am. Acad. of Pediatrics, *supra* note 19, at 496.

22. *Id.* at 496–97.

23. A. Lucas et al., *Randomized Trial of Early Diet in Preterm Babies and Later Intelligence Quotient*, 317 BRIT. MED. J. 1481, 1486 (1998).

24. *See infra* Part II.A.3.

2. Impact to the Mother

Mothers also benefit both psychologically and physically from the ability to breastfeed. Women who breastfeed or pump show decreased postpartum bleeding, more rapid uterine involution, decreased menstrual blood loss, decreased risks of breast and ovarian cancers, and decreased postmenopausal hip fractures.[25] Additionally, research shows that breastfeeding can have a beneficial effect on a mother's psychological health.[26] In longitudinal prospective studies involving repeat observations of the same subject, several researchers found breastfeeding mothers displayed (among other benefits) increased mood, higher quality sleep patterns, lower stress levels, and steeper reductions in cortisol.[27]

3. Impact on Commerce and Society

The economic benefits to both mothers and the nation at large have also been widely documented. In March 2018, the Economic Research Service ("ERS") of the United States Department of Agriculture ("USDA") conducted a study measuring the benefits of breastfeeding, including its effect on the USDA's Women, Infant, and Children ("WIC") nutritional program, which provides supplemental foods for households with women, infants, and children.[28] In that study, the ERS measured breastfeeding's economic impact if women in the WIC program breastfed at levels recommended by the American Academy of Pediatrics.[29] The study found that, while costs to fund the WIC program would admittedly increase by $252.4 million to cover nursing women's higher caloric needs, Federal Medicaid costs would decrease by $111.6 million, and WIC households would see $9 billion in health-related cost savings annually.[30]

The decrease in a child's cognitive performance discussed above[31] can also reduce the gross domestic product. It has been widely documented (though not specifically with breastfeeding) that decreases in a population's average I.Q. levels result in lost earning potential, lost education potential, and

25. Am. Acad. of Pediatrics, *supra* note 19, at 497.

26. Kathleen M. Krol & Tobias Grossmann, *Psychological Effects of Breastfeeding on Children and Mothers*, 61 BUNDESGESUNDHEITSBLATT 977, 981–82 (2018).

27. *Id.*

28. Victor Oliveira, Mark Prell & Xinzhe Cheng, *Economic Implications of Increased Breastfeeding Rates in WIC*, U.S. DEP'T OF AGRIC. (Feb. 14, 2019), https://www.ers.usda.gov/amber-waves/2019/february/economic-implications-of-increased-breastfeeding-rates-in-wic [https://perma.cc/UW87-M7J7].

29. *Id.*

30. *Id.*

31. *Supra* Part II.A.1.

increased healthcare costs.[32] By extension, this results in a reduced gross domestic product.[33] If non-breastfed babies on average have reduced I.Q. levels, it can be inferred that their future earning potentials have also been harmed by attitudes that discourage nursing.[34] While this is admittedly speculative, other studies have measured the inverse scenario—that is, the economic benefit *provided* with increased rates of breastfeeding—and these studies have arrived at the same conclusion.[35] A study of 9,000 people found that those who were breastfed had a 10% higher income when they were over fifty.[36]

Additionally, although it may be counterintuitive, employers with breastfeeding promotion programs also directly see increased employee productivity and decreased costs.[37] Though more research is surely needed, one particular case study with an individual employer found that providing breastfeeding programs at work saved the employer $1,435 on medical claims per infant and three days of employee sick leave per infant, resulting in total savings of $108,737—a return on investment of three to one.[38]

### 4. Impact on the Environment

Lastly, breastfeeding impacts the environment significantly less than the use of baby formula. Production of baby formula requires farming of crops to produce cattle feed, the clearing of land for cattle pastures, vehicles to ship milk and formula pre and post production, facilities to store product, and

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32. *See, e.g.*, Joel Schwartz, *Societal Benefits of Reducing Lead Exposure,* 66 ENV'T RSCH. 105, 110 (1994) (citing M.C. BARTH ET AL., A SURVEY OF THE LITERATURE REGARDING THE RELATIONSHIP BETWEEN MEASURES OF IQ AND INCOME, EPA CONTRACT NO. 68-01-6614 (ICF, Washington D.C.) (1984)) (noting the consistency in the finding that a 1-point I.Q. deficit is associated with a 0.9% reduction in earnings). For a more in-depth discussion of Schwartz's study, see generally RadioLab, *G: Problem Space*, WNYC STUDIOS, at 34:12–35:00 (June 13, 2019), https://www.wnycstudios.org/podcasts/radiolab/articles/g-problem-space [https://perma.cc/FZU2-UUG8]. There are plenty of valid criticisms discussing the danger of using I.Q. scores as a metric of intelligence on the individual level that exceed the scope of this Comment. *Id.* at 24:07. However, I.Q. has proven useful in documenting disparities within populations as a measure of the cognitive health impacts of policy. *Id.* at 33:58.

33. *See* RadioLab, *supra* note 32, at 35:45.

34. Lucas et al., *supra* note 23, at 1486.

35. MARK MCGOVERN ET AL., BREASTFEEDING PROMOTION AS AN ECONOMIC INVESTMENT 5 (2018).

36. *Id.*

37. Thomas M. Ball & David M. Bennett, *The Economic Impact of Breastfeeding*, 48 PEDIATRIC CLINICS N. AM. 253, 257–58 (2001).

38. *Id.* at 258.

resources to dry, cool, pack, and ship the baby formula to retailers.[39] One estimate concluded that it takes 4,000 liters of water to make just one kilogram of powdered baby formula,[40] and though research is scant and sorely needed on the topic, a study surveying six countries in the Asia-Pacific region found that formula production expends 2.89 million tons of greenhouse gases annually, or the equivalent of burning 3,107 million pounds of coal.[41] These numbers are only expected to increase with growing global demand for formula.[42]

### *B. Evolution of Federal Lactation Law*

In light of the changing views toward women in the workplace, federal law gradually began to protect pregnant working mothers.[43] Like other forms of federal workplace anti-discrimination protections, workplace nursing laws are closely interwoven with the Civil Rights Act of 1964 ("Civil Rights Act").[44] However, in direct opposition to the Civil Rights Act's legislative intent,[45] courts initially were reluctant to interpret the Act's class of "sex" broadly.[46]

This tension between the legislature and judicial branch eventually culminated in an amendment to the Civil Rights Act.[47] In response to a Supreme Court interpretation excluding pregnancy from the class of "sex,"[48] Congress incorporated protections for pregnant working women through the

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39. Carly Cassella, *No One Is Talking About the Environmental Impacts of the Baby Formula Industry*, SCI. ALERT (July 17, 2018), https://www.sciencealert.com/no-one-is-talking-about-the-environmental-impacts-of-the-baby-formula-industry [https://perma.cc/C5AV-X8YX].

40. Peta-Gay Hodges, *Breastfeeding Key to Attaining Sustainable Development Goals*, JAM. INFO. SERV. (Jan. 3, 2017), https://jis.gov.jm/breastfeeding-key-attaining-sustainable-development-goals [https://perma.cc/J5R3-6F2D].

41. Cassella, *supra* note 39 (citing J.P. DADHICH ET AL., REPORT ON CARBON FOOTPRINT DUE TO MILK FORMULA: A STUDY FROM SELECTED COUNTRIES OF THE ASIA-PACIFIC REGION 26 (Arun Gupta ed., 2015), https://www.bpni.org/report/Carbon-Footprints-Due-to-Milk-Formula.pdf [https://perma.cc/P3D9-TXVG]).

42. *Id.*

43. H.R. REP. NO. 95-948, at 3 (1978) (stating the reasoning behind the Pregnancy Discrimination Act, discussed *infra* Part II.B.2). "[T]he assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs." *Id.*

44. *Infra* Part II.B.1.

45. S. REP. NO. 95-331, at 2 (1977) (stating that the Court's narrow interpretation of the Civil Rights Act of 1964 contradicted the "principle and the meaning of title VII").

46. Gyory, *supra* note 20*,* at 483–84.

47. *Id.* at 484–85.

48. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145–46 (1976).

PDA.[49] However, because the PDA did not specifically mention nursing, appellate courts yet again sought to interpret Title VII and PDA provisions narrowly.[50]

Thereafter, Congress attempted to codify workplace nursing protections through different avenues, eventually succeeding when pumping accommodation standards were added to the Fair Labor Standards Act ("FLSA") via a last-minute addition to the Affordable Care Act ("ACA").[51] However, the FLSA offers little protection for working mothers as the law lacks an enforcement mechanism and does not expressly forbid discrimination against nursing employees.[52]

Below, this Section will explore this evolution of workplace nursing law. First, it will discuss the genesis of the Civil Rights Act and the narrow interpretation of "sex" in the Supreme Court's *Gilbert* decision. Then, it will discuss the lasting impact of *Gilbert* on breastfeeding accommodations in spite the PDA's direct rebuke of *Gilbert's* reasoning. Last, this Section will review subsequent Congressional efforts to address the absence of workplace nursing law while also offering a critique of the FLSA's eventual protections.

### 1. Title VII of the Civil Rights Act and the *Gilbert* Decision

Title VII was originally seen as the remedy to the segregationist South's brutality before and during the Civil Rights Movement.[53] After televised riots painted a grim picture of police dogs and fire hoses beating down peaceful protesters, the Kennedy Administration set forth its commitment to providing racial equality across the United States.[54] As Congress deliberated the bill for Title VII, women's rights advocates such as Alice Paul lobbied and successfully convinced Representative Howard Smith of Virginia to include sex as a protected class in addition to race.[55] Today, Title VII of the Civil

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49. Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)).

50. Gyory, *supra* note 20, at 499.

51. *Id.* at 513; *see also infra* Part II.C.4.

52. 29 U.S.C. §§ 207(r), 216.

53. Louis Menand, *How Women Got in on the Civil Rights Act*, NEW YORKER (July 14, 2014), https://www.newyorker.com/magazine/2014/07/21/sex-amendment [https://perma.cc/7CD7-R78K].

54. *Id.*

55. Linda Napikoski, *How Women Became Part of the 1964 Civil Rights Act*, THOUGHTCO. (Feb. 4, 2020), https://www.thoughtco.com/women-and-the-civil-rights-act-3529477 [https://perma.cc/T7C7-UDJU]. There is considerable debate as to the sincerity of Representative Smith's addition of the word "sex" to the Act. Some argue that the addition of the word served as an attempt to sabotage the Act. *Id.* Others believe Representative Smith believed that if rights for

Rights Act prohibits discrimination on the basis of race, color, national origin, religion, and—of particular relevance to this Comment—sex.[56] Women who have been treated unfavorably in the workplace can bring claims for either disparate impact discrimination or for disparate treatment discrimination.[57] However, after the Act was passed, courts were uncertain as to whether the language in Title VII was intended to include pregnancy discrimination under the umbrella of sex discrimination.[58]

The Supreme Court ruled on this issue in *General Electric Co. v. Gilbert*.[59] In *Gilbert*, a pregnant employee was denied benefits for the disability resulting from her pregnancy.[60] The Court determined that discrimination on the basis of pregnancy was not the same as discrimination on the basis of sex.[61] The Court reasoned that because pregnant women were being treated differently than a subgroup composed of both men *and* women (non-pregnant employees), the basis of their discrimination was pregnancy and not sex.[62] Effectively, for a claim to be cognizable, plaintiffs would need to demonstrate disparate treatment between themselves and a subgroup of men with the same condition (i.e., pregnant men).[63] Obviously, doing so is inherently impossible.

### 2. The Pregnancy Discrimination Act, *Gilbert's* Lingering Shadow Precedence, and the "Medical Necessity" of Breastfeeding

After the ruling in *Gilbert*, Congress responded forcefully by introducing the Pregnancy Discrimination Act ("PDA") just three months later.[64] Soon after, the law passed, expressly rejecting both the holding and reasoning in *Gilbert*.[65] The amended prohibitions against discrimination included

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Black Americans were inevitable, white women ought to also be protected. *Id.* Regardless of the purpose, "sex" was in fact added to the Act as a fortunate outcome of Representative Smith's actions. *Id.*

56. 42 U.S.C. § 2000e-2(a)(1).

57. *See* Nicole Kennedy Orozco, Note, *Pumping at Work: Protection from Lactation Discrimination in the Workplace*, 71 OHIO ST. L.J. 1281, 1298 (2010). Disparate treatment is intentional employment discrimination while disparate impact occurs when policies that on their face appear nondiscriminatory in fact disproportionately affect a protected group. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431–32 (1971).

58. Gyory, *supra* note 20, at 483.

59. 429 U.S. 125 (1976).

60. *Id.* at 128–29.

61. *Id.* at 136.

62. *Id.* at 138–39.

63. *See id.* at 136.

64. H.R. 4357, 95th Cong. (1977).

65. S. Res. 995, 95th Cong., 92 Stat. 2076 (1978); *see also* Maureen E. Eldredge, *The Quest for a Lactating Male: Biology, Gender, and Discrimination*, CHI.-KENT L. REV. 875, 875–76

discrimination on the basis of pregnancy, childbirth, or related medical conditions.[66] However, the law does not specifically define related medical conditions.[67] As a result, circuits have come to inconsistent conclusions as to whether the phrase generally includes other conditions such as lactation or *in vitro* fertilization, the latter of which exceeds the scope of this Comment.[68]

Regarding lactation, many courts have continued to apply a narrow interpretation of the PDA consistent with the approach used in *Gilbert*. Some courts obstinately rely on the reasoning in *Gilbert* by requiring a showing of a comparable subgroup of lactating men[69] despite the Supreme Court's acknowledgement that Congress overturned both *Gilbert*'s holding *and* reasoning.[70] Other courts instead refuse to protect nursing mothers by holding that "related medical conditions" pertain only to the mother's medical necessities and not to a mother's decision to breastfeed or the infant's health; because breastfeeding is a "choice," these courts have refused to extend protections.[71]

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(2005) (providing history of the PDA and its passage). The unequivocal rejection of the Supreme Court's holding is notable given the widespread bipartisan agreement in passage of the PDA. In the Senate, the bill passed 75–11. U.S. Cong., *S.995*, CONGRESS.GOV, https://www.congress.gov/bill/95th-congress/senate-bill/995/all-actions [https://perma.cc/5XAT-6Z42]. In the House, the bill passed 376–43. U.S. Cong., *H.R.6075*, CONGRESS.GOV, https://www.congress.gov/bill/95th-congress/house-bill/6075/all-actions [https://perma.cc/6DZY-CFFN].

66. 42 U.S.C. § 2000e(k).

67. *See id.*

68. For more information, see Hall v. Nalco Co., 534 F.3d 644, 649 (7th Cir. 2008); Christine Moore, Comment, *The PDA Fails to Deliver: Why* Nalco *and* Wallace *Cannot Coexist, and a New Standard for Defining "Related Medical Condition*,*"* 44 UNIV. S.F. L. REV. 683, 684 (2010).

69. Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 439 (6th Cir. 2004) ("[D]espite the application of the expansive PDA language, none of the district or appellate courts found that breast-feeding fell within the scope of gender discrimination because of the absence of a comparable class. Indeed, both *Wallace* and *Martinez* directly cite to *Gilbert* as controlling authority for their decisions even though they deal with employment cases *after* the passage of the PDA."); *see also* Martinez v. N.B.C., Inc., 49 F. Supp. 2d 305, 310 (S.D.N.Y. 1999).

70. Young v. United Parcel Serv., Inc., 575 U.S. 206, 227 (2015) ("Congress' 'unambiguou[s]' intent in passing the [PDA] was to overturn 'both the holding and the reasoning of the Court in the *Gilbert* decision.'" (quoting Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983))).

71. Wallace v. Pyro Mining Co., 951 F.2d 351 (6th Cir. 1991) (unpublished table decision); Barrash v. Bowen, 846 F.2d 927, 931–32 (4th Cir. 1988); Jacobson v. Regent Assisted Living, Inc., No. CV-98-564-ST, 1999 WL 373790, at *11 (D. Or. Apr. 9, 1999); McNill v. N.Y.C. Dep't of Corr., 950 F. Supp. 564, 569–71 (S.D.N.Y. 1996); Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1491–92 (D. Colo. 1997).

Given the legislative history,[72] Congress expressly intended to overrule *Gilbert*'s reasoning in passing the PDA; it emphasized that a finding of discrimination based on attributes that are inherently tied to sex ought not rely on finding a similar subclass of men.[73] Yet courts such as the Sixth Circuit continue to insist that only the holding in *Gilbert* was overturned, not the reasoning.[74] In *Derungs v. Wal-Mart Stores, Inc.*, the Sixth Circuit, relying on the reasoning in *Gilbert*, agreed that breastfeeding is not a related medical condition covered by the PDA, and that a plaintiff could not prevail under the PDA unless she could find a comparable class of lactating men.[75] The court noted that when breast-feeding has come up in the context of sex-plus discrimination, courts outside the Sixth Circuit have held that plaintiffs can never be successful if there is no corresponding subclass of lactating men.[76]

Aside from outright use of the comparable-group reasoning used in *Gilbert*, other courts have paralleled *Gilbert*'s general assumption that the Civil Rights Act was meant to be narrowly interpreted.[77] In 1988, the Fourth Circuit in *Barrash v. Bowen* reviewed a case where the lower court found the employer violated the PDA for refusing an employee's request for extended unpaid leave to breastfeed her child.[78] While the employee was able to demonstrate disparate treatment between men who were granted extended unpaid leave and nursing mothers who were not, the Fourth Circuit ruled that the comparison was faulty.[79] The court distinguished nursing mothers from individuals suffering extended incapacity due to illness or injury and held that denying a nursing mother leave without pay failed to qualify as evidence of disparate impact.[80] In 1991, the Sixth Circuit echoed this reasoning in

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72. S. REP. NO. 95-331, at 3 (1977) (stating that *Gilbert* threatened to undermine the purpose of Title VII sex discrimination protections), *reprinted in* SEN. COMM. ON LAB. & HUM. RES., 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 39–40 (Comm. Print 1980).

73. *See* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 552–53 (2009).

74. *Derungs*, 374 F.3d at 435.

75. *Id.* at 438–39.

76. *Id.* Sex-plus discrimination exists when a person is subject to disparate treatment based not just on sex, but sex in addition to a secondary characteristic. *Id.* at 432. In such cases, the plaintiff must show a subclass of women were unfavorably treated in comparison to a corresponding subclass of men. *Id.*

77. *E.g.*, Barrash v. Bowen, 846 F.2d 927, 931 (4th Cir. 1988); Wallace v. Pyro Mining Co., 951 F.2d 351 (6th Cir. 1991) (unpublished table decision).

78. 846 F.2d at 928–29.

79. *Id.* at 931–32 ("One can draw no valid comparison between people, male and female, suffering extended incapacity from illness or injury and young mothers wishing to nurse little babies.").

80. *Id.*

*Wallace v. Pyro Mining Co*.[81] The facts and reasoning closely mirrored *Barrash*, with the court holding that such desires are not a medical necessity.[82] These two circuit court holdings established precedent followed by multiple district courts in other jurisdictions.[83]

However, a few courts in recent years have distanced themselves from *Gilbert*'s reasoning and narrow interpretations of "related medical conditions." In 2013, the Fifth Circuit held in *EEOC v. Houston Funding II, Ltd.* that, as a matter of plain meaning, lactation is a physiological response related to becoming pregnant and is thus within the "related medical condition" scope of the PDA.[84] In 2016, the D.C. Circuit in *Allen-Brown v. District of Columbia* expressly rejected the need to find a comparable subset of lactating men after *Gilbert* was overruled, holding that nursing discrimination claims are within the purview of "related medical condition."[85] In 2017, the Eleventh Circuit, following the Fifth Circuit's reasoning in *Houston Funding II*, came to the same conclusion in *Hicks v. City of Tuscaloosa*.[86]

Arizona's Ninth Circuit has yet to consider whether breastfeeding is considered a protected classification under the PDA's amendment to Title VII.[87] However, the two cases arising under the Ninth Circuit's jurisdiction both happen to be Arizona cases and seem to indicate partiality to the Fifth, Eleventh, and D.C. Circuits' interpretation.[88] In *Clark v. City of Tucson*, the court held that lactation is a related medical condition.[89] In *Behan v. Lolo's Inc.*, the court referred to the Fifth and Eleventh Circuits' holdings that breastfeeding falls within the scope of "related medical conditions."[90] However, because the issue was not dispositive to the case's conclusion, the

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81. 951 F.2d 351.

82. *Id.*

83. *See, e.g.*, Falk v. City of Glendale, No. 12-CV-00925-JLK, 2012 WL 2390556, at *3 (D. Colo. June 25, 2012); Jacobson v. Regent Assisted Living, Inc., No. CV-98-564-ST, 1999 WL 373790, at *11 (D. Or. Apr. 9, 1999); McNill v. N.Y.C. Dep't of Corr., 950 F. Supp. 564, 569–71 (S.D.N.Y. 1996).

84. 717 F.3d 425, 428–29 (5th Cir. 2013).

85. 174 F. Supp. 3d 463, 477–78 (D.D.C. 2016).

86. 870 F.3d 1253, 1258–59 (11th Cir. 2017).

87. *See* Behan v. Lolo's Inc., No. CV-17-02095-PHX-JJT, 2019 WL 1382462, at *6 (D. Ariz. Mar. 27, 2019).

88. *Id.* (first citing *Houston Funding II*, 717 F.3d at 428; and then citing *Hicks*, 870 F.3d at 1260) (stating that the Fifth and Eleventh Circuits have held lactation discrimination is within the scope of the PDA but declining to resolve the issue); Clark v. City of Tucson, No. CV-14-02543-TUC-CKJ, 2018 WL 1942771, at *15 (D. Ariz. Apr. 25, 2018) (citing *Allen-Brown*, 174 F. Supp. 3d at 478) (holding lactation discrimination is unlawful under the PDA).

89. 2018 WL 1942771, at *15.

90. 2019 WL 1382462, at *6.

court assumed *without finding* that nursing discrimination claims are cognizable under the PDA.[91]

### 3. Early Federal Attempts To Protect Working Breastfeeding Mothers

While the interpretive trend of Fifth, Eleventh, and D.C. Circuits provides some optimism that other circuits will follow suit and provide discrimination protections to nursing mothers, the PDA by itself does not ensure nursing women are provided the accommodations they need. The PDA does not—at least explicitly[92]—mandate that employers provide space for nursing employees to express milk. Whereas the Americans with Disabilities Act ("ADA") mandates an affirmative obligation from employers to provide reasonable accommodations,[93] the PDA as an element of Title VII requires only that employers do not discriminate if they provide accommodations to likewise situated employees.[94] This means a woman who is terminated for making an accommodation request has no relief if her employer does not typically provide the requested accommodation to other employees similar in their ability to work.[95]

Given the various circuits' split in interpreting the PDA and the lack of accommodation provisions, Congress has attempted to explicitly codify protections for breastfeeding women. This took the form of the Breastfeeding Promotion Act, which was reintroduced each year from the 105th (1997–

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91. *Id.*

92. The Eleventh Circuit in *Hicks v. City of Tuscaloosa* noted that accommodation and discrimination are distinct, stating that the PDA only prevents an employer from denying accommodation to one individual while offering it to another "similar in their ability or inability to work." 870 F.3d at 1260. The PDA still permits an employer the right to deny accommodation if it does not otherwise offer such accommodations to similar employees. *Id.* This reasoning, however, has the same pitfalls as the reasoning in *Gilbert*, where the analysis depends on the level of abstraction as to what was "accommodated" and what constitutes a "similar group of other persons." Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 160–62, 161 n.5 (1976) (Stevens, J., dissenting). For instance, if an employer *does not* offer breaks for nursing women but *does* for those with temporary injuries, a court could conclude the employer *did not* discriminate because "a break to express milk" was never an accommodation available to other employees. Alternatively the court could find the employer *did* discriminate because "a break to tend to bodily needs" was an available accommodation to other employees. The Eleventh Circuit appears to lean toward the latter more expansive interpretation, blurring the line between accommodation and discrimination, despite claiming the two are distinct. *See Hicks*, 870 F.3d at 1261 (broadly defining the provided employer accommodation as an "alternative duty").

93. 42 U.S.C. § 12112(b)(5)(A) (defining discrimination to include "not making reasonable accommodations" for an "otherwise qualified individual with a disability.").

94. Gyory, *supra* note 20, at 486.

95. *See id.* at 511–12.

1998) to the 112th (2011–2012) session of Congress, but never passed.[96] Of particular interest to this Comment is the Breastfeeding Promotion Act of 2009, which has language that mirrors that used in the FLSA[97] but with a provision allowing for a $10,000 tax credit for employer expenses for providing locations where a woman can breastfeed.[98] The bill also sought to clarify confusion regarding the PDA, and it explicitly stated that breastfeeding and expressing milk are included under Title VII.[99] Unfortunately, the bill never became law, and the tax credit as an incentive has not been utilized.

4. The Fair Labor Standards Act

Following these unsuccessful attempts to create an affirmative duty to provide accommodations, advocates in Congress finally were able to pass measures stipulating through the ACA requiring nursing accommodations. In March 2010, Congress passed the ACA, which included a provision amending the FLSA requiring employers to provide employees with reasonable time to express milk in a private place "other than a bathroom."[100] The Department of Labor provided further guidance as to the duration of these breaks and explained that the frequency and duration of the breaks varies as needed for the individual mother.[101]

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96. *See* Breastfeeding Promotion Act of 2011, H.R. 2758, 112th Cong. (2011); Breastfeeding Promotion Act of 2009, H.R. 2819, 111th Cong. (2009); Breastfeeding Promotion Act of 2007, H.R. 2236, 110th Cong. (2007); Pregnancy Discrimination Act Amendments of 2005, H.R. 2122, 109th Cong. (2005); Breastfeeding Promotion Act, H.R. 2790, 108th Cong. (2003); Pregnancy Discrimination Act Amendments of 2003, S. 418, 108th Cong. (2003); Breastfeeding Promotion Act, H.R. 285, 107th Cong. (2001); Pregnancy Discrimination Act Amendments of 2001, S. 256, 107th Cong. (2001); Pregnancy Discrimination Act Amendments of 2000, H.R. 3861, 106th Cong. (2000); Pregnancy Discrimination Act Amendments of 2000, S. 3023, 106th Cong. (2000); Pregnancy Discrimination Act Amendments of 1999, H.R. 1478, 106th Cong. (1999); New Mothers' Breastfeeding Promotion and Protection Act of 1998, H.R. 3531, 105th Cong. (1998).

97. *Compare* S. 1244, 111th Cong. § 501 (2009) (requiring reasonable unpaid break time to express milk for one year after birth in a sanitary, private space), *with* 29 U.S.C. § 207(r) (requiring reasonable unpaid break time to express milk for one year after birth in a sanitary, private space).

98. S. 1244 § 201(a); H.R. 2819 § 201(a). Implementation of this tax-credit incentive is readdressed and advocated for in Part III.B.

99. S. 1244 § 101(b)(2); H.R. 2819 § 101(b)(2).

100. 29 U.S.C. § 207(r)(1)(A)–(B). This language has been co-opted by various states to build the framework for their own workplace nursing protections. *See infra* Part II.C.

101. *See* WAGE & HOUR DIV., U.S. DEP'T OF LAB., FACT SHEET #73: BREAK TIME FOR NURSING MOTHERS UNDER THE FLSA (2018) [hereinafter FACT SHEET #73], http://www.dol.gov/whd/regs/compliance/whdfs73.pdf [https://perma.cc/TA7Y-EXJQ].

However, the law does not require that employers provide compensation during these breaks.[102] While this is not necessarily a problem in itself, the FLSA's enforcement mechanism makes this feature problematic. If an employer fails to provide reasonable nursing accommodations, the employee's only remedy is owed minimum wages or overtime compensation.[103] If breaks are unpaid, however, then there is no owed compensation and therefore no remedy. Because of this statutory language, noncompliance with the law can go relatively unpunished.[104]

The FLSA has some additional limitations. The law amends Section 7 of the FLSA, meaning it applies specifically to employers who are subject to the FLSA's overtime and minimum wage requirements.[105] This means the law does not apply to salaried employees like teachers, meaning it applies specifically to employers who are subject to the FLSA's overtime and minimum wage requirements and not salaried employees.[106] Altogether, these limitations have frustrated courts that have attempted to provide recourse to women seeking nursing accommodations in the workplace.[107]

Last, and perhaps most consequentially, the FLSA does not explicitly prohibit nursing discrimination.[108] Academics have argued that this poses several problems.[109] First, employers may seek to avoid these requirements by refusing to employ women who need to breastfeed, thus excluding women from the workplace.[110] Second, employees exercising their rights under the law may encounter adverse employment conditions in retaliation but would only truly be able to protect themselves if they are terminated and can demonstrate lost wages.[111] Third, because most salaried workers do not benefit from the law's accommodation requirements, the lack of a discrimination provision deprives them of the one tool they might have to defend themselves in the workplace.[112] Last, and as noted above, if an

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102. § 207(r)(2).

103. *Id.* § 216(b).

104. Behan v. Lolo's Inc., No. CV-17-02095-PHX-JJT, 2019 WL 1382462, at *5–6 (D. Ariz. Mar. 27, 2019) (holding that even if Defendant failed to provide breaks, the fact that Plaintiff lost no wages means there is not a remedy available).

105. *See* § 207.

106. *See* § 207(r)(3).

107. *See, e.g.*, Hicks v. City of Tuscaloosa, No. 7:13-CV-02063-TMP, 2015 WL 6123209, at *28 (N.D. Ala. Oct. 19, 2015) ("No alternative right to damages beyond minimum wages or overtime pay is provided for plaintiffs asserting a right under § 207(r)(1). Accordingly, § 216(b) renders § 207(r)(1) virtually useless in almost all practical application.").

108. *Id.*

109. *E.g.*, Orozco, *supra* note 57, at 1295.

110. *Id.*

111. *Id.* at 1295–96.

112. *Id.* at 1296.

employer fails to comply, often an employee does not have any recourse absent owed wages; with a discrimination provision, an employee would be able to claim punitive damages for an employer's willful disregard of the statute even in the absence of retaliation.[113]

### *C. The Development of State Law*

In the absence of adequate and reliable federal law, a majority of states now offer some form of protections that are independent of those provided by the FLSA. Arizona has yet to pass even minimal protections and ultimately will need compassionate laws that both understand the importance of this human function and uphold Arizona's commitment to women as equal participants in the workforce. Creating such law will require consideration of existing state laws and a review of Arizona's current and past efforts to pass lactation laws.

#### 1. How States Currently Protect Breastfeeding Mothers in the Workplace

While all fifty states, Puerto Rico, the Virgin Islands, and Washington, D.C., have laws that allow nursing women to publicly breastfeed in their private capacity, there is significantly more variation in the types of laws protecting mothers in their capacity as employees.[114] Indeed, many states have made efforts to remedy federal deficiencies.[115] As of September 24, 2021, only eighteen states, including Arizona, have absolutely no workplace protections for breastfeeding mothers.[116] This Comment identifies four different general categories of laws used by states to protect

113. *Id.*

114. *Breastfeeding State Laws*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 26, 2021), http://www.ncsl.org/default.aspx?tabid=14389 [https://perma.cc/VM8X-9VY3].

115. *Id.*

116. *Id.* On January 6, 2021, a bill to provide workplace protections and accommodations was introduced in the New Hampshire Senate; it later passed with bipartisan support on February 4, 2021. *New Hampshire Senate Bill 69*, LEGISCAN, https://legiscan.com/NH/bill/SB69/2021 [https://perma.cc/VS6Y-UXQM]. The bill was then "retained in committee" in the House, citing the "Zoom process" and difficulties with teleconferencing legislation during the pandemic. Lissa Sirois, *NH House Leadership Not Working for Working Moms*, CONCORD MONITOR (June 25, 2021, 8:15 AM), https://www.concordmonitor.com/My-Turn-House-leadership-failed-working-mothers-41093662 [https://perma.cc/YG9F-7YN2]. As of September 2021, the bill has been scheduled for a "subcommittee work session," but still has not passed into law. *New Hampshire Senate Bill 69*, *supra*.

nursing mothers.[117] Type (I) laws create protections by both mandating standard accommodations[118] and expressly prohibiting discrimination on the basis of nursing. Type (II) laws mandate accommodation but do not prohibit discrimination against employees on the basis of nursing. Type (III) laws only protect government workers, leaving the private sector completely unregulated. Type (IV) laws offer no protections, though they either provide optional statutes meant to encourage accommodation or public relations incentives that provide benefits to employers that meet state standards via license to certify their goods or services as "infant-friendly."

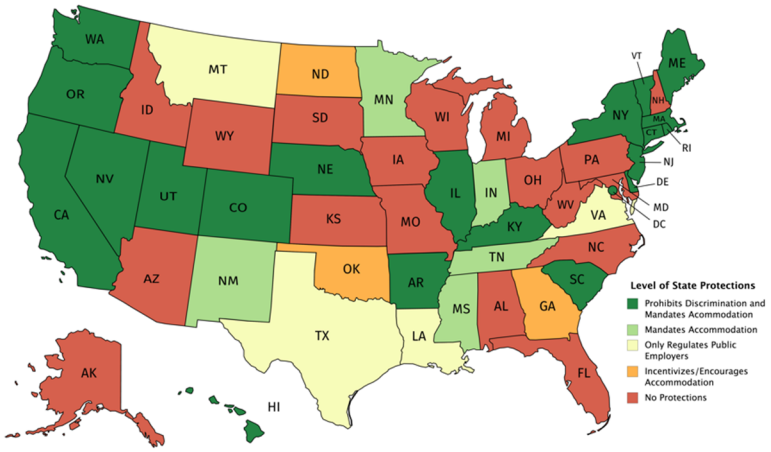


*FIGURE 1. GEOGRAPHIC DISTRIBUTION OF STATE LAW TYPES*

*a. Type (I) Laws*

Type (I) laws are the strongest protections, both requiring reasonable accommodations and prohibiting discrimination against a woman on the basis of her choice to nurse. Twenty-one states and the District of Columbia have

117. The following data was collected through an analysis of each state's statutory code.

118. Standard state accommodations include unpaid breaks necessary to maintain milk supply and comfort; such accommodation requires access to a secure, sanitary, and private room in close proximity to the mother's place of work. These provisions often include undue hardship exemptions. *E.g.*, ARK. CODE ANN. §§ 11-5-116, 16-123-102 (2021). However, there is a wide variety of other supplemental workplace nursing provisions. For example, some states dictate the minimum duration that accommodations must be provided. *E.g.*, COLO. REV. STAT. § 8-13.5-104 (2021) (requiring minimum accommodations for up to two years after childbirth). Others require provision of refrigeration or that employees be allowed to bring their own cold storage. *E.g.*, IND. CODE § 22-2-14-2 (2021).

Type (I) laws, including Arkansas,[119] California,[120] Colorado,[121] Connecticut,[122] Delaware,[123] Hawaii,[124] Illinois,[125] Kentucky,[126] Maine,[127] Massachusetts,[128] Nebraska,[129] Nevada,[130] New Jersey,[131] New York,[132] Oregon,[133] Rhode Island,[134] South Carolina,[135] Utah,[136] Vermont,[137] Virginia,[138] and Washington,[139] and the District of Columbia.[140] Many of these laws are recent and have passed through amendments within the past three years,[141] potentially signifying a cultural shift in the United States as a whole in support of breastfeeding and a nursing mother's right to participate in the workplace.

Most notably, California has passed laws effective January 1, 2020, far exceeding any other state in the Union.[142] The new laws require that every employer provides reasonable break time[143] and access to a sink, electricity, and cooling device with a place to sit and a place to set a breast pump.[144]

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119. ARK. CODE ANN. §§ 11-5-116, 16-123-102 (2021).

120. CAL. LAB. CODE §§ 1030–34 (West 2021); CAL. GOV'T CODE § 12926(r)(1)(C) (West 2021).

121. COLO. REV. STAT. § 8-13.5-104 (2021).

122. CONN. GEN. STAT. § 31-40w (2021).

123. DEL. CODE ANN. tit. 19, §§ 710(17), 711(a) (2021).

124. HAW. REV. STAT. §§ 378-2(a)(7), -92(a) (2021).

125. 775 ILL. COMP. STAT. 5/2-102(I)–(J) (2021); 820 ILL. COMP. STAT. 260/10 (2021).

126. KY. REV. STAT. ANN. §§ 344.030(6)(b), (8)(a)–(b), 344.040(1)(c) (West 2021).

127. ME. STAT. tit. 26, § 604 (2021).

128. MASS. GEN. LAWS ch. 151B, § 4 (2021).

129. NEB. REV. STAT. § 48-1102(11) (2021).

130. NEV. REV. STAT. §§ 613.4371, 613.438 (2021).

131. N.J. STAT. ANN. § 10:5-12 (a), (s) (West 2021).

132. N.Y. LAB. LAW § 206-c (McKinney 2021).

133. OR. REV. STAT. §§ 653.077, 659A.147(1) (2021).

134. 28 R.I. GEN. LAWS. § 28-5-7.4 (2021).

135. S.C. CODE ANN. §§ 1-13-30(l), -30(T), -80(A)(4) (2021).

136. UTAH CODE ANN. §§ 34A-5-102(1)(u), -106(1), 34-49-202 (West 2021).

137. VT. STAT. ANN. tit. 21, § 305 (2021).

138. VA. CODE ANN §§ 2.2-3901, -3905(B)(1) (2021).

139. WASH. REV. CODE § 43.10.005 (2021).

140. D.C. CODE §§ 2-1402.11(a)(1)(B), -1402.82(d) (2021).

141. Massachusetts's amendment was effective April 2018. 2017 Mass. Acts 54 (codified as amended at MASS. GEN. LAWS ch. 151B, § 4 (2021)). Oregon's amendment was effective September 2019. 2019 Or. Laws 118 (codified as amended at OR. REV. STAT. § 653.077 (2021)). South Carolina's amendment was effective May 2018. 2018 S.C. Acts 244 (codified as amended at §§ 1-13-30(l), -30(T), -80(A)). Washington's amendment was effective July 2019. 2019 Wash. Sess. Laws 722 (codified as amended at § 43.10.005).

142. CAL. LAB. CODE §§ 1030–34 (West 2021).

143. *Id.* § 1030.

144. *Id.* § 1031(c)–(d). Instead of simply exempting certain employers, California's laws contain explicit provisions as to what those employer subcategories are required to do. *Id.* § 1031(f)–(g), (i).

Further, an employer must notify employees of their breastfeeding rights, develop a nursing policy, and publish the policy in its employee handbooks.[145] If an employer fails to meet these standards, an aggrieved employee has a private right of action and can file a complaint with the Labor Commissioner.[146] The Labor Commissioner may then issue civil penalties of $100 per day of noncompliance and petition the superior court to grant injunctive relief against the employer.[147] Further, the employer must compensate the employee an additional hour of pay at her regular rate of compensation per day.[148] Because this is considered a wage and not a penalty, employees are then permitted to seek penalties such as compensatory damages, injunctive relief, punitive damages, and attorney's fees.[149] Lastly, because the law amends California's Labor Code, employees can also pursue a representative action on behalf of other aggrieved employees per California state law, circumventing class action requirements, potentially opening up employers to broad liability.[150] Because these provisions go so much further than typical state Type (I) laws, California may as well be in a class of its own.

*b. Type (II) Laws*

Type (II) laws only mandate reasonable accommodations, but like the FLSA, these protections stop short of prohibiting discrimination on the basis of nursing. Five states limit their degree of protections to this category. These states are Indiana,[151] Georgia,[152] Minnesota,[153] New Mexico,[154] Mississippi,[155] and Tennessee.[156] Like the Type (I) laws above, Type (II) laws require that employers provide a sanitary and private space that is not a bathroom within

145. *Id.* § 1034.
146. *Id.* § 1033.
147. *Id.*; *see id.* § 98.7(b)(2)(A).
148. *Id.* § 1033(a).
149. Letter from the California Chamber of Com. to Members of the Senate Comm. on Appropriations (May 8, 2019), https://calretailers.com/wp-content/uploads/2019/07/SB-142-SEN-Approps-Oppose-Coalition.pdf [https://perma.cc/WZK4-3JAQ].
150. *Id.* The Labor Code Private Attorneys General Act of 2004 ("PAGA") was designed to deputize private citizens to act as a proxy of the state's labor law enforcement agencies should those agencies not independently pursue the violations. For more information on PAGA and how it is implemented, see *Huff v. Securitas Security Services USA*, 233 Cal. Rptr. 3d 502, 505–06 (2018).
151. IND. CODE § 22-2-14-2 (2021).
152. GA. CODE § 34-1-6 (2020).
153. MINN. STAT. § 181.939 (2021).
154. N.M. STAT. ANN. § 28-20-2 (2021).
155. MISS. CODE ANN. § 71-1-55 (2021).
156. TENN. CODE. ANN. § 50-1-305 (2021).

reasonable proximity for nursing mothers. While these protections cover all women and often offer real enforcement mechanisms unlike the FLSA, they are still flawed in that they permit nursing discrimination.

*c. Type (III) Laws*

Type (III) laws limit discrimination or provide accommodation provisions to only government employees. Some states such as Louisiana have even narrower protections that cover only public schools but do not apply to all public employers generally.[157] The three states with Type (III) laws as their strongest protections are Louisiana,[158] Montana,[159] and Texas.[160] Texas and Montana prohibit discrimination and require that public employers provide standard accommodations such as a sanitary and private space for nursing that is not a bathroom within reasonable proximity of the mother's workplace.[161] Louisiana is silent as to discrimination but provides enhanced accommodations such as a clean, private, and lockable room equipped with a chair and a surface for a pump, storage for cleaning supplies, and access to electricity.[162]

*d. Type (IV) Laws*

Type (IV) laws involve either statutes meant to encourage workplace accommodations or statutes meant to provide incentives for workplaces that meet certain accommodation criteria; in other words, these laws have absolutely no teeth. The two states that limit protection to Type (IV) laws are North Dakota[163] and Oklahoma.[164] Oklahoma's laws take the form of a suggestion. The language used in the statute mirrors that used by the FLSA but uses the words "may" as opposed to "shall."[165] This offers nothing more than the legal equivalent of a "thumbs-up" from the state.

157. LA. STAT. ANN. §§ 17:81 (2021); *see also id.* § 49:148.4.1.
158. *Id.*
159. MONT. CODE ANN. §§ 39-2-215 to -216 (2021).
160. TEX. GOV'T CODE ANN. §§ 619.001–.006 (West 2021).
161. §§ 39-2-215 to -216; §§ 619.004–.005.
162. LA. STAT. ANN. § 49:148.4.1 (2021).
163. N.D. CENT. CODE § 23-12-17 (2021).
164. OKLA. STAT. tit. 40, § 435 (2020). While this statute uses permissive language for private employers, it uses mandatory language for state agencies: "Every state agency *shall* allow an employee who is lactating reasonable paid break time each day to use the designated lactation room for the purpose of maintaining milk supply and comfort." § 435(A)(2) (emphasis added).
165. *Id.* ("An employer may make a reasonable effort to provide a private, secure, and sanitary room or other location . . . .").

Alternatively, states in this category may also use an incentive system such as that utilized by North Dakota.[166] An incentive system allows employers to use the designation "infant-friendly" on products if they provide flexible work scheduling and breaks, a convenient sanitary location other than a bathroom, a water source for washing hands within the private location, and a clean refrigerator to store milk.[167] Like North Dakota, Texas[168] and Washington[169] also provide product certifications contingent on accommodations that are actually broader than standard accommodations required by Type (I) laws.[170] This discrepancy seems to suggest political palatability of laws that balance an employer's interest in running his or her business as he or she sees fit.

### 2. Arizona's Lactation Legislation History

In light of the broad national movement toward broader nursing employment laws, it is surprising Arizona has scantly discussed the topic. Indeed, Arizona's history with lactation law is extremely limited. In 2006, Arizona passed House Bill 2376, which gave mothers the right to "breast-feed in any area of a public place or a place of public accommodation where the mother is otherwise lawfully present."[171] The bill received wide bipartisan support,[172] yet has since spurred debate as to what should be considered a "public place."[173] Beyond this law, there have not been any laws in Arizona protecting the right to breastfeed in the workplace.

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166. § 23-12-17.

167. *E.g.*, *id.*

168. TEX. HEALTH & SAFETY CODE ANN. § 165.003 (West 2021).

169. WASH. REV. CODE § 43.70.640 (2021). Though Washington has Type (IV) provisions to incentivize workplace nursing, it also has Type (I) accommodation and discrimination provisions. *Id.* § 43.10.005.

170. *Compare* § 23-12-17 (allowing employers to use the "infant friendly" designation if their policy includes flexible work scheduling; a convenient location to breastfeed; a private, clean, and safe water source; and a refrigerator to store the mother's breast milk), *with* CONN. GEN. STAT. ANN. § 31-40w (2021) (prohibiting discrimination and requiring an employer to make reasonable efforts to provide employees with places to express her milk).

171. ARIZ. REV. STAT ANN. § 41-1443 (2021).

172. *See* H.B. 2376, 47th Leg., 2nd Reg. Sess. (Ariz. 2006).

173. Lorraine Longhi, *Women Can Breastfeed Anywhere in Arizona – or Can They?*, ARIZ. REPUBLIC, (Apr. 12, 2019, 2:16 PM), https://www.azcentral.com/story/news/local/scottsdale/2019/04/11/what-does-arizona-law-say-where-moms-can-breastfeed/3439084002 [https://perma.cc/E6UP-5JVB].

## III. A NEW PROPOSAL FOR ARIZONA WORKPLACE NURSING LAW

Part III of this Comment proposes two different statutory schemes for future Arizona workplace nursing laws—one idealized and the other more practical given Arizona's political climate. Section A of Part III will first examine potential criticisms for Arizona lactation at large and argue that, despite these claims, nursing is still deserving of workplace protection.

Section B will argue that nursing employees would be most protected by broad and extremely employee-friendly mandates modeled after those passed by California in 2020.[174] However, given the inevitable pushback such a law would have[175] and Arizona's pro-business political culture,[176] approval of such measures in Arizona seems unlikely.

Consequentially, Section C will propose a more pragmatic "carrot-stick" approach by blending Type (I) and Type (IV) state law types with a tax-credit incentive. The Type (I) laws would serve as the "stick," setting a floor of obligations the employer must abide by. However, the Type (IV) certification laws would act as the "carrot," creating incentives for employers to go beyond the minimal standards set by most states. To further encourage workplace nursing, Arizona could innovate by incorporating the tax-credit provisions previously proposed but never adopted by the federal government.

### *A. Addressing Criticisms of Nursing Accommodation Law*

Nursing accommodation protections in Arizona would face criticism from legal scholars concerned with untenable laws and business communities that demand less regulation. Some of this criticism stems from the fact that nursing accommodations exist in an uncertain interstitial space somewhere between disability accommodations and sex-based discrimination

174. *See supra* Part II.C.1.a.

175. *See, e.g.*, *Why California Is the Most Pro-Employee State*, MESRIANI L. GRP. (Sept. 20, 2019), https://www.mesrianilaw.com/blog/why-california-is-the-most-pro-employee-state [https://perma.cc/XG4F-UAF8].

176. *Best States for Business: 2019 Rank*, FORBES, https://www.forbes.com/best-states-for-business/list/#tab:overall [https://perma.cc/3XMT-ZGAG] (last visited Sept. 4, 2021) (ranking Arizona eighteenth overall for its business environment); *New Report: SBE Council Ranks 50 States According to Public Policy and Tax Climates for Small Business*, SMALL BUS. & ENTREPRENEURSHIP COUNCIL (May 6, 2019, 8:17 AM), https://sbecouncil.org/2019/05/06/new-report-sbe-council-ranks-50-states-according-to-public-policy-and-tax-climates-for-small-business [https://perma.cc/3N4R-L9L4] (ranking Arizona ninth for its business policy environment and eleventh for its business tax environment); Emily Richardson, *California Businesses Are Heading to Arizona*, AZ BIG MEDIA (July 30, 2019), https://azbigmedia.com/business/economy/california-businesses-are-heading-to-arizona [https://perma.cc/8XFB-K6ZR] (noting migration of jobs from California to Arizona due largely to Arizona's business culture).

protections. Whereas the Americans with Disabilities Act ("ADA") demands differential treatment between employees,[177] Title VII's purpose was to forbid differential treatment.[178] As such, courts have two distinct standards of review for what constitutes an "undue employer burden" under the ADA and Title VII.[179] To avoid accommodation under the ADA, employers must show significant difficulty or expense, taking into account factors such as cost of implementation, employer size, and the employer's industry.[180] In contrast, under Title VII religious protections employers need only show *de minimis* hardship to avoid providing religious accommodations;[181] virtually any contractual or economic cost will satisfy this burden.[182] Nursing protections as quasi-accommodation quasi-discrimination law creates ambiguity as to employer obligation. This Section notes possible criticisms stemming from this ambiguity as well as general criticisms as to the flat costs of accommodation. On balance, however, this Section will argue that such criticisms do not justify a bar on implementing workplace nursing laws.

### 1. Accommodation Criticisms

Some academics have argued the distinction between disability and religious Title VII accommodation standards is justified because religion is a choice whereas disability is not.[183] One's choice in religion is made with an understanding that religion inherently involves sacrifices; those sacrifices

177. *See* 42 U.S.C. § 12112(b)(5)(A).

178. *See, e.g.*, EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615–16 (9th Cir. 1988); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146 n.5 (5th Cir. 1982). This ambiguous nature of nursing accommodations has caused federal courts to struggle with applying Title VII protections and, as a result, some courts have relied on seemingly arbitrary reasoning to classify it one way or another. Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1260 (11th Cir. 2017). For a greater depth of explanation, see *supra* note 92.

179. In-depth review of the distinctions of case law between Title VII religious accommodations versus ADA accommodations have been discussed at length, but such discussion exceeds the scope of this Comment. For more information, see Stephen Gee, Note, *The "Moral Hazards" of Title VII's Religious Accommodation Doctrine*, 89 CHI.-KENT L. REV. 1131 (2014); Keith S. Blair, *Better Disabled than Devout? Why Title VII Has Failed To Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 ARK. L. REV. 515 (2010).

180. 42. U.S.C. § 12111(10); 29 C.F.R. § 1630.15(d) (2021).

181. Title VII accommodation tends to only arise in the religious context regarding days of Sabbath, types of dress, and grooming. Blair, *supra* note 179, at 517. Presumably, the other protected classes (race, color, nationality, and sex) do not require accommodation because they are simply physical characteristics. However, nursing and pregnancy as a subset of sex have occasionally been read to require accommodation, though courts have avoided this language, focusing on discriminatory aspects instead. For more information, see discussion *supra* note 118.

182. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

183. Gee, *supra* note 179, at 1152.

may mean one may not eat a particular food or may not be suitable for a particular job.[184] Nursing accommodation critics could liken religious choice with the choice to nurse, arguing that mothers understand that nursing requires sacrifice. For instance, smoking, drinking alcohol, and taking certain medication should be avoided while breastfeeding.[185] Leaving the workplace may just be another one of these sacrifices. Therefore, these critics could argue that an employer should only have to show *de minimis* hardships to avoid providing nursing accommodations—if accommodation is to be required at all.

Second, specific Title VII accommodations are inherently subjective because they concern personal spirituality compared to ADA accommodations which require objective medical assessments.[186] Because ADA accommodations are more objective and concrete, some academics argue greater burdens on the employer are justified.[187] Here, nursing accommodation critics could also argue that accommodations differences between nursing women are inherently subjective as the amount of breaks and the time needed to express milk can widely differ from woman to woman.[188]

Third, academics argue that Title VII and ADA distinctions are justified because employees could gain preferential treatment by using religious accommodations as a trump card to excuse themselves from rules broadly applicable to other employees.[189] Consequently, rather than simply accommodating religion, the availability of religious accommodations may actually create incentives for employees to make false claims for accommodations.[190] On the other hand, disability it is not a choice and is therefore less likely to be incentivized or used against other employees.[191] Regarding nursing, critics could argue that women would use nursing to secure preferential schedules or treatment over coworkers who either do not or choose not to breastfeed. Accommodations would inherently incentivize

184. *Id.*

185. *Breastfeeding and Alcohol, Drugs, and Smoking*, U.S. DEP'T OF AGRIC., https://wicbreastfeeding.fns.usda.gov/breastfeeding-and-alcohol-drugs-and-smoking [https://perma.cc/UTF8-W53Y].

186. 42 U.S.C. § 12112(d)(4)(A)–(B) (allowing employers to inquire only into an employee's ability to perform job-related functions, and even then, only consistent with a business necessity).

187. Gee, *supra* note 179, at 1150–55.

188. *See* FACT SHEET #73, *supra* note 101.

189. Gee, *supra* note 179, at 1154.

190. *Id.* at 1148.

191. *Id.* at 1155.

nursing rather than simply accommodating it, thus causing workplace disruption.

Aside from legal scholar critiques, businesses in states where workplace nursing laws have passed have also been resistant to nursing regulations and have sought laws with limited intrusiveness and greater exceptions to enforcement.[192] Recent business responses to Kentucky's 2019 workplace nursing law and California's expansive 2020 workplace law demonstrate these concerns. Before Kentucky's bill was passed, State Republican Senator Dan Seum protested Type (I) protections, as they would inevitably result in pregnant women being overlooked in favor of those who do not require accommodation. He stated, "[Y]ou can always tell when those on the committee have never owned and operated a business. After a while you start hiring defensively . . . . You don't hire a problem."[193] In other words, the law itself subverts its own intention; less women will be employed, not more.

California's Chamber of Commerce (the "Chamber") also opposed passage of California's extensive 2020 nursing law because it reduced the ways a business could exempt itself, required expensive renovations, and allowed deputized private citizens to enforce the statute.[194] The Chamber pointed specifically to the law's mandate requiring construction of lactation rooms, an estimated expense of $30,000 to $105,000 to employers.[195] This expense was compounded by requiring running water access, effectively requiring plumbing installation for an impermanent accommodation.[196] Last, the Chamber expressed concern over conflicting employee needs. Because the law requires that nursing take priority over other room uses, if other employees needed to take mandatory breaks (for disability, for example) they

192. Letter from the California Chamber of Com. to Members of the Senate Comm. on Appropriations, *supra* note 149.

193. Ryland Barton, *Kentucky Legislative Panel Approves Pregnant Workers' Rights Bill*, 89.3 WFPL NEWS LOUISVILLE (Feb. 14, 2019), https://wfpl.org/kentucky-legislative-panel-approves-pregnant-workers-rights-bill [https://perma.cc/CJ6S-CLAU]. In an attempt to highlight the necessity of lactation protections for working women conveniently ignored by working men, bill sponsor State Republican Senator Alice Forgy Kerr jabbed back, stating, "[I]t's always easy to tell who on these committees has never been pregnant." *Id.* Louisville's Chamber of Commerce also saw the issue differently, finding the law actually helped businesses by ensuring markets have access to employees who are highly capable and eager to work. Dina Bakst, Elizabeth Gedmark, & Sarah Brafman, *Long Overdue: It Is Time for the Federal Pregnant Workers Fairness Act*, A BETTER BALANCE 22 (May 2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf [https://perma.cc/P8T4-88LJ].

194. Letter from the California Chamber of Com. to Members of the Senate Comm. on Appropriations, *supra* note 149.

195. *Id.*

196. *Id.*

would be unable to. Thus, accommodation would force employers to violate other obligations absent a specially designed room for the mother.[197]

### 2. Response to Anti-Nursing Accommodation Concerns

However, these criticisms are either misplaced or insufficiently justified when compared to the social, economic, and human impact of excluding nursing women from the workplace. In other words, protections are not all-or-nothing; business concerns can be mitigated by specific statutory language, reasonableness parameters, or benefits to participating employers.

This Comment addresses the above concerns in turn: first, framing a decision to nurse as a personal choice is either intentionally sexist or unintentionally privileged in that it does not reckon with its assumption that women will inevitably breastfeed. In a world where breastfeeding is treated as a choice, both sexes could only achieve equal workforce participation if no woman breastfed. That way, women never make the "choice" to sacrifice their careers to breastfeed—a "choice" men never make. Instead, all people prioritize their jobs, and as a result, nearly all children are formula fed. This would have a profound impact on public health, public education, and the environment.[198] If society is uncomfortable with that outcome, it is because the choice was never truly voluntary to begin with. Breastfeeding is a societal necessity. Inversely, if workplace nursing is instead treated as a temporary but necessary employee condition, women could simultaneously attain equality in the workplace[199] *and* provide the breast milk necessary for a healthy society because they are not forced to choose between the two.[200]

In regard to the argument that nursing accommodations would be excessively subjective, this Comment concedes that legal subjectivity is difficult for an employer to navigate. It is hard to know whether an accommodation request exists in the nebulous world of what is reasonable. However, this Comment argues that the individual subjectivity of nursing accommodations is the same (if not less) subjective than ADA accommodations. Medical professionals can recommend the number and frequency of breaks, and unlike the ADA, which deals with the broad umbrella of disability, nursing accommodations are highly specific and can

197. *Id.*

198. *See supra* Part II.A.

199. This thought experiment is presuming for argument's sake there are no other barriers to a woman's entry into the workplace. This Comment does not mean to suggest nursing accommodation would resolve all impediments to workplace sex-based equality, though such a discussion exceeds the scope of this discussion.

200. *See supra* Part II.A.

be carefully tailored in the statute. Further, the ADA requires a "meeting of the minds" also known as an "interactive process" to reach a reasonable conclusion.[201] So long as the employer makes a good faith effort to provide an effective accommodation, it will not be liable for failing to provide the employee's preferred accommodation.[202] This same standard could apply to nursing.

The concern that nursing accommodations incentivize breastfeeding and operate as a trump card over other employees also seems to miss the point. It is true that nursing breaks would disrupt the lives of other employees. Coworkers would have to compensate for the mother's absence while nursing and she may get breaks otherwise unavailable to her coworkers. However, this argument ignores that it is a difficult accommodation to exploit. Women will not go through childbirth or childrearing just to get more breaks at work, and nursing itself is semi-labor intensive,[203] sparsely amounting to a "break" in the layman sense of the word. Further, these laws typically require women to use breaks already allotted to them before asking for more.[204] Coupled with the constraints of reasonableness and the fact that an employer need only provide an effective (not preferred) accommodation,[205] it is unlikely nursing would be wielded as a tool against the rest of the workforce. To the extent that accommodations incentivize nursing, this Comment agrees. That is the point. Just as the ADA's purpose was to provide equal opportunity in the workplace and shift the economic costs of dependency and nonproductivity from the government to employers,[206] the purpose of nursing accommodations is to provide women greater access to the workforce and shift the government costs related to formula-fed children to employers.

Last, the two business criticisms essentially boil down to two issues: the threat of litigation undermining the purpose of accommodation as voiced by Kentucky State Senator Dan Seum, and the financial cost of accommodation as voiced by California's Chamber of Commerce. To the first point, it is true that the possibility of suit may discourage an employer from hiring women. However, this would run afoul of existing sexual discrimination law.[207] This

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201. 29 C.F.R. § 1630.2(o)(3) (2021).

202. *See* Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313, 317 (2007).

203. *Common Breast Pumping Problems and How To Fix Them*, BYRAM HEALTHCARE, https://breastpumps.byramhealthcare.com/blog/index.php/2018/05/21/fix-common-breast-pumping-problems [https://perma.cc/6CX4-7D2V].

204. *See, e.g.*, CAL. LAB. CODE § 1030 (West 2021).

205. Porter, *supra* note 202, at 317.

206. 42 U.S.C. § 12101(a)(7)–(8).

207. *Id.* § 2000e-2(a)(1); ARIZ. REV. STAT. ANN. § 41-1463(B)(1) (2021).

concern is further alleviated by the difficulty in ascertaining someone's eventual breastfeeding needs before hiring them.

As to the Chamber's criticisms, financial costs are indeed a valid concern that Arizona will need to weigh in creating its workplace nursing laws. After all, accommodation law will inherently increase a business' administrative costs, require H.R. departments to be trained and equipped to work with nursing protocols, and often require changes to the actual workplace structure and organization that require money.[208] However, while this Comment acknowledges some costs would be difficult for some employers, it rejects the argument that overall businesses' harms would outweigh benefits generally. Workplace modification would require short term start-up costs[209] and businesses would actually eventually enjoy economic benefits that research shows will accrue.[210] Indeed, breastfeeding pods such as those sold by the company Mamava provide a relatively cheap and easy-to-implement solution for large and small businesses alike.[211] Beyond these financial considerations, nursing accommodation is simply good practice. These costs should be acceptable in order to create room for skilled employees who want to participate in the workforce but do not want to forego the right to provide their babies with breastmilk.

### *B. Idealized Breastfeeding Accommodations and Protections*

As a baseline, any workplace nursing law must include certain provisions to function effectively. First, the law must designate lactating women as a protected class within the definition of sex, and this designation must include both the need to express milk as well as the choice to express milk.[212] Absent

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208. Letter from the California Chamber of Com. to Members of the Senate Comm. on Appropriations, *supra* note 149.

209. *E.g.*, *id.*; *see also* Jack Katzanek, *Law Requires Further Accommodations for Mothers Who Breastfeed*, THE PRESS-ENTERPRISE (Dec. 12, 2019, 4:19 PM), https://www.pe.com/2019/12/12/law-requires-further-accommodations-for-mothers-who-breastfeed [https://perma.cc/3B5E-KPHS] (reporting that California attorneys have been working on helping employers comply with the law and believe it will change the way future workplaces are designed).

210. Ball & Bennett, *supra* note 37, at 257–58.

211. Product page showing *Mamava Original*, MAMAVA, https://www.mamava.com/all-products/original-mamava-lactation-suite [https://perma.cc/UN3K-8HQN]. Such pods cost between $14,000 and $23,000. Harriet Baskas, *Oh Baby: Mamava Pods Populating Airports*, RUNWAY GIRL NETWORK (July 12, 2018), https://runwaygirlnetwork.com/2018/07/12/oh-baby-mamava-pods-populating-airports [https://perma.cc/5KE6-9XK6].

212. Such a distinction would preclude a court from holding that the decision to pump is a childrearing concern rather than a pregnancy-related condition. *See* Barrash v. Bowen, 846 F.2d 927, 931–32 (4th Cir. 1988) (finding breastfeeding was a childrearing concern distinct from pregnancy).

such protections, Arizona courts may follow the example of other courts and find that—while lactating women are indeed a protected class within the definition of "pregnancy-related medical conditions"—women who "choose" to breastfeed when not medically necessary should not receive protections.[213] Second, because discrimination provisions do not create an affirmative obligation to act whereas accommodation requirements do,[214] any proposed law must also include a provision requiring reasonable accommodation to nursing mothers. These requirements are the provisions provided by Type (I) states and include unpaid breaks as needed in a sanitary, private space that is not a bathroom.

To fully protect and encourage workplace nursing, however, Arizona law needs to go further. Ideal laws would stipulate explicit accommodation requirements matching those provided by California's recently passed 2020 workplace nursing law.[215] These provisions would require a place to sit, access to electricity and running water, and a surface for a woman to place her pump. Further, employers would be required to let breastfeeding mothers use available refrigeration for milk storage, and if such storage is unavailable, employers must permit employees to bring their own cold storage to ensure the purpose behind accommodation is not effectively frustrated. Protections should be available to women for one year, in accordance with breastfeeding duration recommendations by the Center for Disease Control,[216] and some form of written notice should be provided to employees of these rights.[217]

Further, enforcement exceptions ought to be limited only to those experiencing "undue hardship" akin to disability standards. However, even with such a showing, the law should still require that employers of all sizes accommodate to the maximum degree possible.

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213. *See* Allen v. Totes/Isotoner Corp., 915 N.E.2d 622, 624 (Ohio 2009) (per curiam). In *Allen*, the plaintiff was forbidden from pumping outside of her lunch break. *Id.* at 630 (O'Connor, J., concurring). However, she decided to relieve herself anyway, likening it to bathroom breaks taken by other employees. *Id.* at 631. She was caught by her supervisor who then terminated her for failing to follow directions. *Id.* at 623 (majority opinion). The Ohio Supreme Court held that this termination was not discrimination, nor was it pretext for discrimination on the basis of pregnancy, reasoning that the plaintiff was terminated only for her choice to breastfeed, not for her need to lactate. *Id.* at 623. Given this holding, the court did not rule on whether lactation discrimination specifically is cognizable under Ohio discrimination law. *Id.* at 624.

214. *See* Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1260 (11th Cir. 2017); EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 429 n.6 (5th Cir. 2013).

215. *See supra* Part II.C.1.a.

216. *Breastfeeding: Frequently Asked Questions*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/breastfeeding/faq/index.htm [https://perma.cc/6JP5-BVAH].

217. *See* CAL. LAB. CODE § 1034 (West 2021).

Last, while Arizona employees are unable to enforce labor law regulations on behalf of the State like employees in California,[218] Arizona should still have robust measures that provide compensatory damages (calculated as one hour of standard wages per day of violations), injunctive relief, punitive damages, and attorney's fees.[219]

The benefit to this approach is that it is simple in its demands and it is clearly applicable to everyone. Further, the law provides comprehensive protections like cold storage and electricity sorely needed so as to not undermine the law's purpose. However, the extent of the demands may cause employer backlash and dampen the appeal of doing business in Arizona. Indeed, it appears highly unlikely that California-inspired measures would even pass in Arizona; California itself received considerable opposition both when the bill was originally introduced and vetoed by its former Governor[220] and when the bill was reintroduced but resisted by California's business community.[221]

### *C. A Carrot-Stick Approach to Nursing Accommodation Law*

This Comment argues that Arizona could instead focus on passing a bill that mixes various state law strategies to increase the likelihood of bill passage. Further, Arizona could innovate by offering business-friendly tax incentives that would expediate roll-out of the law and effectively provide broader protections than mandated baselines. As a result, Arizona could increase rates of workplace nursing in a way that is less coercive to businesses than an outright mandate of maximum accommodations. This is the carrot-stick approach.

Like the idealized provisions in the proceeding section, this Comment argues that Type (I) protections are inescapable as a baseline level of protections. Without requiring some form of accommodation *and* forbidding discrimination, mothers are inherently vulnerable to termination and

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218. California's PAGA deputizes private citizens to enforce labor law regulations for themselves and other wronged employees on the State's behalf. *See supra* note 150.

219. *See* CAL. LAB. CODE § 1033 (West 2021); Letter from the California Chamber of Com. to Members of the Senate Comm. on Appropriations, *supra* note 149.

220. S.B. 937, 2017–2018 Leg., Reg. Sess. (Cal. 2018). Despite having passed previous workplace protections for nursing mothers, Governor Jerry Brown still vetoed the bill, claiming its measures were "unnecessary." *New Workplace Lactation Standards Approved, but Room Requirements Vetoed*, CBS SACRAMENTO (Oct. 1, 2018, 12:38 PM), https://sacramento.cbslocal.com/2018/10/01/lactation-standard-law-california [https://perma.cc/S4BQ-J2TP].

221. S.B. 142, 2019–2020 Leg., Reg. Sess. (Cal. 2019); Letter from the California Chamber of Com. to Members of the Senate Comm. on Appropriations, *supra* note 149.

exclusion from the workplace. Mandated accommodations must include unpaid breaks as needed in a sanitary, private space that is not a bathroom, and available remedies must include a standard hours' pay per day of violation as well as standard discrimination damages.

However, unlike the idealized protections in the preceding section, the carrot-stick approach stops short of the extensive requirements such as a place to sit; a surface for the pump; or access to refrigeration, running water, and electricity. It also does not suggest that all employers regardless of size provide mandated accommodation. Instead, the carrot-stick approach recognizes that these requirements ask a lot of employers, both financially and practically, and provides greater flexibility for employers to refuse accommodation.

This Comment's underlying theory behind the carrot-stick approach argues that if the law mandates compliance to a certain threshold, incentives would provide employers with the last remaining push to provide the desired comprehensive accommodation. This strategy would take advantage of the psychological phenomenon of the sunk cost fallacy—individuals tend to continue an endeavor when investment, money, and effort have already been made.[222] If the law requires baseline nursing accommodation, and it rewards voluntary behavior that costs only marginally more, individuals may as well invest in the voluntary behavior.

This blend of Type (I) baseline protections[223] with added Type (IV) incentives[224] is Washington's model, and Arizona would be wise to adopt it. Washington's law stipulates that employers who also provide flexible scheduling, refrigeration, and a clean water source in addition to mandated requirements may designate their products or services as "Infant-Friendly."[225] With the positive public image this designation would bring, many employers would be motivated to make the renovations needed to provide comprehensive accommodations rather than the legal minimums.

Further, Arizona has the opportunity to innovate by providing tax breaks for employers who do go above and beyond required Type (I) protections. No state has taken this approach, but such an idea was proposed by the United

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222. Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 124, 124 (1985).

223. WASH. REV. CODE § 43.10.005 (2021). As a reminder, Type (I) protections prohibit discrimination and require that accommodations include unpaid breaks to express milk and access to a secure, private, sanitary room that is not a bathroom. Breaks are to be provided as needed and run concurrently with already allotted breaks to the extent possible. Rooms are to be within reasonable proximity to an employee's place of work. *See supra* Part II.C.1.a.

224. WASH. REV. CODE § 43.70.640 (2021).

225. *See id.*

States Congress in the Breastfeeding Promotion Act of 2009.[226] This proposal would have credited 50% of breastfeeding accommodation expenditures up to a cap of $10,000.[227] Arizona could adopt similar provisions but with a few modifications. First, because the purpose of the incentives is to elicit compliance with broader-than-mandatory accommodation standards, such a tax credit should be withheld until an employer can demonstrate they have reached this heightened standard. Second, as written, the law relieves the burden on smaller businesses to a greater extent than larger businesses. Because larger employers will expect costs well beyond the cap, the "carrot" component of the law is relatively negligible. To remedy this, the Arizona law should create incremental caps based on a facility's employee capacity rather than per employer.

The benefit of this approach is that it preserves greater employer autonomy to run a business as he or she sees fit. Further, it removes some of the transaction costs in determining which employers actually face an undue burden permitting exemption; if the employer rejects greater accommodation despite the incentives, one can presume that employer is actually unable to provide that coverage. Given this flexibility, broad accommodations that would otherwise not pass as a mandate may nonetheless be widely adopted by businesses.

However, the cost to this approach is that not all mothers will be protected, and it provides businesses with the flexibility to avoid protections like cold storage that are important to effectuate the law's purpose. Yet because this proposal appears more likely to pass through Arizona's legislature, and because some protections are better than no protections, this Comment ultimately argues that the carrot-stick approach is the best of the two approaches. It better balances competing business-employee interests and would likely be able to reshape the ways workplaces are designed in Arizona.

## IV. CONCLUSION

If civil rights protections mean anything, they mean creating space in society for those who are different but nonetheless valued. As such, Arizona must adopt its own measures to encourage a mother's decision to nurse at work. Breastfeeding is not an inconsequential choice akin to the decision to provide organic foods or sign a child up for karate classes; it is deeply human and fundamental to an infant and mother's health.[228] Using formula

226. S. 1244, 111th Cong. § 201(a) (2009); H.R. 2819, 111th Cong. § 201(a) (2009); *see supra* Part II.B.3.

227. H.R. 2819 § 201(a).

228. *See supra* Part II.A.

exclusively can lead to significant harm to newborn children, while choosing to breastfeed provides significant benefits to the child, mother, and society at large.[229] When employers are permitted to exclude women on the basis of their decision to nurse, efforts to uphold our values as an egalitarian society are frustrated. Thus, sex-based equality demands workplace nursing laws that either protect the right to breastfeed in totality or alternatively provide baseline mandates with incentives for broader protections. If Arizona wants women to have the same access to the workforce as men, the legislature must realize that this equality is impossible without accommodating an employee's capacity for motherhood.

229. *See supra* Part II.A.