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## Men are Winning: Why Paid Paternity Leave Has Not Taken Full Flight in the United States

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***MEN ARE WINNING: WHY PAID  
PATERNITY LEAVE HAS NOT TAKEN  
FULL FLIGHT IN THE UNITED STATES***

*By Nina Franco\**

TABLE OF CONTENTS

I.	INTRODUCTION.....	230
II.	BACKGROUND.....	233
III.	ANALYSIS.....	240
	A. Legal Arguments .....	240
	1. History of Legal Battles.....	240
	2. Proposed Acts That Have Failed.....	244
	3. Current Legislation.....	251
	4. Proposed Policy.....	255
	B. Financial Arguments.....	259
	1. Case Study: Lithuania .....	262
	C. Ethical Arguments .....	263
	1. More Engaged Fathers Equal Happier Kids.....	263
	2. Closing the “Motherhood Penalty Gap” .....	266
IV.	CONCLUSION .....	269
	APPENDIX A.....	271

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## I. INTRODUCTION

In March 2021, one mother, under the pseudonym “rollerskates,” described her solo postpartum experience on a *BuzzFeed* community post as “extremely traumatic.” After just *one day* of paternity leave, her husband was back to working twelve-to-fourteen-hour days while she, in stitches and a diaper, cared for their newborn “completely alone.”<sup>1</sup> Shocking as her story may sound, it is not an uncommon narrative in this country—mothers forced to endure most of postpartum childcare while their partners return to work.<sup>2</sup>

The United States (U.S.) does not have a national paid paternity leave policy,<sup>3</sup> and it is not fathers who are losing; it is the 4 million women who give birth each year in this country.<sup>4</sup> These women, especially during the ongoing coronavirus pandemic, have borne the brunt of childcare and domestic labor post-birth. They clean spit-up off their shirts, change smelly diapers, pump breastmilk, and take care of household chores, while their spouses continue to climb promotional ladders at work. Mothers on maternity leave often have no choice but to stall their career goals for the time being—subtly falling behind—as the men at their workplaces thrive off opportunities they left behind.

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<sup>1</sup> Mike Spohr, *26 Parental Leave Stories That Prove America is So Far Behind the Rest of the World*, BUZZFEED (Mar. 21, 2021), <https://www.buzzfeed.com/mikespohr/americans-share-parental-leave-experiences> (describing the postpartum experiences of twenty-six American parents and their struggles with the U.S. parental leave system).

<sup>2</sup> *Id.* (including posts from other mothers; one who gave birth to her baby on a Friday, and her husband’s employer expected him back in the office on Monday morning, and another, who exclaimed that her husband had a total of one-and-a-half days off after their child was born).

<sup>3</sup> See generally Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2612(c) (2006) (affording strictly *unpaid* maternity and paternity leave to qualified employees).

<sup>4</sup> *Births and Natality*, CTR. FOR DISEASE CONTROL (Feb. 7, 2022), <https://www.cdc.gov/nchs/fastats/births.htm> (citing 3,613,647 U.S. births in 2020).

Out of our nation's fifty states, only eleven states and the District of Columbia offer paid family leave for fathers.<sup>5</sup> An additional eleven states have proposed, but unsuccessfully passed, family leave legislation.<sup>6</sup> Many private companies like Microsoft, Deloitte, and Netflix have hopped on the bandwagon as well. However, paid paternity leave is still not, by any means, common in the U.S. As of 2019, only 31% of surveyed workplaces, not subject to any government mandates, offered some sort of paid paternity leave for fathers.<sup>7</sup>

Yet, even when offered paid paternity leave by their state or employer, fathers rarely take full advantage of it. After California implemented family leave in 2004, many fathers were cautious about embracing the policy.<sup>8</sup> Studies revealed that California fathers worried about damaging their professional reputations or hurting their future earning potential—concerns new mothers have no choice but to concede.<sup>9</sup> In some instances, where fathers take their offered paternity leave, society shames them for their decision.<sup>10</sup> When former major

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<sup>5</sup> These states include California, Colorado, Connecticut, Delaware, Massachusetts, Maryland, New Jersey, New York, Oregon, Rhode Island, and Washington. Yet, leave has yet to go into effect in Oregon, Colorado, Maryland, and Delaware. *State Family and Medical Leave Laws*, NAT'L CONF. OF STATE LEGISLATORS (Sept. 9, 2022), <https://tinyurl.com/bdzb2jyr>.

<sup>6</sup> *State Paid Family Leave Laws Across the U.S.*, BIPARTISAN POL'Y CTR. (Oct. 3, 2022), <https://bipartisanpolicy.org/explainer/state-paid-family-leave-laws-across-the-u-s/>.

<sup>7</sup> SOC'Y FOR HUM. RES. MGMT. & OXFORD ECON., *Paid Leave in America: An Economic Overview*, (Aug. 2020), <https://tinyurl.com/vv9mkxz4>.

<sup>8</sup> Nathaniel Popper, *Paternity Leave Has Long-Lasting Benefits. So Why Don't More American Men Take It?*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/parenting/paternity-leave.html>.

<sup>9</sup> *Id.*

<sup>10</sup> *Parental Leave Survey*, DELOITTE, <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-about-deloitte-paternal-leave-survey.pdf> (last visited Oct. 4, 2022) (concluding that 54% of U.S. survey respondents said “their colleagues would judge a man more than a woman for taking the same amount of paternity leave”); Michael Marty, *The Real Reason Dads Think Twice About Taking Parental Leave*, FORTUNE (Apr. 12, 2016, 7:00 PM), <https://fortune.com/2016/04/13/dads-parental-leave/> (“Dad shaming isn’t always overt, but it exists. In the workplace, it often manifests in the widespread

league baseball player Daniel Murphy took the MLB's three-day paid paternity leave, sports radio co-hosts, Boomer Esiason and Craig Carton, criticized him for missing the first two games of the 2014 baseball season. During their weekly radio show, *Boomer & Carton* (now *Boomer & Gio*), Carton said, Murphy should have gotten his "ass back to [the] team and [] play[ed] baseball."<sup>11</sup> Boomer similarly suggested Murphy tell his wife to "[h]ave [a] C-section before the season starts" because he "need[s] to be at Opening Day."<sup>12</sup>

Nevertheless, fathers that can take paid leave and choose to take it are in a better position to develop strong and healthy relationships with their children. Not only does paid paternity leave support co-parenting and family stability, but it also promotes workplace productivity and gender equality amongst new parents and cognitive development in children.<sup>13</sup>

The U.S. should enact a comprehensive national paid paternity leave policy which will offer emotional and financial benefits to American fathers. As one of the richest countries in the world, with the highest nominal gross domestic product at roughly \$23 trillion, the U.S. can pass paternity leave legislation.<sup>14</sup> It is a failure on the part of the U.S. government that approximately 73% of our North Atlantic

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unconscious bias leading men to feel pressured to prioritize work over family."); see generally Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?*, 69 J. SOC. ISSUES 322 (June 12, 2013) (illustrating that men who take paternity leave are regarded by society as "poor organizational citizens," who suffer from "femininity stigma").

<sup>11</sup> Hannah Levintova, *Baseball Player Takes 2 Days of Paternity Leave. Sports Radio Goes Ballistic*, MOTHER JONES (Apr. 3, 2014), <https://tinyurl.com/3m7y5rv4>.

<sup>12</sup> *Id.*

<sup>13</sup> See Evelina Nedlund, *Bank of America's Employee Satisfaction at Record High—Thanks to its Paid Parental Leave Policy*, EMP. BENEFIT NEWS (June 21, 2019, 2:43 AM), <https://tinyurl.com/mr44xdra> ("Our satisfaction with benefits are basically running at an all-time high,' says Chris Fabro, Global Head of Compensation and Benefits at Bank of America. '[Paid paternity leave] is certainly helping drive our ability to keep teammates in the bank and help them grow their careers here.'"); Patrick Ball, *5 Reasons New Dads Need Paternity Leave*, CARE.COM (Feb. 25, 2020, 12:30 PM), <https://benefits.care.com/5-reasons-new-dads-need-paternity-leave>.

<sup>14</sup> Caleb Silver, *The Top 25 Economies in the World: Ranking the Richest Countries in the World*, INVESTOPEDIA (Sept. 1, 2022), <https://www.investopedia.com/insights/worlds-top-economies/>.

Treaty Organization (NATO) allies offer some form of nationwide paid paternity leave, while the U.S. offers it in just some states.<sup>15</sup> Despite 109 recognized nations across the globe offering fathers paid leave in 2021 (approximately 56%), the U.S. is not among them.<sup>16</sup>

This comment will explore the reasons why the U.S. government has struggled and failed to implement paid paternity leave while our NATO allies offer a wide range of leave policies.<sup>17</sup> In particular, this comment will analyze ethical arguments in favor of paid paternity leave, difficulties surrounding enactment of paid family leave legislation in the U.S., and the U.S.'s financial ability to implement a leave policy, compared to one of our less affluent NATO counterparts, Lithuania, which offers leave. Additionally, the comment will dissect the paternity leave policies of France and Norway, where there is evidence that these policies have led to more engaged parenting, equally divided household chores, and fewer anti-anxiety prescriptions.<sup>18</sup>

NATO countries with paid paternity policies see more active and engaged parents. Without a similar paid paternity leave policy, the U.S. will not be able to close the gender pay gap (“motherhood penalty”), will continue to experience a decline in family engagement, and endanger the welfare of our nation’s children. If our allies have figured out a way to adopt paid paternity leave, the U.S. can too.

## II. BACKGROUND

The United Nations International Children’s Emergency Fund (UNICEF) defines paternity leave as “job-protected leave for fathers

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<sup>15</sup> See Yekaterina Chzhen et al., *Are the World’s Richest Countries Family Friendly?*, UNICEF OFF. OF RSCH. (June 2019), <https://tinyurl.com/yvr6etj9> (relying on Figure 1 to determine the percentage of NATO countries that offer paid paternity leave).

<sup>16</sup> Claire Cain Miller, *The World Has Found a Way to Do This’: The U.S. Lags on Paid Leave*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/10/25/upshot/paid-leave-democrats.html>.

<sup>17</sup> See *infra* Appendix A.

<sup>18</sup> Elian Peltier, *France Doubles Paid Paternity Leave to 28 Days, One of Europe’s Most Generous Plans*, N.Y. TIMES (Sept. 24, 2020), <https://tinyurl.com/57nar5tu>.

at the time of childbirth or soon after.”<sup>19</sup> It differs from general “parental leave,” which is “job-protected leave for employed parents . . . [which] usually follows maternity leave.”<sup>20</sup> The structure of a parental leave policy depends on either the beneficiary’s home country and or employer, but a majority of these policies allocate a set amount of leave time for fathers.<sup>21</sup>

In September of 1970, a schoolteacher named Gary Ackerman sued the New York City Board of Education for *unpaid* paternity leave. A year earlier, his wife gave birth to their daughter, Lauren. When Lauren was about ten months old, Ackerman applied for unpaid leave from the district, citing “leave (without pay) for childcare purposes,” and his request was later denied.<sup>22</sup> After the school board denied his appeals, declaring that their leave policy applied only to female teachers, Ackerman and his wife filed a complaint with the Federal Equal Employment Opportunity Commission (EEOC) on grounds of sex discrimination.<sup>23</sup> While he was able to secure a revision of the Board’s policy—a rewording of the bylaws to include male teachers alongside affected females—Ackerman was not able to secure paid leave.<sup>24</sup> The District Court for the Southern District of New York denied his plea for compensation on grounds that he was no longer serving as a public school teacher and that the Board had already made a positive language change in their bylaws.<sup>25</sup>

As efforts toward enacting paid paternity leave in the U.S. stalled, several Nordic countries embraced the challenge. In 1974, Sweden became the first country in the world to grant fathers paid

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<sup>19</sup> Chzhen et al., *supra* note 15.

<sup>20</sup> *See id.* (illustrating the structure of “parental leave” differs based on your employer and your home country, but a majority of parental leave systems across NATO apportion a certain amount of time for fathers).

<sup>21</sup> *See id.*

<sup>22</sup> Lily Rothman, *Meet the Father of Paternity Leave*, TIME (June 10, 2015, 2:49 PM), <https://www.time.com/3916437/paternity-leave-gary-ackerman/>.

<sup>23</sup> Lisa Belkin, *Breaking the Paternity Leave Barrier: Gary Ackerman and the Rest of the Story*, HUFF POST (June 18, 2013), [https://huffpost.com/entry/paternity-leave-gary-ackerman\\_n\\_3455866](https://huffpost.com/entry/paternity-leave-gary-ackerman_n_3455866).

<sup>24</sup> Rothman, *supra* note 22.

<sup>25</sup> *Ackerman v. Bd. of Educ. of City of N.Y.*, 387 F. Supp. 76, 81-82 (S.D.N.Y. 1974).

leave.<sup>26</sup> Sweden's policy allows parents to split seven months of paid leave while receiving up to 90% of their previous incomes.<sup>27</sup> Norway, the first Nordic country to insist new mothers take leave, followed in 1977.<sup>28</sup> In that same year, the country allowed Norwegian fathers two weeks of paid leave in the form of arrangements worked out with their employers.<sup>29</sup> Both countries have since increased their leave time and take-home pay.<sup>30</sup>

While Sweden was the first country in the world to enact paid paternity leave, Norway was one of the first countries in NATO to adopt this policy.<sup>31</sup> Twenty-three of the thirty NATO member countries, excluding the U.S., followed Norway's lead and enacted paid paternity leave policies "emphasizing reconciliation of work and family."<sup>32</sup> In 1993, Norway increased their paternity leave to one month, while prohibiting fathers from transferring leave to their child's mother.<sup>33</sup> The Norwegian National Insurance Act statutorily mandates parental benefits during parental leave. Norway bases the benefits parents receive on their income at the start of their leave period.<sup>34</sup> Either or both parents can receive parental benefits for a year, if they meet the Norwegian Labour and Welfare Administration (NAV) qualifications.<sup>35</sup> This statutory implementation morphed the 90% of Norwegian fathers, who decided to take leave, into more active and

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<sup>26</sup> Fríða Rós Valdimarsdóttir, *Nordic Experiences with Parental Leave and its Impact on Equality Between Women and Men*, NORDIC COUNCIL OF MINISTERS 17 (2006), <http://norden.diva-portal.org/smash/get/diva2:701827/FULLTEXT01.pdf>.

<sup>27</sup> *Id.* at 30.

<sup>28</sup> *Id.* at 13.

<sup>29</sup> *Id.* at 17.

<sup>30</sup> See Jennifer Barrett, *Here's What Working Parents Should Envy About Norway (and It's Not Just the Electric Cars)*, FORBES (Feb. 12, 2021, 4:40 PM), <https://tinyurl.com/5w7stbbr>.

<sup>31</sup> Valdimarsdóttir, *supra* note 26, at 27.

<sup>32</sup> *Infra* Appendix A; Jedediah Purdy, *The New Biopolitics: Autonomy, Demography, and Nationhood*, 2006 B.Y.U. L. REV. 889, 947 (2006).

<sup>33</sup> Valdimarsdóttir, *supra* note 26, at 27.

<sup>34</sup> *Parental Benefit in Norway*, NORDIC CO-OPERATION, <https://www.norden.org/en/info-norden/parental-benefit-norway> (last visited June 24, 2022).

<sup>35</sup> *Id.* (specifying that the parent must be a member of the Norwegian National Insurance Scheme (*Folketrygden*), have been working, and have had "pensionable income for at least 6 of the last 10 months before the start of the benefit period").



engaged parents rather than merely “secondary caregivers.”<sup>36</sup> Norway did not stop its crusade after implementing additional leave in 1993; the country went a step further, encouraging fathers to take leave through a public service campaign featuring advertisements of celebrities with their children in tow.<sup>37</sup> The policy and ad campaign have not only persuaded more Norwegian fathers to take leave but have also aided in shrinking the income gap between men and women in Norway.<sup>38</sup>

France is another NATO country with a successful paid paternity leave policy. The country first enacted paid paternity leave in 2002, and as of 2020, 70% of fathers have taken advantage of the policy.<sup>39</sup> When the country doubled their paternity leave from fourteen to twenty-eight days in September 2020, President Emmanuel Macron proclaimed, “[W]hen a baby arrives in the world, there is no reason it should be just the mother who takes care of it.”<sup>40</sup> Macron’s office advertised this reform as a critical effort to move the country from “a mid-ranking position in Europe” to a principal leader alongside Spain, Sweden, Norway, and Portugal; countries that put a strong emphasis on paid leave.<sup>41</sup> The French government also modernized the policy to include gay couples,<sup>42</sup> who have traditionally received less paid parental leave in comparison to lesbian and heterosexual couples.<sup>43</sup> France’s policy enhancement came as a result of a 2020 report commissioned

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<sup>36</sup> Barrett, *supra* note 30.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (“Norway now has one of the highest ratios of female-to-male earned income, nearly closing the gap in the so-called ‘motherhood penalty.’”)

<sup>39</sup> Peltier, *supra* note 18.

<sup>40</sup> *Id.*

<sup>41</sup> Kim Willsher, *France Doubles Paid Paternity Leave to 28 Days*, THE GUARDIAN (Sept. 23, 2020, 10:07 AM), <https://www.theguardian.com/world/2020/sep/23/france-doubles-paid-paternity-leave-to-28-days>.

<sup>42</sup> Peltier, *supra* note 18.

<sup>43</sup> See Kate Ryan, *Gay Father Receive Less Parental Leave than Other Couples: Study*, REUTERS (Sept. 5, 2019, 12:43 AM), <https://www.reuters.com/article/us-global-lgbt-parental-leave/gay-fathers-receive-less-parental-leave-than-other-couples-study-idUSKCN1VQ0EX> (concluding that, after an examination of 33 countries in the Organization for Economic Co-operation and Development (OECD), “on average, same-sex male couples had five fewer months of paid leave than different-sex couples, while same-sex females received three fewer months than heterosexual couples”).

by President Macron reporting that taking paternity leave can lead to more engaged parenting, divided household chores, and fewer anti-anxiety prescriptions.<sup>44</sup> French activists had been fighting for this extension, and 80% of French citizens were in favor of the reform.<sup>45</sup> Of these twenty-eight leave days, France mandates that new fathers take at least seven.<sup>46</sup> The new policy requires employers to cover the first three days of the father's leave. The country covers the rest through their *sécurité sociale* ("social security") system, which costs France approximately 500,000 euros annually (\$565,275).<sup>47</sup> The report, which examined the first 1,000 days of French childhood, noted a correlation between increased paid paternity leave and "a more harmonious and secure attachment" between fathers and their children.<sup>48</sup> After the birth of his child and the leave period extension, one French father remarked, "This is the most beautiful moment of my life. Getting more time off will give [my family] more time to settle in."<sup>49</sup> Unfortunately, the U.S. offers this critical bonding period between father and child to only 9% of American fathers.<sup>50</sup>

The U.S. has historically struggled to implement paid paternity leave while developing countries have managed to offer leave benefits.<sup>51</sup> Ackerman's daughter was born in 1969, and by that time, the country's second wave of feminism was in motion. Women in the U.S. were working hard to reverse the tide and alter how Americans viewed pregnancy. Yet, it was not until 1972 when the EEOC drafted

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<sup>44</sup> Cyrulnik, Et. Al., *Les 1000 Premiers Jours: Là Où Tout Commence*, LE MINISTÈRE DES SOLIDARITÉS ET DE LA SANTÉ (Sept. 2019), <https://perma.cc/JT2J-B2CA>.

<sup>45</sup> France 24 English, *Making Time for Bébé: France Doubles Paid Paternity Leave*, YOUTUBE (Oct. 1, 2020), <https://www.youtube.com/watch?v=CAVmG28QbG0>.

<sup>46</sup> Willsher, *supra* note 41.

<sup>47</sup> *Id.*

<sup>48</sup> CYRULNIK, ET. AL., *supra* note 44.

<sup>49</sup> France 24 English, *supra* note 45.

<sup>50</sup> *Paid Family and Medical Leave: Busting 10 Common Myths with Facts and Evidence*, NAT'L P'SHIP FOR WOMEN & FAM. (Apr. 2017), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/paid-family-and-medical-leave-busting-10-common-myths-with-facts-and-evidence.pdf>.

<sup>51</sup> See Megan Sholar, *The History of Family Leave Policies in the United States*, ORG. AM. HIS. (2016), <https://www.oah.org/tah/issues/2016/november/the-history-of-family-leave-policies-in-the-united-states/>.

guidelines requiring employers to “treat disabilities resulting from pregnancy, such as miscarriage, abortion, or childbirth and recovery, in the same manner as other temporary disabilities.”<sup>52</sup> Shortly after, the U.S. enacted the Pregnancy Discrimination Act (PDA) of 1978 to “prohibit discrimination on the basis of pregnancy, childbirth, or related medical conditions.”<sup>53</sup> Yet, PDA did not provide time off to care for the child. Although never formally introduced to Congress, the Family Employment Security Act (FESA) of 1984 promoted dialogue regarding “unpaid, job-protected leave to care for a new child, child’s illness, spousal disability, or the employee’s own disability.”<sup>54</sup> A year later, the Parent and Disability Leave Act was formally introduced to Congress. That Act mandated eighteen weeks of unpaid leave, as compared with FESA’s twenty-six. Nevertheless, the bill was stalled and never enacted. From the mid-80s to the early-90s, similar debates surrounding family leave made their way to Congress until lawmakers developed the Parental and Medical Leave Act, which would eventually become the Family and Medical Leave Act (FMLA).<sup>55</sup>

In 1990, the FMLA made it all the way to then-President George H.W. Bush’s desk, where he vetoed it based on his belief that businesses should only provide family leave if “they wanted to.”<sup>56</sup> President H.W. Bush erroneously assumed the FMLA would hurt the U.S. economy, and other Republican lawmakers bolstered this unfounded concern.<sup>57</sup> While debating the enactment of the FMLA on the House floor, former Texas Republican Representative Tom DeLay said, “This bill is unfair, antibusiness, antigrowth, invasive, deathly expensive, and paid for through a hidden tax.”<sup>58</sup> Also, during these debates, former representatives Deborah Pryce [R-OH] and Michael Collins [R-GA] asserted baseless claims that a paid leave policy would

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 139 CONG. REC. 1958, 1994 (1993) (statement of Rep. Tom DeLay).

hurt American businesses and force them to adopt too many “suffocating regulatory burdens.”<sup>59</sup>

President H.W. Bush instead proposed that Congress establish a “tax credit for businesses that provided family leave for their employees.”<sup>60</sup> However, when Bill Clinton took office in 1993, the FMLA became the first key piece of legislation he signed into law.<sup>61</sup> Since its enactment, the FMLA, contrary to former President H.W. Bush’s concerns, has not burdened the U.S. economy. In fact, in 2021, 90% of American worksites reported that they had “no difficulty complying with the FMLA.”<sup>62</sup> Most worksites were able to adapt to the policy without difficulty; one-third of FMLA-complying workplaces even experienced positive outcomes like increased labor participation and employee retention.<sup>63</sup>

However, the FMLA is far from the perfect solution. The FMLA entitles employees to twelve weeks of leave during any twelve-month period. However, it is completely *unpaid* and only certain employees meet the qualifications to receive FMLA benefits. An eligible employee includes one “who has been employed in any employing office for twelve months and for at least 1,250 hours of employment during the previous twelve months.”<sup>64</sup> Additionally, an eligible employee also must work for a company with fifty or more

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<sup>59</sup> *See id.* at 1969 (statement of Rep. Deborah Pryce) (“Now is not the time to shove restricted Federal mandates down the throats of American businesses and American families.”); *id.* at 1991 (statement of Rep. Michael Collins) (“Today America’s businesses are already saddled with too many suffocating regulatory burdens. By mandating a Federal leave policy we eliminate the much-needed flexibility in the employer-employee relationship.”).

<sup>60</sup> Sholar, *supra* note 51.

<sup>61</sup> William J. Clinton, *Remarks on Signing the Family and Medical Leave Act of 1993*, THE AM. PRESIDENCY PROJECT (Feb. 5, 1993), <https://tinyurl.com/2wbk3w34>.

<sup>62</sup> *Key Facts: The Family and Medical Leave Act*, NAT’L P’SHP FOR WOMEN & FAM. (Jan. 2021), <https://tinyurl.com/4xbjsw7v> (citing Scott Brown et. al., *Employee and Worksite Perspectives of the Family and Medical Leave Act: Results from the 2018 Surveys*, ABT ASSOC. (July 2020), [https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHHD\\_FMLA2018SurveyResults\\_FinalReport\\_Aug2020.pdf](https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHHD_FMLA2018SurveyResults_FinalReport_Aug2020.pdf)).

<sup>63</sup> *See* Heather Boushey et al., *The Economic Benefits of Family and Medical Leave Insurance*, CTR. FOR AM. PROGRESS (Dec. 12, 2013), <https://tinyurl.com/4ym2bsrt>.

<sup>64</sup> 3 U.S.C.A. § 412 (West).

employees and be a full-time salaried worker to qualify.<sup>65</sup> Therefore, the FMLA denies coverage to self-employed workers such as freelancers and contractors. As a result, the Act is only able to cover roughly 60% of the American workforce.<sup>66</sup> This lack of coverage for the remaining 40% of uncovered Americans costs those workers \$22.5 billion annually in lost wages.<sup>67</sup> The FMLA's guidelines are not only hurting the 40% of new parents who are ineligible for benefits but are also costing the U.S. billions of dollars.<sup>68</sup> If American fathers without paternity leave benefits do wish to take some sort of leave after the birth of their child, they will have to develop a "patchwork system" where they are forced to use up their unpaid vacation and sick days.<sup>69</sup> This patchwork system cannot suffice for a country as advanced as the U.S., which prides itself on being a forward-thinking beacon of equality.

### III. ANALYSIS

#### A. Legal Arguments

##### 1. History of Legal Battles

American fathers have traditionally settled for a second-class caregiving role in the parenting of their children. Yet, within the last decade, American fathers have begun to feel more empowered to take time off to spend with their newborn children.<sup>70</sup> A series of legal

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<sup>65</sup> Claire Suddath, *Washington Journal Paid Maternity Leave*, C-SPAN (Feb. 3, 2015), <https://www.c-span.org/video/?324106-5/washington-journal-claire-suddath-maternity-leave>.

<sup>66</sup> Sholar, *supra* note 51.

<sup>67</sup> Press Release, The White House, Fact Sheet: The American Families Plan (Apr. 28, 2021) (on file with The White House).

<sup>68</sup> *See id.* (describing the lack of childcare options for new parents costs this country roughly \$57 billion annually).

<sup>69</sup> Suddath, *supra* note 65.

<sup>70</sup> *See* Miranda Bryant, *More Fathers are Taking Paternity Leave, But Mothers are Still Doing All the Work*, THE GUARDIAN (Nov. 18, 2019, 2:30 PM), <https://www.theguardian.com/money/2019/nov/17/more-fathers-are-taking-paternity-leave-but-mothers-are-still-doing-all-the-work> ("Attitudes towards paternity leave have drastically changed in America in the last five years as more fathers feel comfortable

actions taken by fathers have worked to advance our country's outlook on paid leave and unravel the outdated notions surrounding gender roles. Though it is more likely that Congress, rather than the courts, will serve as a better branch to enact a sound paid paternity leave policy, the following legal settlements signal a retreat from society's traditional view of one parent serving as the primary caregiver, while the other serves in a secondary role.<sup>71</sup>

The foundation for this contemporary notion that fathers are entitled to paternity leave was set in motion when the University of Iowa informed a full-time Registrar employee, David Johnson, that he was not allowed to use accrued paid sick leave days to spend time with his newborn daughter.<sup>72</sup> The University's Human Resources Department explained that Johnson, under university policy, had no right to paternity leave. While his wife could take leave for "any period of pregnancy-related temporary disability," the University would not afford Johnson that same right.<sup>73</sup> As a result, in June 2003, Johnson filed a complaint with the Iowa Civil Rights Commission and the EEOC. The complaint alleged the University's leave policy was "discriminatory" because it provided new mothers and adoptive parents leave but not biological fathers.<sup>74</sup> The court held that the policy was non-discriminatory and declared that Johnson had "no fundamental right to paid parental leave."<sup>75</sup> For the Supreme Court to consider a right "fundamental," it must be "deeply rooted in this Nation's history and tradition."<sup>76</sup> In this case, the Eighth Circuit found no evidence that paid leave for fathers was deeply rooted within our society. The court reasoned that mothers, rather than fathers, receive this right because they are the ones who go "through the physical

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taking extended time off, but gender stereotypes persist when it comes to career prospects and the home, according to a new study of working parents.").

<sup>71</sup> *Id.* ("Categorizing one parent as primary and one as secondary is just not the way people think in 2019.").

<sup>72</sup> *Johnson v. U. of Iowa*, 431 F.3d 325, 327 (8th Cir. 2005).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 327-28.

<sup>75</sup> *Id.* at 325.

<sup>76</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

trauma of labor.”<sup>77</sup> This point of reasoning sought to uphold stereotypical notions that the U.S. should not grant fathers time to co-parent because they face no ailments from the physical aspect of labor.<sup>78</sup>

Despite a loss for Johnson, his case paved the way for former CNN correspondent, Josh Levs, to file a charge of discrimination with the EEOC in 2013 for the inability to take paid leave.<sup>79</sup> Under Time Warner’s policy,<sup>80</sup> birth mothers and adoptive parents received ten weeks of paid leave, yet biological fathers received only two.<sup>81</sup> Levs pursued the charge for indispensable time to “spend . . . at home sharing in caregiving responsibilities with his wife.”<sup>82</sup> Title VII of the Civil Rights Act of 1964 allows companies, like CNN, to offer a greater amount of leave to biological mothers over biological fathers, given their difference in medical needs.<sup>83</sup> Yet, Levs’ quiet settlement with

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<sup>77</sup> *Johnson*, 431 F.3d at 330; see also Ayelet R. Weiss, *New Fathers, Old Rights: How the Massachusetts Maternity Leave Act Discriminates Against Men*, 22 B.U. PUB. INT. L.J. 439, 457 (2013) (“The Eighth Circuit framed its inquiry by considering the distinction between leave for childbirth and leave for childcare. The Eighth Circuit found that the University’s policy focused on childbirth rather than childcare due to medical evidence that six weeks constitutes a reasonable childbirth recovery period. The court made this determination despite references to childcare in the policy’s statements of purpose and despite the lack of a medical verification requirement during the period of presumptive disability.”).

<sup>78</sup> See Weiss, *supra* note 77, at 466 (“The facilitation of maternal childcare, as distinct from parental childcare, is impermissible because it ‘relies on overbroad generalizations about the different talents, capacities, of preferences of males and females.’”); *Johnson*, 431 F.3d at 328 (admitting that there is no legitimate reason that employers should deny biological fathers the same leave allowed to mothers “to care for, and bond with, a newborn”).

<sup>79</sup> Noam Scheiber, *Attitudes Shift on Paid Leave: Dads Sue, Too*, N.Y. TIMES (Sept. 15, 2015), <https://www.nytimes.com/2015/09/16/business/attitudes-shift-on-paid-leave-dads-sue-too.html>.

<sup>80</sup> Time Warner is CNN’s parent company.

<sup>81</sup> Katherine L. Fechte, *Equal Paid Parental Leave: The Emerging Trend That Is Not Emerging Quickly Enough*, THOMAS REUTERS EXPERT ANALYSIS 2 (Sept. 14, 2018), [https://www.greensfelder.com/media/publication/332\\_Fechte\\_ParentalLeave\\_Sept2018.pdf](https://www.greensfelder.com/media/publication/332_Fechte_ParentalLeave_Sept2018.pdf).

<sup>82</sup> Josh Levs, *Why I’ve Filed an EEOC Charge Against Time Warner*, TUMBLR (Oct. 20, 2013), <http://joshlevs.tumblr.com/post/65567442495/why-ive-filed-an-eeoc-charge-against-time-warner>.

<sup>83</sup> Scheiber, *supra* note 79.

Time Warner in 2015 signified that this rule might be subject to change.<sup>84</sup>

In June 2015, the EEOC issued guidance on pregnancy discrimination mandating that employers offer parental leave for reasons other than medical recovery from childbirth “equally to males and females.”<sup>85</sup> This new mandate represented a policy win for employed fathers at companies who previously only offered paid maternity leave. But the mandate failed to provide any rights for fathers employed at companies that did not offer any form of paid leave. Further, instead of encouraging employers to adopt non-discriminatory leave policies, the EEOC explained that “employers should carefully distinguish between leave related to any physical limitations imposed by pregnancy or childbirth . . . and leave for purposes of bonding with a child and/or providing care for a child.”<sup>86</sup> This was and is not a sustainable policy solution. Physical limitations imposed by pregnancy should not be the sole determining factor in granting leave. Parental bonding with newborn children plays a critical role in their future development.

Settlements surrounding parental leave only began to increase after the EEOC’s 2015 guidance on the matter. In 2018, Estée Lauder agreed to a \$1 million settlement with male employees, acknowledging its leave policy discriminated against fathers.<sup>87</sup> J.P. Morgan Chase followed Estée Lauder with a settlement in 2019. In that case, Ohio father, Derek Rotondo asserted that upon request for paid parental leave, J.P. Morgan informed him that the company considered only women as “primary caregivers” eligible for the full sixteen weeks of available leave.<sup>88</sup> Rotondo would only be eligible for two weeks of paid leave, only applicable upon proof that his wife had returned to work or was medically unable to care for their child.<sup>89</sup> Rotondo filed his

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<sup>84</sup> Fechte, *supra* note 81.

<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Id.*

<sup>87</sup> Stephen Miller, *JPMorgan Chase Settles Paternity Leave Suit Over ‘Primary Caregiver’ for \$5 Million*, SOC’Y HUM. RES. MGMT. (June 3, 2019), <https://tinyurl.com/369tjkwv>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*



complaint both with the EEOC and the U.S. District Court for the Southern District of Ohio.<sup>90</sup> In his complaint, Rotondo alleged that J.P. Morgan's policies "constituted sex discrimination in the terms and conditions of employment."<sup>91</sup> These sex-based classifications, Rotondo argued, which afforded more time off to mothers compared with company fathers, violated Title VII of the federal Civil Rights Act.<sup>92</sup> Rotondo further alleged that this company practice not only denied fathers critical time with their children at their earliest stages but "deterred [him] and other birth fathers employed by Chase from seeking to apply to be primary caregivers."<sup>93</sup> Thus, in the creation of a parental leave policy, *Rotondo* highlights the importance of abandoning the stereotype that only mothers can serve as primary child caregivers. Rotondo's complaint not only led to a \$5 million settlement with the company but also encouraged J.P. Morgan to increase their paternity leave to eight weeks and implement a gender-neutral paid leave program.<sup>94</sup>

## 2. Proposed Acts That Have Failed

Despite a growing social movement away from traditional household roles, U.S. lawmakers on both sides of the aisle have struggled and failed to implement a practical paid paternity leave policy. Although a majority of Americans desire some form of paid leave, lawmakers diverge on the qualifications for the program, how to implement it, and most importantly, *how to pay for it*.<sup>95</sup> A majority of Democratic lawmakers favor funding a paid parental leave policy through a payroll tax, whereas Republican lawmakers have gravitated towards policies that allow parents to access their Social Security funds

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<sup>90</sup> See generally Complaint, *Rotondo v. JPMorgan Chase Bank*, 19-CV-02328, 2019 WL 6496806 (S.D. Ohio Dec. 2, 2019).

<sup>91</sup> *Id.* at 5.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 30.

<sup>94</sup> Miller, *supra* note 87.

<sup>95</sup> *New Survey Shows Voters in Senate Battleground States Want Paid Leave Urgently, as Part of Infrastructure Package*, GLOB. STRATEGY GRP. (May 2021), <https://globalstrategygroup.com/wp-content/uploads/2020/05/PLFA-BG-Press-Memo-F06.01.21.pdf> ("Headed into 2022, 84% of voters, including majorities of Democrats (96%), independents (81%), Republicans (74%), and Trump voters (74%) support paid leave.").

at an earlier date to pay for leave benefits.<sup>96</sup> In spite of both parties' efforts, neither has prevailed with a triumphant policy. Flaws still linger in many of these proposed policies which inhibit fathers from receiving valuable time with their newborns without having to shoulder significant financial and mental health burdens.

In March of 2019, Senator Marco Rubio [R-FL] was the first lawmaker within the Republican party to introduce a national paid family leave program, the New Parents Act, alongside his co-sponsor Senator Mitt Romney [R-UT].<sup>97</sup> Representative Ann Wagner [R-MO-2] sponsored the House counterpart to the bill.<sup>98</sup> Even though it was only read twice and died in the Committee on Finance, the Act served as a major feat for a party whose former Speaker of the House, John Boehner, referred to family leave as “another example of yuppie empowerment.”<sup>99</sup> The growing reality for Republican lawmakers though is that “paid family leave resonates with voters.”<sup>100</sup> In 2018, 70% of voters said they were more likely to favor “a [ ] congressional candidate who publicly supports a national paid family and medical leave policy.”<sup>101</sup> However, it is equally important to note that while Republican lawmakers, like Rubio and Romney, have conceded that society's views on working mothers and parental roles are changing, they often overly agonize about the finances of a paid leave program.<sup>102</sup> For example, the New Parents Act offers fathers up to twelve weeks of paid leave, but those fathers would have to pay for the leave themselves.<sup>103</sup> With Social Security funding the proposed act, fathers would have the option to receive leave benefits by either increasing

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<sup>96</sup> Li Zhou, *Cutting Paid Leave Hurts Low-Wage Workers the Most*, VOX MEDIA (Oct. 29, 2021, 9:30 AM), <https://www.vox.com/2021/10/29/22749595/paid-leave-sick-parental-leave-biden-build-back-better-bill>.

<sup>97</sup> S. 920, 116th Congress (2019-2020); *see also* Bryce Covert, *The Wrong Way to Do Paid Family Leave*, N.Y. TIMES (Aug. 12, 2018), <https://www.nytimes.com/2018/08/12/opinion/paid-family-leave-marco-rubio.html?>.

<sup>98</sup> New Parents Act of 2019, H.R. 1940, 116th Cong. (2019).

<sup>99</sup> Covert, *supra* note 97.

<sup>100</sup> Megan Sholar, *Yes, Gillibrand and DeLauro Introduced a Family Leave Bill. More Important, Republicans Are Introducing Paid Leave Bills, Too*, WASH. POST (Feb. 20, 2019), <https://tinyurl.com/3dtftxs3>.

<sup>101</sup> *Id.*

<sup>102</sup> Covert, *supra* note 97.

<sup>103</sup> S. 920, 116th Congress (2019-2020).

their retirement age by three to six months or accepting an equivalent reduction in their monthly retirement benefits.<sup>104</sup> Strictly speaking, to obtain paid leave, fathers either must work longer or forgo a significant portion of their retirement funds. Romney publicized the Act as giving parents “the flexibility” to take time away from work to spend with their newborn(s), “without growing [the] national debt, raising taxes, or creating a new entitlement program.”<sup>105</sup> Yet, this Act would force a father, taking twelve weeks of leave at half-pay, to relinquish either twenty-five weeks of retirement or reduce his monthly retirement checks by 3%.<sup>106</sup> Based on these options, it is likely that fathers with lesser means would receive the short end of the stick.

In 2021, Rubio and Romney re-introduced the New Parents Act, ignoring its harmful flaws. Rubio acknowledged the coronavirus pandemic had triggered the reintroduction, as “far too many young working families [were] falling behind.”<sup>107</sup> Even though Rubio and Romney marketed the Act as a way for young fathers to have flexibility in how they choose to support their families, the New Parents Act will force fathers to decide between falling behind now or sometime in the future. It is a lesser of two evils policy—a father must either decide to spend precious time with his newborn or keep a stable retirement fund. Working fathers would have to carry the future burden of paying for their time off “by delaying their retirement by twice as many months as they took off for parental leave.”<sup>108</sup> Therefore, this Act is by no means a grant of paid leave to fathers, as many other NATO countries offer, but rather a policy they must pay for themselves. How much Social Security one receives depends on job earnings over their lifetime. Thus, under this policy, the government would just be giving parents back the money they already worked for at an earlier period or

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<sup>104</sup> New Parents Act of 2019, *supra* note 98, at § 219(f)(3).

<sup>105</sup> Press Release, Marco Rubio, U.S. Senator, Rubio, Romney Reintroduce Bill Giving New Parents Option for Paid Leave (Sept. 15, 2021), <https://www.rubio.senate.gov/public/index.cfm/2021/9/rubio-romney-reintroduce-bill-giving-new-parents-option-for-paid-leave>.

<sup>106</sup> Covert, *supra* note 97.

<sup>107</sup> *Id.*

<sup>108</sup> Alexia Fernández Campbell, *The GOP's Deeply Flawed Paid Family Leave Plan, Explained*, VOX MEDIA (Mar. 13, 2019, 4:30 PM), <https://www.vox.com/policy-and-politics/2019/3/13/18263790/paid-family-leave-bill-cradle-act>.

making them work more to achieve the leave. If a father would like to receive paid leave under the New Parents Act but does not believe he is in a financial situation to decrease his funds for the first five years of his retirement, the policy might force him to work an extra six months past his retirement age, where he might be experiencing age-related medical issues which deem him unfit for work. Therefore, the only genuine benefits of this Act are its role in encouraging Republican lawmakers to consider paid family leave policies and its allowance for three or more months of paid leave.

During that same time, March 2019, additional Republican lawmakers, Senators Joni Ernst [R-IA] and Mike Lee [R-UT], put forth similar paid leave legislation. The Child Rearing and Development Leave Empowerment (CRADLE) Act, if passed, would have allowed parents to receive up to three months of voluntary leave funded through postponing the activation of their Social Security benefits.<sup>109</sup> However, this proposal is nearly identical to Rubio's policy and still threatens to dive into the Social Security Trust Fund, which constantly faces risks of depletion.<sup>110</sup> Parents who are eligible to qualify for funding under the Act must be lawful U.S. citizens or permanent residents, be the parents of a new child, have worked for at least four quarters, and intend to live with their child for at least half a year following a birth or adoption.<sup>111</sup> These restrictions pose additional barriers for undocumented fathers residing in the U.S. and fathers who decide to give their child up for adoption. For example, under the Act's eligibility requirements, if a mother gives her child to an adoptive family, the policy does not give her any time to recover from her birthing experience nor the emotional pain of giving up a child, and the biological father is also prohibited from receiving any benefits. The same holds for surrogates, who also fall outside of the Act's stringent guidelines.

Even if a father could meet the CRADLE Act's eligibility requirements to receive benefits, he would face an additional obstacle: choosing between spending time with his newborn or having an

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<sup>109</sup> Press Release, Joni Ernst, U.S. Senator, CRADLE Act: Paid Parental Leave Summary (Mar. 12, 2019) (on file with author).

<sup>110</sup> Campbell, *supra* note 108.

<sup>111</sup> Ernst, *supra* note 109.

adequate retirement plan in place. This dilemma mirrors the one posed in the New Parents Act. Eligible fathers could choose to take their parental leave, but at the repayment cost of “two months for every one month of parental leave taken.”<sup>112</sup> Lee phrased it like this: “You can take . . . parental leave and as a consequence of that, choose to delay your retirement date.”<sup>113</sup> Yet, a policy should not consider a father’s appropriate choice to devote time to his newborn as a “consequence.” Lee’s use of the word “consequence” signals a belief that paid paternity leave is not a right, but a choice with a repercussion as great as the “sacrifice of [] future retirement benefits.”<sup>114</sup> While Ernst and Lee billed the policy as a plan to provide new fathers with the “flexibility” to stay home,<sup>115</sup> it would create mental and financial constraints for fathers considering leave. Ernst and Lee’s leave policy would usher fathers, who may decide to take leave after the birth of their newborn, into the analogous “I need it now’ trap that induces younger adults to withdraw money from their retirement plans when changing jobs.”<sup>116</sup> The CRADLE Act may satisfy a father for a short time, but when faced with a serious medical condition later in life, that father might regret his decision to relinquish his earlier retirement.<sup>117</sup>

Not only would the CRADLE Act force fathers to sacrifice their retirement plans, but—antithetical to traditional Republican ideology—it would increase the nation’s budget deficit.<sup>118</sup> Ernst and Lee addressed this Social Security depletion problem by granting

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<sup>112</sup> *Id.*

<sup>113</sup> Max Richtman, *Stop Asking Parents to Sacrifice Social Security Benefits for Paid Family Leave*, THE HILL (Mar. 19, 2019, 6:00 PM), <https://thehill.com/opinion/healthcare/434799-stop-asking-parents-to-sacrifice-social-security-benefits-for-paid-family>.

<sup>114</sup> *Id.*

<sup>115</sup> Press Release, Mike Lee, U.S. Senator, Sens. Ernst, Lee Put Forward Paid Parental Leave Plan That is Budget Neutral and Flexible for Parents (Mar. 12, 2019).

<sup>116</sup> Richtman, *supra* note 113.

<sup>117</sup> Kerri Anne Renzulli, *The Cradle Act Would Give New Parents Paid Leave Through Their Social Security Benefits—Here’s What Financial Advisers Think*, CNBC (Mar. 15, 2019, 12:54 PM), <https://www.cnbc.com/2019/03/15/financial-advisers-weigh-in-on-parental-leave-through-the-cradle-act.html> (explaining that for a father, facing something as serious as a heart condition in his 70s, six extra months of working could be calamitous).

<sup>118</sup> Campbell, *supra* note 108.

lawmakers the ability to transfer money annually from the government's General Fund to replace the funds that new parents borrowed from the Social Security Trust Fund. But this solution is not viable; there is currently not enough funding for the CRADLE Act in the General Trust Fund. Under this Act, if new parents were to borrow \$2 billion from their Social Security funds, Congress would have to find a way to cover those funds for the year to ensure that retired workers receive their critical monthly payments relied on for basic living expenses.<sup>119</sup>

Additional shortcomings of the CRADLE Act include consequences for late applications, corporate benefit slashing, and nonexistent employment protections. If this Act were to pass, eligible fathers who decide to draw from their Social Security and turn in a late application by mistake could face a fine and delay in their initial disbursement of funds.<sup>120</sup> Not to mention, the CRADLE Act would bar new fathers, who currently work for a company or organization that already provides paid leave or reside in a state where paid leave has already been implemented, from receiving leave benefits. Therefore, if a father's company offers just two weeks paid leave, as compared with the CRADLE Act's three months, Ernst and Lee's policy would force the father to accept the two weeks.<sup>121</sup> This caveat would create disparities amongst fathers wishing to take leave, granting some fathers more leave time than others. Consequently, the adoption of the Act could encourage companies to slash their existing parental leave programs, expecting the government to pick up their slack. Lastly, this Act offers no employment protections.<sup>122</sup> A new father working part-time at a company like Comcast, that offers no paid

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<sup>119</sup> *Id.*

<sup>120</sup> The Child Rearing and Development Leave Empowerment (CRADLE) Act, S. \_\_\_\_\_, 116th Cong. § 235(d)(4)(B) (2019) (as drafted for discussion by Sens. Ernst, Lee, March 12, 2019).

<sup>121</sup> See Jen Gann, *Is the Cradle Act Better Than Nothing?*, THE CUT (Mar. 25, 2019), <https://tinyurl.com/bddw2bsk> ("Those who want to use the Cradle Act — and no one would be required to — would have to first draw upon available employer and/or state paid leaves.").

<sup>122</sup> *Comparison of Federal Paid Family and Medical Leave Proposals*, NAT'L P'SHIP. FOR WOMEN AND FAMS. (Jan. 2020), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/comparison-of-federal-paid-family-medial-leave-proposals.pdf>.

paternal leave for part-time employees, could choose to demote that father if he were to decide to take leave.<sup>123</sup> Moreover, proposed acts like the New Parents Act and the CRADLE Act do little to provide fathers with the financial and emotional support they need following the birth of a child.

On the other hand, Democratic proposals have been more robust, offering greater benefits for fathers. In 2013, before the Republican wave of parental leave proposals, Senator Kirsten Gillibrand [D-NY] introduced her own paid leave act, the Family and Medical Insurance Leave (FAMILY) Act.<sup>124</sup> The most recent introduction of this Act was in February 2019, when Gillibrand pushed for the bill alongside Representative Rosa DeLauro [D-CT-3].<sup>125</sup> Although Gillibrand continues to push for paid leave at present, her original policy died; it was only read twice and referred to the Committee on Finance.<sup>126</sup> The FAMILY Act would allow for up to twelve weeks of paid leave annually, up to 66% of a parent's highest annual earnings over the last three years (up to \$4,000 per month), and prohibits employers from retaliating against parents who choose to take advantage of these benefits.<sup>127</sup> Gillibrand's funding plan differs from the Republican solution to pulling funds from Social Security; Gillibrand plans for the government to implement a payroll tax. The payroll tax would subject a 0.4% increase to payroll taxes on both employee and employer revenues, costing these individuals an average of one dollar and fifty cents per week per individual. The tax would also apply to self-employed individuals.<sup>128</sup> This funding system was specifically designed after state paid family and medical leave programs.<sup>129</sup> Although this strategy would tackle the depleting Social

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<sup>123</sup> *PL+US Employer Trends Report*, PAID LEAVE FOR THE U.S. (Jan. 28, 2019), [https://static1.squarespace.com/static/56018de2e4b097f984369ce2/t/5e31d6b8bf53926bc4abee22/1580324536574/PFML\\_data.pdf](https://static1.squarespace.com/static/56018de2e4b097f984369ce2/t/5e31d6b8bf53926bc4abee22/1580324536574/PFML_data.pdf).

<sup>124</sup> Family and Medical Insurance Leave Act (FAMILY) Act, S. 248, 117th Cong. (2021).

<sup>125</sup> Sholar, *supra* note 100.

<sup>126</sup> FAMILY Act, *supra* note 124.

<sup>127</sup> *Id.*

<sup>128</sup> See NAT'L P'SHIP. FOR WOMEN AND FAMS., *supra* note 122.

<sup>129</sup> Caroline M. Gelinne, *A Trip Down Legislative Memory Lane: How the FMLA Charts a Path for Post-Covid-19 Paid Leave Reform*, 62 B.C. L. REV. 2515, 2551 (2021).

Security problem, it is not necessarily a complete “winning strategy.”<sup>130</sup> It is common wisdom, dating back to the revolutionary period, that Americans do not like tax increases.<sup>131</sup> Additionally, Republicans have traditionally had an aversion to tax increases, favoring more fiscally conservative options. Therefore, to ensure all Democrats are on board with the plan (especially more moderate-leaning ones) and maybe even some moderate Republicans, Gillibrand would have to propose alternative solutions for the funding of this bill.

Gillibrand’s proposal garnered decent support though, acquiring thirty-six Democratic co-sponsors, including Senators Bernie Sanders [I-VT], Sherrod Brown [D-OH], and Amy Klobuchar [D-MN]. Yet, one critical Senator was missing from this list: Senator Joe Manchin [D-WV]. Since Democrats in the 2021 cycle needed fifty votes to pass any paid leave policy, Gillibrand needed Manchin to pledge his support for her policy. Though Gillibrand, unlike her Republican colleagues who had proposed paid leave policies, was willing to compromise. “There [are] lots of ways to pay for this bill,” Gillibrand noted in November 2021, “And there [are] ways to have employer and employee involvement. And I’ve begun to offer different versions of that to [Senator Manchin].” Moreover, it is unlikely Gillibrand’s proposal will be successful, but she and many of her colleagues are not ready to give up the fight quite yet.

### 3. Current Legislation

*“Let’s be clear: A budget deal that does not include paid leave fails working families and will not allow us to **build back better**.”* – Molly Day, Paid Leave Activist<sup>132</sup>

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<sup>130</sup> *Id.* at 2566.

<sup>131</sup> See generally Dennis J. Ventry Jr., *Americans Don’t Hate Taxes, They Hate Paying Taxes*, 44 U.B.C. L. REV. 835 (2011).

<sup>132</sup> Lorie Konish, *Paid Leave Advocates Slam Exclusion of Policy from Social Spending Bill as ‘Outrageous and Shameful’*, CNBC (Oct. 28, 2021, 2:26 PM), <https://www.cnbc.com/2021/10/28/paid-leave-advocates-slam-policy-exclusion-in-social-spending-bill.html> (quoting Molly Day, Executive Director of Paid Leave for the U.S.).



In July 2020, then-presidential candidate, Joe Biden, outlined his key economic plan for the country, titling it “Build Back Better.” The proposed plan, hotly contested in 2021, was aimed specifically at aiding working and middle-class families. Countering then-President Trump’s intense focus on the stock market and economic markets for wealthier Americans, Biden’s plan promised “to rebuild the backbone of the country—the middle class—so that this time everyone comes along.”<sup>133</sup> The original \$700 billion proposal sought to mobilize procurement investments, create five million new jobs, boost the corporate tax rate, and finally guarantee paid family leave.<sup>134</sup> In January 2021, President Biden took office, and roughly eight months into his tenure, in September 2021, Representative John Yarmuth [D-KY-3] introduced Biden’s Build Back Better (BBB) Act in the House.<sup>135</sup> This became known as simply the 2021 “Budget Bill.” The Act’s original proposal, which went through some extensive changes, included a commitment to twelve weeks of paid family and medical leave, replacing at least two-thirds of earnings up to \$4,000 per month; the lowest-paid workers would receive 80% of their income.<sup>136</sup> Representative Ritchie Torres [D-NY-15] lauded the proposal in a congressional discussion on the Act:

The United States is the richest nation in the world but one of the few modern democracies that lacks a paid leave program. The [BBB] Plan remedies this shameful failing by creating a national, comprehensive paid family and medical leave program, providing direct

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<sup>133</sup> Press Release, The White House, The Build Back Better Framework, <https://www.whitehouse.gov/build-back-better/> (last visited July 1, 2022).

<sup>134</sup> Asma Khalid & Barbara Sprunt, *Biden Counters Trump’s “America First” with “Build Back Better” Economic Plan*, NAT’L PUB. RADIO (Jul. 9, 2020, 4:52 PM), <https://tinyurl.com/mvsd7xr6>.

<sup>135</sup> Build Back Better Act, H.R. 5376, 117th Cong. (2021) (enacted as the Inflation Reduction Act).

<sup>136</sup> Kelly Anne Smith, *What’s the Build Back Better Plan?*, FORBES (Oct. 6, 2021), <https://www.forbes.com/advisor/personal-finance/whats-the-build-back-better-plan/>.

support to workers and families . . . without risking [their] needed income or employment.<sup>137</sup>

The plan also included a critical benefit for employers offering paid leave—a reimbursement option. This policy would allow the Secretary to grant employers 90% of the costs of providing leave to their employees, reducing concerns about corporate benefit slashing. Biden’s plan would have granted benefits to employees “regardless of [their] length of service, job type, membership in a labor organization, seniority status, or any other employee classification.”<sup>138</sup> This ensured that the eligibility requirements were not too stringent as to block out a class of fathers from receiving crucial benefits. Additionally, the Act would have guaranteed fathers taking leave, their job upon return. If a father were to worry that their employer may not let them take paternity leave for some reason, the BBB proposal would mandate the Secretary to conduct periodic reviews of employment locations to ensure that employers were enforcing the paid leave policy.<sup>139</sup> Nevertheless, this proposal was put through the wringer, losing many critical parts throughout the negotiation process.

In October 2021, as House Speaker Nancy Pelosi pushed for a vote on BBB, lawmakers debated the inclusion of paid family leave. Representative Marie Newman [D-IL-3] emphasized that without a paid family leave policy in this country, 300,000 mothers “[were] forced to quit [their jobs] so they [could] take care of their kids.”<sup>140</sup> Adopting a paid leave policy that does not force mothers into the primary caregiver box is integral in affording American children a well-balanced home environment.<sup>141</sup> Despite the Republican view that paid leave in the budget bill was a “reckless tax-and-spending spree” which would cost hundreds of billions of dollars,<sup>142</sup> Pelosi remained

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<sup>137</sup> 167 CONG. REC. H4548 (daily ed. Sept. 20, 2021) (statement of Rep. Ritchie Torres).

<sup>138</sup> Build Back Better Act, *supra* note 135.

<sup>139</sup> *Id.*

<sup>140</sup> 167 CONG. REC. H5772 (daily ed. Oct. 21, 2021) (statement of Rep. Marie Newman).

<sup>141</sup> See discussion *infra* Part III.C.1.

<sup>142</sup> 167 CONG. REC. S7352 (daily ed. Oct. 26, 2021) (statement of Sen. John Thune).

determined to keep the policy within the bill. To retain leave, Democratic leaders made concessions. Manchin's influence within the caucus, along with fellow moderate Democrat, Senator Kyrsten Sinema [D-AR], brought the \$3.5 trillion budget package down to \$1.75 trillion and decreased the original paid leave from twelve weeks to four weeks—a detrimental move for fathers.<sup>143</sup> During the last week of October 2021, Manchin's refusal to support the paid leave policy within the budget bill forced the Democratic caucus to eliminate it from the plan.<sup>144</sup> Manchin reasoned that he could not support leave legislation amid growing apprehensions surrounding the increasing national debt, rising inflation, and the ongoing COVID-19 pandemic.<sup>145</sup> Yet, with the livelihoods of new parents hanging in the background of this bill, Gillibrand asserted that there was still time to urge Manchin to get on board.<sup>146</sup>

In the wake of these comments and the November 2021 election upsets for Democrats, Pelosi, in a “Dear Colleague” letter to her caucus, made the executive decision to ignore Manchin's demands and put paid family leave back in the budget. In her decision to reinsert leave into the budget, Pelosi stated that “It is imperative that we show the world that America will do more than its fair share to meet and beat the standards.”<sup>147</sup> However, Manchin remained strongly

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<sup>143</sup> Ben Thompson, *Loss of Paid Family Leave Deals Harsh Blow to President Biden's Domestic Policy Plan*, WCNC-TV (Nov. 1, 2021, 8:12 AM), <https://tinyurl.com/5f98pk8z>; Emily Cochrane & Catie Edmondson, *Manchin Pulls Support from Biden's Social Policy Bill, Imperiling Its Passage*, N.Y. TIMES (Dec. 20, 2021), <https://tinyurl.com/yc2z4t79>.

<sup>144</sup> Eleanor Mueller, *Manchin Upends Paid Leave, A Benefit Personal to the President*, POLITICO (Oct. 29, 2021, 6:30 PM), <https://tinyurl.com/mryvxx2j> (“As a result, the plan to allow workers paid leave for illnesses, births, caring for loved ones and more was tossed this week, despite being significantly watered down, as Democrats scrambled to make a \$1.75 trillion deal—though supporters say they haven't given up on it.”).

<sup>145</sup> Cochrane & Edmondson, *supra* note 143.

<sup>146</sup> See Michael Martin, *Sen. Gillibrand Isn't Ready to Give Up on Paid Family Leave*, NAT'L PUB. RADIO (Oct. 31, 2021, 5:00 PM), <https://tinyurl.com/2d7dvzue> (“New York Senator Kirsten Gillibrand says she is not ready to give up. She's been seen lobbying Senator Manchin in an effort to get paid leave back into the bill . . . Yes, there's still reason to hope.”).

<sup>147</sup> Press Release, Nancy Pelosi, Speaker, House of Reps., Dear Colleague on Moving the Build Back Better Act Forward (Nov. 3, 2021) (on file with author).

opposed to the policy. Manchin effectively “killed” the BBB plan in December 2021, appearing on *Fox News Sunday* announcing a “definitive no” regarding the legislation and refusing a call with an aide to President Biden.<sup>148</sup> Without Republican support, the 2021 Democratic majority needed all fifty votes, including Manchin’s, to pass any substantive legislation. Despite pleas from the public, celebrities, and Democratic lawmakers, the BBB, complete with a paid leave policy, did not pass.<sup>149</sup> Instead, a budget compromise was made in the form of the Inflation Reduction Act of 2022, signed into law by President Biden on August 16, 2022, which failed to include any form of paid leave.<sup>150</sup>

#### 4. Proposed Policy

The U.S. needs a paternity leave policy more robust than what is currently offered by the FMLA. Because the U.S. has no national paid leave policy whatsoever, the government must include a paid paternity leave policy into a larger leave package.<sup>151</sup> Based on the performance of paid paternity leave policies in other countries,<sup>152</sup> recommendations from expert 501(c)(3) organizations,<sup>153</sup> and previous policy proposals,<sup>154</sup> a U.S. policy should grant twelve weeks of paid

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<sup>148</sup> John Cassidy, *Joe Manchin Kills the Build Back Better Bill*, NEW YORKER (Dec. 19, 2021), <https://www.newyorker.com/news/our-columnists/joe-manchin-kills-the-build-back-better-bill>.

<sup>149</sup> However, even if a form of paid paternity leave would pass in a budget bill, it would not provide nearly enough support for fathers. A likely compromise would be a four-week policy, which would not provide fathers with enough time to develop strong connections with their newborns or support their co-parents in the child-rearing process.

<sup>150</sup> Inflation Reduction Act of 2022, H.R. 5376, 117th Cong. (2022).

<sup>151</sup> See *supra* text accompanying note 3.

<sup>152</sup> See *supra* text accompanying notes 17, 36, 38, 44, 48-49.

<sup>153</sup> See Namatie, Mansaray, *See Paid Leave Is Critical to All Families*, MOMSRISING TOGETHER (May 16, 2022), <https://www.momsrising.org/blog/paid-leave-is-critical-to-all-families>; PAID LEAVE FOR ALL, <https://paidleaveforall.org/> (last visited Oct. 11, 2022); *Fathers Need Paid Family and Medical Leave*, NAT’L P’SHIP FOR WOMEN & FAMS. (June 2022), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/fathers-need-paid-family-and-medical-leave.pdf>; BUS. ADVANCING NAT’L PAID LEAVE, <https://tinyurl.com/ycy5x66x> (last visited Oct. 11, 2022).

<sup>154</sup> See *supra* discussion in Section III.A.2.

paternity leave to fathers. Each of the previously proposed policies, including President Biden's original "American Families Plan," offered a leave period of roughly three months.<sup>155</sup> Additionally, twelve weeks would put the U.S. in line with Portugal, the NATO country currently offering the highest leave period for fathers.<sup>156</sup> This leave period would allow fathers the critical time needed to form relationships with their newborn children and take the burden off already constrained mothers.

A strong federal paid paternity policy should utilize the already successful New York State policy qualifiers to determine leave eligibility for fathers. In New York, employees who work twenty or more hours per week are entitled to leave after twenty-six weeks of employment.<sup>157</sup> Employees who work less than twenty hours a week can become eligible for leave after 175 days worked.<sup>158</sup> Yet, based on a lack of Republican support in previously proposed leave plans, this proposed paid paternity leave policy would require six months on the job for both full-time and part-time employees. However, for those in a job transition period or currently serving as a stay-at-home parent, the policy would still make leave available but with a reduced benefit payment. Again, to appease more conservative lawmakers, there would be qualifiers for stay-at-home fathers and fathers in a job transition. A stay-at-home father could qualify for leave if (a) the father had previously contributed to the U.S. workforce in the last five years; (b) the father is caring for a close family member; or (c) the father has a disability, which qualifies under Medicaid. Fathers in a job transition period would have to prove that they are actively seeking work, like the proof they provide for unemployment insurance benefits. Unlike some NATO policies, fathers in same-sex relationships would also be eligible for paternity leave benefits under this proposed policy.<sup>159</sup>

As an incredibly well-developed country, the U.S. must have an LGBTQ+ friendly policy consistent with the Supreme Court's 2015

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<sup>155</sup> See *supra* discussion in Section III.A.2.

<sup>156</sup> See *infra* Appendix A.

<sup>157</sup> *New York State Paid Family Leave: Employee Facts*, NY.GOV, <https://tinyurl.com/mr8wseej> (last visited July 1, 2022).

<sup>158</sup> *Id.*

<sup>159</sup> See *infra* note 187.

legalization of same-sex marriage.<sup>160</sup> While this addition may alienate some more conservative lawmakers, it would ensure that far-left members of the Democratic Party are still on board.

To appease both political parties, the benefits received should not be greater than “the eligible [father’s] average indexed monthly earnings.”<sup>161</sup> While Gillibrand’s policy offered parents 66% of their monthly wages, requiring them to make up the remaining 34%, a more adequate policy would allow fathers to receive 75% of their monthly wages. While this pay reduction would still require fathers to adjust their monthly budget, it would make the transition a little less difficult. A 9% increase might feel like an insignificant amount, but for the average middle-income family, who will spend around \$12,980 on their child annually, this could make a substantial difference.<sup>162</sup>

Although paid leave garners wide support on both sides of the political aisle, party proposals widely differ.<sup>163</sup> The main disparity lies not within leave time, eligibility, or percent of benefits, but rather, how to fund the policy. The Democrats favor a payroll tax and the Republicans, an early withdrawal of Social Security funds. Yet, withdrawing funds from Social Security to support a paid leave policy for new fathers is not a viable solution for the federal government, U.S. economy, or new parents.<sup>164</sup>

A paid leave policy for fathers should not force them to choose between spending time with their newborns or their future retirement benefits. If a policy requires new fathers to draw from their Social Security early to support their growing families, they will risk their

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<sup>160</sup> See generally *Obergefell v. Hodges*, 576 U.S. 644, 645 (2015) (holding the Due Process Clause of the Fourteenth Amendment allows same-sex couples to experience the fundamental liberty of marriage just as it does for heterosexual couples).

<sup>161</sup> The Child Rearing and Development Leave Empowerment (CRADLE) Act, S. \_\_\_\_\_, 116th Cong. § 235(b)(2)(A) (2019) (as drafted for discussion by Sens. Ernst, Lee, March 12, 2019).

<sup>162</sup> Mark Lino, *The Cost of Raising a Child*, U.S. DEP’T OF AG. (Feb. 18, 2020), <https://tinyurl.com/2fs8hfwf>.

<sup>163</sup> Gregory Svirnovskiy, *Paid Leave Is Incredibly Popular—Even with Republicans*, VOX MEDIA (Jun. 7, 2021, 8:00 AM), <https://tinyurl.com/yt3z564s>.

<sup>164</sup> See *supra* text accompanying notes 106, 116.

future incomes. As of today, 65% of Americans have little or no savings; this means that two-thirds of retirees rely on Social Security for most of their income.<sup>165</sup> These numbers will only continue to rise, as pensions fade into the distance.<sup>166</sup> Even the American fathers that do receive retirement benefits from their employer could see those funds diminish because of the volatility of financial markets.

Additionally, the Social Security System is already running a deficit. The administration expects that the system will run out of funds to pay workers their full retirement benefits by 2035.<sup>167</sup> Allowing the government to take more money out of the system, even if the leave policy required new fathers to pay it back, would only make the problem worse. Therefore, in this proposed policy, the government would set aside a small amount of funds in the fiscal budget and implement a slight payroll tax (0.15%), barely noticeable to the average employee. While increased taxes are not ideal, it is unlikely that the 96% of Social Security supporters would like to see those funds diminished.<sup>168</sup> By making small administrative and indirect cuts in large spending areas, like the defense budget, the U.S. could accumulate funds from the fiscal budget to finance a paternity leave policy.<sup>169</sup> By cutting administrative funds in an area like defense, on which the U.S. “now spends more on defense than the next 9 countries combined,” the government would be able to divert those funds to education,

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<sup>165</sup> Richtman, *supra* note 113.

<sup>166</sup> John Sabelhaus & Alicia Henriques Volz, *Are Disappearing Employer Pensions Contributing to Rising Wealth Inequality?*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Feb. 1, 2019), <https://www.federalreserve.gov/econres/notes/feds-notes/are-disappearing-employer-pensions-contributing-to-rising-wealth-inequality-20190201.html>.

<sup>167</sup> Campbell, *supra* note 108.

<sup>168</sup> See John Waggoner, *AARP Poll Finds Near-Universal Support for Social Security After 85 Years*, AARP (Aug. 14, 2020), <https://www.aarp.org/retirement/social-security/info-2020/aarp-poll-finds-near-universal-support.html>.

<sup>169</sup> See Carlo Rovelli & Matteo Smerlak, *A Small Cut in World Military Spending Could Help Fund Climate, Health and Poverty Solutions*, SCI. AM. (Mar. 17, 2022), <https://www.scientificamerican.com/article/a-small-cut-in-world-military-spending-could-help-fund-climate-health-and-poverty-solutions/>; Eric Chewing, et. al, *Defense Affordability: It's Time for a New Approach*, MCKINSEY & CO. (Oct. 22, 2021), <https://www.mckinsey.com/industries/aerospace-and-defense/our-insights/defense-affordability-its-time-for-a-new-approach>.

veterans' affairs programs, healthcare services, and paid family leave.<sup>170</sup> Furthermore, it is important that the U.S., as one of the wealthiest nations in the world, create a paid policy that ensures fathers time with their newborns without worrying about what is in their wallet while at the same time ensuring that Social Security funds for the elderly are not sacrificed at the cost of this policy.

Lastly, the language and employment protections within the paternity leave policy are incredibly important. The policy language should not suggest that the U.S. will only grant leave to fathers on the basis that they are to help mothers recover from the physical aspect of childbirth. While this is a critical factor in giving fathers paid time off, it is not the only one. Psychological factors should also be thoroughly analyzed and included within the language of the policy. Regarding employment protections, fathers should not have to risk losing their jobs because they decided to take leave. Since some employers may still possess stereotypical notions surrounding gender roles in the home, the policy should include consequences for employer retaliation in response to a male employee taking paid paternity leave.

#### B. Financial Arguments

Senator Manchin's main reason for opposing the inclusion of paid leave in BBB was a financial one: it costs too much money.<sup>171</sup> Republicans in Congress agreed, citing five reasons to oppose paid leave in November 2021:

- (1) Democrats' one-size-fits-all plan would make Washington your new family benefits manager[;]
- (2) No protection for small businesses who can't afford to lose workers in a national labor shortage[;]
- (3) Target for fraud[;]
- (4) Traps Americans in poverty and hooks

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<sup>170</sup> *The United States Spends More on Defense than the Next 11 Countries Combined*, PETER G. PETERSON FOUND. (July 19, 2021), <https://www.pgpf.org/blog/2021/07/the-united-states-spends-more-on-defense-than-the-next-11-countries-combined>.

<sup>171</sup> See Mueller, *supra* note 144 ("Manchin shared his concerns about how a paid leave program would impact small businesses . . . and how 'we just can't be spending so much money.'").



another generation on government dependency]; and]  
(5) Handouts to wealthy corporations that could lead to Americans losing the paid leave plans they have and like.<sup>172</sup>

However, these Republic counterarguments sound vaguely like the debates surrounding the enactment of the FMLA, which proved successful.<sup>173</sup> The unsupported argument that the U.S. does not have the funds to enact paid paternity leave is only meant to increase Americans' fears about rising debt and inflation.

The U.S. has the financial capability to enact a paid leave policy. This country had a Gross Domestic Product (GDP) of \$25.66 trillion in the third quarter of 2022.<sup>174</sup> According to the U.S. Treasury, the U.S. spent \$6.27 trillion in fiscal year (FY) 2022, while its revenue was \$4.90 trillion.<sup>175</sup> In 2021, President Biden signed off on a \$768 billion defense spending bill for FY 2022.<sup>176</sup> Based on that amount, defense spending took out roughly 15.67% of our nation's revenue in 2022 and 12.25% of our nation's actual expenditures.<sup>177</sup> If this country can spend roughly 20% of its revenue on the military, the U.S. should be able to allocate a small percentage of the budget towards helping uplift American

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<sup>172</sup> *Top 5 Reasons to Oppose Democrats' Paid Leave Plan*, WAYS & MEANS REPUBLICANS, HOUSE OF REPRESENTATIVES, (Nov. 3, 2021), <https://gop-waysandmeans.house.gov/top-5-reasons-to-oppose-democrats-paid-leave-plan/>.

<sup>173</sup> *See 20 Years of Success: New Federal Study Finds Family and Medical Leave Act Has Worked Well for Workers, Businesses but 40 Percent of Workers Not Covered, and Millions More Cannot Afford the Unpaid Leave the Law Provides*, NAT'L P'SHIP FOR WOMEN & FAMS., (Feb. 4, 2013), <https://www.nationalpartnership.org/our-impact/newsroom/press-statements/20-years-of-success-new.html> (“[T]he [FMLA] has had an overwhelmingly positive impact on workers, families and businesses. The FMLA is the only federal law ever to help workers meet the dual demands of job and family.”).

<sup>174</sup> *Gross Domestic Product, Third Quarter 2022 (Advance Estimate)*, BUREAU OF ECON. ANALYSIS (Oct. 27, 2022), <https://www.bea.gov/news/2022/gross-domestic-product-third-quarter-2022-advance-estimate>.

<sup>175</sup> *Understanding the National Deficit*, U.S. TREASURY FISCAL DATA, <https://tinyurl.com/425cd3y3> (last visited Nov. 16, 2022).

<sup>176</sup> Alexandra Jaffe, *Biden Signs \$768.2 Billion Defense Spending Bill into Law*, AP NEWS (Dec. 28, 2021), <https://apnews.com/article/coronavirus-pandemic-joe-biden-health-congress-china-323bbee32e7c9a25e475be7d94cfac6a>.

<sup>177</sup> *See id.* (calculations based on U.S. expenditures and revenue for Fiscal Year 2022, as collected from the U.S. Treasury).

families. While the defense budget absorbs \$768 billion in one year, a twelve-week paid leave policy, including paternity leave, would require \$225 billion over a decade—that is \$22.5 billion a year.<sup>178</sup> Therefore, each year, based on the fiscal year 2022 outlays, a paid paternity leave policy would only occupy 0.36% of government expenditures.<sup>179</sup>

The U.S. deficit has been around since this nation’s inception, and it has continued to steadily rise since 1931.<sup>180</sup> While some economists stress that national debt can hurt the capital structure and “unfairly harm future generations either through higher taxes or inflation,” a majority of Keynesian macroeconomists are of the opinion that debt can actually “boost aggregate demand in the economy.”<sup>181</sup> Since 1931, federal debt has been on the rise, and has continued to progress and will continue to progress with or without the addition of paid paternity leave into the U.S. budget.<sup>182</sup> While trillions of dollars in debt sounds like a crushing problem, it does not put the U.S. at risk of default. More critical than cash assets are the

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<sup>178</sup> Annie Nova, *Workers Could Get 12 Weeks of Paid Leave Under Biden’s Plan. Here Are the Details*, CNBC (Apr. 28, 2021, 10:34 AM), <https://www.cnbc.com/2021/04/28/paid-leave-of-up-to-4000-a-month-for-12-weeks-part-of-biden-proposal.html>.

<sup>179</sup> See Press Release, The White House, *supra* note 67 (percentage derived from the Biden Administration’s prediction that a paid leave program “will cost \$225 billion over a decade”).

<sup>180</sup> Michael Boyle & Yariet Perez, *The National Debt Explained*, INVESTOPEDIA (July 18, 2022), <https://www.investopedia.com/updates/usa-national-debt/> (“The U.S. has carried national debt throughout its history, dating back to the borrowing that financed the Revolutionary War. Since then, the debt has grown alongside the economy as a result of increased government responsibilities and in response to economic developments.”); William D. Lastrapes, *Why the \$22 Trillion National Debt Doesn’t Matter—Here’s What You Should Worry About Instead*, CONVERSATION (Feb. 14, 2019, 11:36AM), <https://theconversation.com/why-the-22-trillion-national-debt-doesnt-matter-heres-what-you-should-worry-about-instead-111805> (“This [\$2 trillion in deficit] is a reflection of the large annual budget deficits that the federal government has run, pretty much continuously since 1931.”).

<sup>181</sup> *The National Debt Explained*, INVESTOPEDIA (Jan. 3, 2019), <https://www.investopedia.com/updates/usa-national-debt/> [<https://web.archive.org/web/20190118125639/https://www.investopedia.com/updates/usa-national-debt/>].

<sup>182</sup> *But see id.* (“Only briefly during the heyday of the economic markets and the Clinton administration in the late 1990s has the U.S. seen debt levels trend down in a material manner.”).

U.S. economy's "quantity of [ ] scarce resources . . . and how [the government uses] those resources."<sup>183</sup> Moreover, debt is not a sound indicator of how our nation is performing fiscally and should not bar the federal government from allocating funds toward policies, like paid paternity leave, that are beneficial to our nation's health and the well-being of its people.

### 1. Case Study: Lithuania

Most of the U.S.'s NATO allies, ranging in fiscal statuses, can offer at least some form of paid paternity leave. For example, Lithuania, a poorer European Union country and a mid-ranking NATO GDP country, offers paternity benefits for fathers.<sup>184</sup> Despite having a GDP of roughly \$68.03 billion,<sup>185</sup> around \$26 trillion less than the U.S. GDP, the country managed to create a thirty-day paternity leave policy offering fathers an income of roughly 78% of their regular earnings.<sup>186</sup> To qualify for paternity benefits, Lithuanian fathers must have paid social insurance taxes for at least twelve out of the last twenty-four months leading up to the birth of their child.<sup>187</sup> Lithuania funds its paternity leave policy through their Social Insurance Fund, *Sodra*, which is 90% funded by taxpayers, individuals, and employers through state social insurance contributions. The State Social Insurance Fund Board makes up for the remaining 10% through

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<sup>183</sup> Lastrapes, *supra* note 180.

<sup>184</sup> See *From Leaders to Underachievers—How Lithuanians Feel at the Bottom of the EU*, LITH. TRIB. (Jul. 22, 2019), <https://lithuaniatribune.com/how-lithuania-feels-at-the-bottom-of-the-european-union/>; GDP, *Current Prices (Billions of U.S. Dollars)*, INT'L MONETARY FUND (Oct. 2022), <https://tinyurl.com/yc6euhev> (ranking collected from spreadsheet of NATO countries; Lithuania with a GDP of \$68.031 billion in 2022).

<sup>185</sup> See *Lithuania Datasets*, INT'L MONETARY FUND (Oct. 2022), <https://tinyurl.com/4u4fubmp> (Lithuania GDP, current prices \$68.03 billion).

<sup>186</sup> *Employment, Social Affairs & Inclusion*, EUR. COMM'N, <https://tinyurl.com/syfhwtp8> (last visited July 1, 2022) ("Paternity benefit is paid to the father for 30 calendar days after the birth of the child with the possibility of choosing when to receive the benefit until the child is one year old. It is equal to 77.58% of earnings.").

<sup>187</sup> Ruta Braziene, *Lithuania*, LITH. SOC. RES. CTR. (Apr. 2017), <https://tinyurl.com/4nwmr576> (listing the qualifying factors for maternity and paternity benefits in Lithuania, excluding same-sex couples who are not currently offered leave in the country).

delayed interest and fines.<sup>188</sup> In 2019, Lithuanian employees contributed about 20% of their incomes to *Sodra*; a substantial portion (8.72%) of those funds went to pension insurance and health insurance (6.98%). The remaining percentages went to sickness insurance (2.09%) and maternity and paternity insurance (1.71%).<sup>189</sup> On the other hand, U.S. employees pay only 6.2% of their income to the Social Security fund, but the government does not guarantee healthcare, sick leave, or paid maternity or paternity leave.<sup>190</sup> While the only state social insurance system in the U.S. is Social Security, whose funds are already overburdened and in jeopardy, the U.S., with a GDP nearly 400 times greater than Lithuania's, is capable of setting aside the funds in a fiscal budget for a paid paternity leave policy. Based on Lithuania's policy, a paternity leave policy would only increase income taxes in the U.S. by a maximum of 1.71%. Regarding its past fiscal budgets though, the U.S. has the means to decrease this percentage, allowing for taxpayers to contribute an amount that will not hurt their wallets as substantially as Lithuania's 19.5% taxation. Even without the budgetary funds, Lithuania found a way to ensure paid paternity leave through a taxpayer system.

### C. Ethical Arguments

#### 1. More Engaged Fathers Equal Happier Kids

Parents impact their children developmentally at their earliest stages of life. Despite their young age, children can grasp highly sophisticated social and emotional concepts by witnessing the behaviors of those around them, especially their parents or guardians.<sup>191</sup> Parents contribute more to their children's development

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<sup>188</sup> *State Social Insurance System*, GOV'T OF THE REPUBLIC OF LITH. (July 15, 2020), <https://socmin.lrv.lt/en/activities/social-insurance-1/state-social-insurance-system>.

<sup>189</sup> *Taxing Wages 2020: Lithuania*, OECDILIBRARY, <https://doi.org/10.1787/047072cd-en> (last visited July 1, 2022).

<sup>190</sup> *How Is Social Security Financed?*, SOC. SEC. ADMIN., <https://tinyurl.com/3eszum32> (last visited Nov. 16, 2022).

<sup>191</sup> *See Transforming the Workforce for Children Birth Through Age 8: A Unifying Foundation*, NAT'L ACAD. OF SCI'S, ENG'G, & MED. (2015), <https://www.nap.edu/resource/19401/EducatorsCaregivers.pdf> ("As children progress into their

than the traditional shoe tying or bike riding lessons. Their outward manners are thoroughly observed—and often replicated—by their children. Parents and other family members are a child’s first “teachers,” and their active engagement with the child can promote their health and well-being, social and behavioral development, and academic achievement.<sup>192</sup> The presence of a father figure plays a critical role in purposeful parental engagement.

Fathers who decide to take leave after the birth of their child will become more involved in their child’s future.<sup>193</sup> If a father is present for his child’s earliest stages, that child will view him as a more long-lasting caregiver. Father-and-baby bonding during paternity leave can also lead to a child’s improved performance at school.<sup>194</sup> Children, who come from highly educated, middle-class parents, are more likely to gain “‘large and significantly positive effects’ in later exam results if their parents took longer periods of paid leave after they were born.”<sup>195</sup> In 2013, the Organization for Economic Co-operation and Development (OECD) found evidence that a father’s increased involvement is related to their child’s tendency to perform better on

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preschool and early elementary years, they learn in ways that are more explicit and visible.”).

<sup>192</sup> See *Family Engagement*, OFF. OF EARLY CHILDHOOD DEV. (Nov. 3, 2020), <https://www.acf.hhs.gov/eccd/family-engagement> (“Positive parenting and strong family engagement is central—not supplemental—to promoting children’s healthy development and wellness. This includes social-emotional and behavioral development; preparing children for school; seamlessly transitioning them to kindergarten and supporting academic achievement in elementary school and beyond.”).

<sup>193</sup> See, e.g., Taylor Bleistein, *The United States’ “Most Inclusive” Paid Parental Leave Policy Pales in Comparison to Foreign Countries Policies*, 41 WOMEN’S RTS. L. REP. 52, 66 (2019).

<sup>194</sup> Sara Cools et al., *Causal Effects of Paternity Leave on Children and Parents*, SCANDINAVIAN J. ECON. 801, 803 (May 4, 2015), <https://doi.org/10.1111/sjoe.12113> (“[W]e find that children’s school performance improves due to paternity leave. This effect seems to be concentrated in families in which the father has at least as high education as the mother . . .”).

<sup>195</sup> Richard Adams, *Longer Maternity Leave Linked to Better Exam Results for Some Children*, THE GUARDIAN (Feb. 7, 2018, 14:05 EST), <https://www.theguardian.com/education/2018/feb/07/longer-maternity-leave-linked-to-better-exam-results-for-some-children>.

cognitive tests.<sup>196</sup> Father-and-child bonding goes beyond test scores though and ensures that children who have strong relationships with their fathers are “twice as likely as those who do not to enter college or find stable employment after high school.”<sup>197</sup> Better academic and job performances, in turn, steer children away from teen pregnancy, jail time, and depression and anxiety symptoms.<sup>198</sup>

Fatherhood engagement leads to increased school performance and more positive social behavior patterns in children. Strong authoritative involvement from a father—“loving and with clear boundaries and expectations”—can ultimately create “lower levels of externalizing behavior problems (conduct problems, delinquency) or internalizing problems (depression, self-esteem, life satisfaction), and positive social behavior (social competence, popularity, size of support networks).”<sup>199</sup> Children who process their emotions externally can trigger behaviors such as “breaking/destroying objects, running away, hitting others, fidgeting or daydreaming, and yelling.”<sup>200</sup> On the other hand, children who internally process emotions may face increased “[physical or emotional] withdraw[al], worrying, crying, depression, [and or] anxiety.”<sup>201</sup> A child’s struggle to manage their behaviors can impact the relationships they develop and their mental health. Therefore, increased fatherhood involvement can combat childhood behavioral

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<sup>196</sup> Huerta, M., et al., *Fathers’ Leave, Fathers’ Involvement and Child Development: Are They Related? Evidence from Four OECD Countries*, OECD (Jan. 14, 2013), <https://doi.org/10.1787/5k4dlw9w6czq-en>. (focusing on the relationships between Australian children and their fathers).

<sup>197</sup> KYLE

PRUETT, FATHERNEED: WHY FATHER CARE IS AS ESSENTIAL AS MOTHER CARE FOR YOUR CHILD 38 (2001).

<sup>198</sup> *Id.* (“Children who feel a closeness to their father are: . . . 75% less likely to have a tenth birth, 80% less likely to spend time in jail, and half as likely to experience multiple depression symptoms.”)

<sup>199</sup> William Marsiglio et al., *Scholarship on Fatherhood in the 1990s and Beyond*, 62 J. MARRIAGE & FAM. 1173, 1173 (2000).

<sup>200</sup> Sara Hill, *The Power of Play: Father Involvement in Social and Development in Children*, BYU FOREVER FAMS. (July 9, 2019), <https://foreverfamilies.byu.edu/the-power-of-play-father-involvement-in-social-and-emotional-development-in-children>.

<sup>201</sup> *Id.*

issues by promoting “higher levels of sociability, confidence, and self-control in children.”<sup>202</sup> Moreover, a father’s unique ability to push their child to adapt outside of their comfort zone can aid that child in forming vital social relationships.

Lastly, the mere presence of a father-child relationship from a young age can positively impact a child’s development. The absence of a father in the home impacts children from birth into their adult years. The impact of fatherhood absence can, as previously mentioned, particularly increase externalizing behavior. Yet, the absence of a father from an early age can go far beyond acting out in school; “absence increases adolescents’ risky behavior, such as smoking or early childbearing.”<sup>203</sup> However, one of the most profound effects of a father’s absence is the impact on a child’s mental health. The psychological harm developed in place of a father’s presence—*anxiety, depression, and suicidal thoughts or actions*—can endure for a lifetime.<sup>204</sup>

## 2. Closing the “Motherhood Penalty Gap”

Aside from the wide range of negative effects on fathers and their child(ren), the most disadvantaged group due to this policy absence are mothers. Without paternity leave, the U.S. forces mothers to decide whether they should work during and after their pregnancy or leave their jobs to maintain engagement with their newborn child.<sup>205</sup> Confronting expecting mothers with this dilemma bolsters stereotypical gender roles; men work, and women make decisions about childcare.<sup>206</sup> If the U.S. had an adequate paid paternity leave policy, designed to encourage men to take the full time off, “gender stereotypes regarding the roles of mothers and fathers in the household could begin to diminish.”<sup>207</sup> This promotion of gender equality would

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<sup>202</sup> Emily Anthes, *Family Guy*, SCI. AM. (Oct. 1, 2012), <https://www.scientificamerican.com/article/family-guy-2012-10-23/>.

<sup>203</sup> Sara McLanahan et al., *The Causal Effects of Father Absence*, 39 ANN. REV. SOCIO. 399, 422 (2013), <https://doi.org/10.1146/annurev-soc-071312-145704>.

<sup>204</sup> *Id.* at 418.

<sup>205</sup> See Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2612(c) (2006).

<sup>206</sup> Bleistein, *supra* note 193, at 64.

<sup>207</sup> *Id.* at 66.

decrease the acute emotional and economic stress that the dual role of “breadwinner and primary caregiver” brings to many expecting mothers.<sup>208</sup> A paid paternity leave policy would also encourage female economic empowerment by “fostering a workforce that enables working mothers to balance their competing commitments.” If this country enacts and normalizes paid paternity leave in workplaces, employers would be less hesitant to hire potential and current mothers and instead promote “family-friendly business practices.”<sup>209</sup>

Additionally, the enactment of a paid policy would combat the U.S.’s ever-growing gender pay gap.<sup>210</sup> At the start of their careers, working men and women, in similar age categories, have a distinctly smaller wage gap than they do midway through their careers.<sup>211</sup> The widening of the pay gap with the progression of a career is “evidently a reflection of the undue pressure on women to raise children—a phenomenon typically referred to as the ‘care penalty.’”<sup>212</sup> Women often value job qualities that differ from their male counterparts including workplaces that “support caregiving, such as job security and workplace flexibility, over more demanding and riskier jobs with higher earnings growth.”<sup>213</sup> The emphasis on these qualities negates a number of lucrative job prospects for women available to men of the same ages, skills, and educational levels. Paid paternity leave would allow more mothers to return to the labor force and “stay in high-wage

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<sup>208</sup> *Id.* at 65.

<sup>209</sup> Monica Porter, *Combating Gender Inequality at Home and at Work: Why the International Labour Organization Should Provide for Mandatory Paid Paternity Leave*, 48 GEO. WASH. INTL. L. REV. 203, 210 (2015).

<sup>210</sup> Janelle Jones, *5 Facts About the State of the Gender Pay Gap*, U.S. DEP’T OF LAB. BLOG (Mar. 19, 2021), <https://blog.dol.gov/2021/03/19/5-facts-about-the-state-of-the-gender-pay-gap> (“Women earn 82 cents for every dollar a man earns. According to the Bureau of Labor Statistics data, in 2020, women’s annual earnings were 82.3% of men’s, and the gap is even wider for many women of color.”).

<sup>211</sup> John McDermott, *Is Paternity Leave the Solution to the Gender Pay Gap?*, MEL. MAG. (2020), <https://melmagazine.com/en-us/story/is-paternity-leave-the-solution-to-the-gender-pay-gap>.

<sup>212</sup> *Id.*

<sup>213</sup> Ben Gitis, *Paid Family Leave Can Help Close the Gender Pay Gap*, BIPARTISAN POL’Y CTR. (Mar. 24, 2021), <https://bipartisanpolicy.org/blog/paid-family-leave-can-help-close-the-gender-pay-gap/>.



careers that are typically dominated by men.”<sup>214</sup> Furthermore, paid paternity leave would stimulate employment, career advancement, lifetime earnings, and participation in the labor market for women.

### 3. The Police Powers of Paid Paternity Leave

A paid paternity leave policy in the U.S. would also benefit the public health and safety of our nation. First, a paternity leave policy would lower divorce rates.<sup>215</sup> Newborn babies cause significant mental, financial, and physical stress to parents. When one parent shoulders the entirety of the caregiving burden, one can anticipate that the primary caregiver is likely to resent his or her partner which may cause fights within the home. Yet, when both parents “share the responsibility, their partnership becomes even stronger.”<sup>216</sup> Second, paternity leave would create a reduction in the financial stress of the home. A sound policy would mean families could rely on a steady income during the first year of their child’s birth. There would not have to be a critical decision between putting food on the table and spending time with the newborn. Additionally, a paternity leave policy makes for healthier children. With the father home, the newborn is more likely to make it to pediatrician appointments and receive required immunizations.<sup>217</sup> With an engaged father present, a mother is also more likely to breastfeed the child—a decision encouraged by doctors to provide a child with more nutrients and prevent infections.<sup>218</sup> Third, a paternity leave policy would promote the overall mental health and well-being of this country. Men are happier and are exposed to fewer

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<sup>214</sup> *Id.*

<sup>215</sup> Richard J. Petts et al., *If I [Take] Leave, Will You Stay? Paternity Leave and Marital Stability*, CAMBRIDGE UNIV. PRESS (Oct. 2020), <https://tinyurl.com/mc3jnydb> (finding that paternity leave is directly associated with lesser divorce rates and “greater marital stability” among American parents).

<sup>216</sup> *The Benefits of Paternity Leave*, UNILEVER (2021), <https://tinyurl.com/34nuhxbw> [<https://web.archive.org/web/20210623013604/https://www.dove.com/us/en/men-care/paternity-leave/the-benefits-of-paternity-leave.html>].

<sup>217</sup> Tara O’Neill Hayes & Margaret Barnhorst, *How Children Benefit from Paid Family Leave Policies*, AM. ACTION F. (June 9, 2020), <https://www.americanactionforum.org/research/how-children-benefit-from-paid-family-leave-policies/>.

<sup>218</sup> *Breast Milk Is Best*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/breastfeeding-your-baby/breast-milk-is-the-best-milk> (last visited July 1, 2022).

health problems when they engage in the newborn caregiving process.<sup>219</sup> Women, on the other hand, are less likely to experience intense postpartum “depressive symptoms” when their partner contributes to the caregiving process.<sup>220</sup>

#### IV. CONCLUSION

The U.S. serves as a symbol of freedom and democracy, not just for our people, but for the rest of the world. Our nation’s failure to enact any form of a paid family leave policy, especially one which includes fathers, is a “failure of democracy.” In 1954, then-U.S. Attorney General, James P. McGranery, and former Department of Justice attorney, Philip Elman, filed a brief on behalf of the U.S. government on the original argument for the landmark case *Brown v. Board of Education of Topeka*, as amicus curiae. They urged reversal, arguing that a decision in favor of the Topeka Board of Education and the perpetuation of racial segregation in schools would be detrimental to our country’s reputation for democracy and equality on the world stage:

[Washington, D.C.] is the window through which the world looks into our house. The embassies, legations, and representatives of all nations are here, at the seat of the Federal Government . . . The President has stated that “The District of Columbia should be a true symbol of American freedom and democracy for our own people, and for the people of the world.” Instead, as the President’s Committee on Civil Rights found, the District of Columbia “is a graphic illustration of a failure of democracy.”<sup>221</sup>

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<sup>219</sup> UNILEVER, *supra* note 216.

<sup>220</sup> See Natalène Séjourné et. al., *The Impact of Paternity Leave and Paternal Involvement in Child Care on Maternal Postpartum Depression*, 30 J. REPROD. & INFANT PSYCH. 135 *passim* (2012).

<sup>221</sup> Brief for the United States as Amicus Curiae, *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 344 U.S. 1 (1952) (Nos. 8, 101, 191, 413, 448), 1952 WL 82045, at \*4.

When foreign visitors come to our nation, when other countries look to us for guidance in developing their own policy initiatives, and when our adversaries look for any minor detail to demonstrate our democracy might be unraveling, they will see that while we have a strong constitution that has seemed to stand the test of time, we do not have a comprehensive policy to support our nation's families. If the U.S. is unable to even provide new parents with time to spend with their own children, without the stress of financial ruin, what does that say about us? It says, we are weak and hold elitism and monetary gain above the happiness of our nation.

## APPENDIX A

Paid Leave Reserved for Fathers in NATO Countries<sup>222</sup>

<b>Country</b>	<b><u>Length of Leave</u></b> (weeks, full-rate equivalent)
Belgium	5 weeks
Bulgaria	1.7 weeks
Croatia	2.9 weeks
Denmark	1.1 weeks
Estonia	2.0 weeks
France	5.6 weeks
Germany	5.7 weeks
Greece	.04 weeks
Hungary	1 week
Iceland	7.8 weeks
Latvia	1.1 weeks
Lithuania	4.0 weeks
Luxembourg	10.4 weeks
Netherlands	0.4 weeks
North Macedonia <sup>223</sup>	1 week
Norway	9.8 weeks
Poland	2.0 weeks
Portugal	12.5 weeks
Romania	4.7 weeks
Slovenia	2.6 weeks

<sup>222</sup> Chzhen, *supra* note 15. Slovakia is not listed because even though it offers 28 weeks of paid parental leave, there is no specific statutory provision for paid paternity leave in the country's labor laws. Dančíková, Z., *Slovak Republic Country Note*, INT'L NETWORK ON LEAVE POL'YS & RSCH. (Apr. 2020), <https://tinyurl.com/yu6e659z>.

<sup>223</sup> Since the publication of this UNICEF study, *supra* note 15, North Macedonia has entered NATO. The country offers fathers seven days of paid paternity leave. *Macedonia Payroll and Benefits Guide*, PAPAYAGLOBAL (May 23, 2022), <https://www.papayaglobal.com/countrypedia/country/macedonia/>.

Spain	2.1 weeks
Turkey	1 week
United Kingdom	0.4 weeks

Appendix A depicts the wide range of paternity leave periods across the NATO countries. The table is based upon a June 2019 UNICEF study on family leave policies in countries specifically involved in the Organisation for Economic Co-operation and Development (OECD) and the European Union (EU), along with some countries falling outside of these groups.