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**Testimony of the New York Civil Liberties Union  
Before the Joint Legislative Budget Hearing on Workforce Development**

**January 30, 2024**

The New York Civil Liberties Union (NYCLU) is grateful for the opportunity to submit the following testimony for the Joint Legislative Budget Hearing on Workforce Development. The NYCLU, the New York state affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 180,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution through an integrated program of litigation, legislative advocacy, public education, and community organizing. The NYCLU has successfully litigated numerous pregnancy discrimination cases in state and federal courts and was intimately involved in the development and passage of New York’s Paid Family Leave program in 2016.

**I. Increase Short-Term Disability Leave Benefits**

Most New Yorkers do not have the ability to take time off from work to address their own serious health needs – whether to undergo cancer treatments, recover from major injuries or illnesses, or to prevent or recover from a pregnancy loss or neonatal loss – without risking their economic security and taking the chance that they will not have a job to return to. That is because New York’s Temporary Disability Insurance (TDI) program that provides medical leave benefits to New Yorkers who need time off from work to tend to their own health needs has been capped since 1989 at \$170/week – far below cost of living in 2023 – and it does not include job protection.

Updating New York’s medical leave program is a gender and racial justice imperative. The United States faces a maternal health crisis that disproportionately impacts Black women.<sup>1</sup> New York has seen a quadrupling of the maternal mortality rate for Black women in the last

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<sup>1</sup> Donna L. Hoyert, Ph.D., *Maternal Mortality Rates in the United States*, Division of Vital Statistics, CENTERS FOR DISEASE CONTROL AND PREVENTION, 2020, <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/maternal-mortality-rates-2020.htm>.

seven years.<sup>2</sup> Under current law, pregnant people in New York simply cannot afford to take time off to keep themselves and their pregnancies healthy without risking economic security.

And, because Paid Family Leave (PFL), the job-protected time off people can take to care for a family member, is a more generous program than TDI, perversely, under current law, when a person experiences a pregnancy complication or loss, they are not able to take leave without losing their income and risking their job. But a family member can take job-protected leave with a sustainable wage to care for them.

In her Part N of her PPGG Article VII legislation, Governor Hochul proposes to modernize TDI. This proposal is long overdue, and the NYCLU welcomes it. Critically, the Governor's proposal raises TDI's wage replacement rate and matches it to PFL's more generous benefits; it adds job protection, protections against retaliation, and the continuation of health insurance to TDI – all critical protections that will enable workers to avail themselves of TDI – and all benefits that already exist in PFL.

Governor Hochul's proposal is a good start. The legislature should advance a more holistic and inclusive proposal in its one house budgets. In particular, the Governor's proposal phases in the wage replacement rate increase at far too slow a pace. For the first three years of the improved program, wage replacement is limited to 50% of a worker's salary up to a hard cap. For many low-wage workers, this will result in a lower wage replacement rate than even the current law's \$170/week, rendering the program impossible for low-wage workers to use.

In addition, the Governor only proposes to raise TDI's wage replacement rate to match PFL's for the first twelve weeks of TDI. For the subsequent fourteen weeks of TDI, the Governor would cap the wage replacement rate at \$280 – ensuring that we will end up in the exact same place we are in now – with a program that is functionally not usable – within a term of years – if we are not there already. The number of weeks of TDI an individual receives is based on medical need. While the vast majority of workers will need twelve weeks or less, those whose medical conditions – including complicated pregnancies – prevent them from working for longer periods of time have no less need for a sustainable wage on week thirteen than they did on week four. Indeed, of the states that offer more than twelve weeks of TDI, none offers an inferior wage replacement rate to workers who require longer leave time.<sup>3</sup>

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<sup>2</sup> *New York State Report on Pregnancy Associated Deaths in 2018*, N.Y. DEPT. OF HEALTH, p.1, [https://www.health.ny.gov/community/adults/women/docs/maternal\\_mortality\\_review\\_2018.pdf](https://www.health.ny.gov/community/adults/women/docs/maternal_mortality_review_2018.pdf) (2022) (citing New York State Vital Statistics Tables, N.Y. DEPT. OF HEALTH, [https://www.health.ny.gov/statistics/vital\\_statistics/vs\\_reports\\_tables\\_list.htm](https://www.health.ny.gov/statistics/vital_statistics/vs_reports_tables_list.htm) (last visited Jan. 25, 2024)).

<sup>3</sup> See Cal. Unemp. Ins. Code § 2601 *et seq.* (offering 52 weeks of TDI); Haw. Rev. Stat. § 392-1 *et seq.* (offering 26 weeks of TDI); Mass. Gen. Laws ch. 175M, § 1 *et seq.* (offering 20 weeks of TDI); N.J. Stat. Ann. § 43:21-25 *et seq.* (offering 26 weeks of TDI); R.I. Gen. Laws § 28-39-1 *et seq.* (offering 30 weeks of TDI).

Moreover, New York must take this opportunity to fully modernize TDI – and PFL – and to do that, both chambers of the legislature should include S.2821-B (Ramos)/A.4053-B (Solages) in their one house budgets.

In addition to the protections already discussed in this testimony, S.2821-B/A.4053-B would move both family and medical leave to a progressive wage replacement system to increase low-income workers’ access to both types of leave. A progressive wage replacement system enables workers to recoup a higher percentage of their wages up to a certain amount and a lesser percentage of their wages above that amount. In recognition that progressive wage replacement makes it possible for low-income workers to take leave, it is standard in most states’ family and medical leave programs.<sup>4</sup>

Furthermore, S.2821-B/A.4053-B expands PFL’s definition of family to include the diverse family structures that exist in New York, including chosen family – a measure that is particularly important for LGBTQ+ New Yorkers, who are often less likely to have a traditional nuclear family.<sup>5</sup> This provision is similarly becoming standard across the country.<sup>6</sup>

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<sup>4</sup> See Cal. Unemp. Ins. Code § 2601 *et seq.* (workers currently receive between 60% and 70% of their average weekly wage, depending on their income; beginning in 2025, they will receive between 70% and 90% of their average weekly wage, depending on income); Colo Rev. Stat. § 8-13.3-501 *et seq.* (workers receive 90% of their average weekly wage up to 50% of the statewide average weekly wage and 50% of their average weekly wage above that amount); Conn. Gen. Stat. 31-49e *et seq.* (workers receive 95% of their average weekly wage up to 40 times the state minimum wage and 60% of their average weekly wage above that amount); D.C. Code Ann. 32-541.01 *et seq.* (workers receive 90% of their average weekly wage up to 40 times 150% of the D.C. minimum wage and 50% of their average weekly wage above that amount); Me. Stat. tit. 26, § 850-a *et seq.* (workers receive 90% of their average weekly wage up to 50% of the statewide average weekly wage and 66% of their average weekly wage above that amount); Md. Code Ann., Lab. & Empl. § 8.3-101 *et seq.* (workers receive 90% of their average weekly wage up to 50% of the statewide average weekly wage and 66% of their average weekly wage above that amount); Mass. Gen. Laws ch. 175M, § 1 *et seq.* (workers receive 80% of their average weekly wage up to 50% of the statewide average weekly wage and 50% of their average weekly wage above that); H.F. 2, 93d Leg., Reg. Sess. (Minn. 2023) (enacted) (workers receive 90% of their average weekly wage up to 50% of the statewide average weekly wage, 66% of their average weekly wage above that amount up to 100% of the state average weekly wage, and 55% of their average weekly wage above that amount up to 100% of the state average weekly wage); Or. Rev. Stat. § 8-13.3-501 *et seq.* (workers receive 100% of their average weekly wage up to 65% of the statewide average weekly wage and 50% of their average weekly wage above that amount); Wash. Rev. Code 50A.05.005 *et seq.* (workers receive 90% of their average weekly wage up to 50% of the statewide average weekly wage and 50% of their average weekly wage above that amount).

<sup>5</sup> Nina Jackson Levin et al., “We Just Take Care of Each Other”: Navigating ‘Chosen Family’ in the Context of Health, Illness, and the Mutual Provision of Care amongst Queer and Transgender Young Adults, *INT. J. ENVIRON. RES. PUBLIC HEALTH* (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7579626/>.

<sup>6</sup> See Colo Rev. Stat. § 8-13.3-501 *et seq.* (the definition of family includes, as demonstrated by the worker, any other individual with whom the worker has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship); Conn. Gen. Stat. 31-49e *et seq.* (the definition of family includes an individual related to the employee by blood or affinity whose close association the employee shows to be the equivalent of the family relationships enumerated in the

S.2821-B/A.4053-B makes other technical fixes to standardize TDI and PFL and ensure that the programs can benefit as many of the workers who need them as possible. It reduces the wait time for a worker to be eligible for PFL upon taking a new job to match TDI's more generous four week waiting period.<sup>7</sup> It enables workers to take TDI on the first day of their medical need, rather than having to endure a week of uncompensated disability leave first. This would match New York's PFL and is a common feature of TDI programs nationwide.<sup>8</sup> S.2821-B/A.4053-B would also permit intermittent leave at hourly intervals in both TDI and PFL, a benefit that is critical for workers going through cancer treatments or addressing mental health concerns, who often need a small amount of time off for a doctor's appointment but who need not be absent from work for weeks at a time.

Finally, S.2821-B/A.4053-B would enable automatic conversion between PFL and TDI for a worker who experiences a pregnancy or neonatal loss, recognizing that when someone experiences such a profound loss – and must undergo the physical recovery associated with that loss – they may not be in the position to fill out more paperwork. Because the same insurer typically administers both programs for a given employer, automatic conversion should be administratively feasible.

New York has the opportunity to ensure that all New Yorkers, including pregnant workers, workers with disabilities, LGBTQ+ workers, workers who struggle with substance use, and workers living with Long COVID, have a paid family and medical leave program that truly meets their needs. The Governor's proposal in PPGG Part N is a good start. Because New Yorkers deserve a paid family and medical leave program that will open the door for equity in the workforce and support healthy and thriving communities, the NYCLU urges the legislature to improve upon the Governor's proposal by putting S.2821-B/A.4053-B in their one house budgets and fighting for it at the negotiating table.

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statute); Me. Stat. tit. 26, § 850-a *et seq.* (the definition of family includes, as designated by the covered individual, an individual with whom the covered individual has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship); H.F. 2, 93d Leg., Reg. Sess. (Minn. 2023) (enacted) (the definition of family includes an individual who has a relationship with the worker that creates an expectation and reliance that the worker care for the individual, whether or not the worker and the individual reside together); N.J. Stat. Ann. § 43:21-25 *et seq.* (the definition of family includes any other person that the worker shows to have a close association with the worker which is the equivalent of a family relationship); Or. Rev. Stat. § 8-13.3-501 *et seq.* (the definition of family includes any individual related by blood or affinity whose close association with a covered individual is the equivalent of a family relationship); Wash. Rev. Code 50A.05.005 *et seq.* (the definition of family includes any individual where the relationship creates the expectation that the worker care for the individual and that individual depends on the worker for care).

<sup>7</sup> PFL's waiting period is currently six months.

<sup>8</sup> See Colo Rev. Stat. § 8-13.3-501 *et seq.* (no unpaid waiting period); Conn. Gen. Stat. 31-49e *et seq.* (no unpaid waiting period); Del. Code Ann. Tit. 19, § 3701 *et seq.* (no unpaid waiting period); D.C. Code Ann. 32-541.01 *et seq.* (no unpaid waiting period); Md. Code Ann., Lab. & Empl. § 8.3-101 *et seq.* (no unpaid waiting period); H.F. 2, 93d Leg., Reg. Sess. (Minn. 2023) (enacted) (no unpaid waiting period); Or. Rev. Stat. § 8-13.3-501 *et seq.* (no unpaid waiting period); R.I. Gen. Laws § 28-39-1 *et seq.* (no unpaid waiting period).

## II. Paid Prenatal Leave

In Part M of her PPGG Article VII legislation, Governor Hochul proposes to establish 40 hours of dedicated paid leave for prenatal visits. As described above, New York, like the United States more generally, faces a maternal health crisis that disproportionately impacts Black women.<sup>9</sup> Prenatal care is integral to healthy pregnancies and to preventing maternal and infant mortality. People who do not receive prenatal care are three to four times more likely to die from pregnancy-related complications than those who are able to access care.<sup>10</sup> Similarly, babies born to people who did not receive prenatal care are three times more likely to have low birth weight and five times more likely to die in infancy than those whose birthing parent was able to access care.<sup>11</sup> Paid time off for prenatal visits will enable more New Yorkers to access this critical care and is a wise and welcome innovation.

However, Governor Hochul has proposed to shoehorn this critical leave into PFL. In addition to posing serious logistical hurdles for workers who wish to avail themselves of this leave, locating leave for prenatal care within PFL could provoke unintended legal consequences that ultimately endanger pregnant people.

PFL is an entirely worker-financed program. Adding leave for prenatal care to PFL forces workers to unilaterally shoulder the costs of this leave. Moreover, workers who wish to take advantage of this leave would be required to apply to an insurance program each time they have a medical appointment, a burdensome process that is likely to dissuade and reduce utilization of the program.

PFL is leave to care for another person. By contrast, prenatal care is best understood as care for the pregnant person themselves. Shoehorning prenatal care leave into PFL inadvertently suggests that the fetus is a separate person from the pregnant person, because PFL is paid leave to care for another person. By suggesting the legal personhood of a fetus, this would have seriously deleterious effects on the pregnant person's legal standing.

Fetal personhood lays a foundation to argue for the legal rights of a fetus – as separate from – and sometimes opposed to – the rights of the pregnant person.<sup>12</sup> Fetal personhood has

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<sup>9</sup> Donna L. Hoyert, Ph.D., *Maternal Mortality Rates in the United States*, 2020, DIVISION OF VITAL STATISTICS, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/maternal-mortality-rates-2020.htm>; *New York State Report on Pregnancy Associated Deaths in 2018*, N.Y. DEPT. OF HEALTH, p.1, [https://www.health.ny.gov/community/adults/women/docs/maternal\\_mortality\\_review\\_2018.pdf](https://www.health.ny.gov/community/adults/women/docs/maternal_mortality_review_2018.pdf) (2022) (citing New York State Vital Statistics Tables, N.Y. DEPT. OF HEALTH, [https://www.health.ny.gov/statistics/vital\\_statistics/vs\\_reports\\_tables\\_list.htm](https://www.health.ny.gov/statistics/vital_statistics/vs_reports_tables_list.htm) (last visited Jan. 25, 2024)).

<sup>10</sup> Cristina Novoa, *Ensuring Healthy Births Through Prenatal Support: Innovations From Three Models*, CENTER FOR AMERICAN PROGRESS, Jan. 31, 2020, <https://www.americanprogress.org/article/ensuring-healthy-births-prenatal-support/>.

<sup>11</sup> *Id.*

<sup>12</sup> The Editorial Board, *A Woman's Rights*, N.Y. TIMES, Dec. 28, 2018, <https://www.nytimes.com/interactive/2018/12/28/opinion/pregnancy-women-pro-life-abortion.html>.

always carried dangers, but is particularly risky in New York, which prides itself on being an abortion access state, and particularly post-*Dobbs v. Jackson Women's Health*, which ended the constitutional right to abortion in the United States. Were the state to recognize fetal personhood, its ability to control a pregnant person's life would be limitless. Almost everything a pregnant person does or does not do has an impact on the fetus, including exercising or not exercising, gaining too much or too little weight, eating or not eating certain foods, working long hours, and not getting enough sleep, to name a few. We seek to avoid any argument that could support fetal personhood because of the disturbing trend – in New York and across the country – of prosecutions of pregnant people for their behavior during pregnancy or their pregnancy outcomes. Indeed, in the 16.5 years before the *Dobbs* decision, Pregnancy Justice documented 1,396 cases of pregnancy criminalization in the United States, most relying on fetal personhood arguments to criminalize pregnant people's behavior during pregnancy.<sup>13</sup>

Each of these problems can be avoided by providing for 40 hours of leave for prenatal care through New York's paid sick leave program, and the NYCLU recommends that the legislature include 40 hours of paid sick leave for prenatal care in its one house budgets and advocate for it at the negotiating table.

### **III. Paid Breaks for Breast Milk Expression in the Workplace**

Breastfeeding offers health benefits to both the lactating parent and the infant.<sup>14</sup> Studies indicate that sixty percent of parents who stop breastfeeding do so earlier than desired,<sup>15</sup> and return to work is a top reason cited for lactation cessation.<sup>16</sup> Parents with limited socioeconomic means are more likely than their wealthier peers to stop breastfeeding sooner.<sup>17</sup>

New York currently provides for reasonable unpaid break time and the use of any pre-existing paid break or meal time for workers to express breast milk during the work day. The state also prohibits discrimination against lactating parents. In Part J of her ELFA Article VII legislation, the Governor requires twenty minutes of paid break time for workers to

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<sup>13</sup> PREGNANCY JUSTICE, THE RISE OF PREGNANCY CRIMINALIZATION (Sept. 2023).

<sup>14</sup> Breastfeeding can help reduce the lactating parent's risk of high blood pressure, type 2 diabetes, and ovarian and breast cancer. It can also reduce the infant's risk of asthma, obesity, type 1 diabetes, lower respiratory disease ear infections, sudden infant death syndrome, and gastrointestinal infections, as well as necrotizing enterocolitis in premature babies. *Breastfeeding: Why It Matters*, CDC, July 21, 2023, <https://www.cdc.gov/breastfeeding/about-breastfeeding/why-it-matters.html>.

<sup>15</sup> Erika C. Odom, Ruowei Li, Kelley S. Scanlon, Cria G. Perrine, & Laurence Grummer-Strawn, *Reasons for Earlier Than Desired Cessation of Breastfeeding*, 131 PEDIATRICS 2726 – 32 (2013).

<sup>16</sup> *E.g.* Catherine R. L. Brown, Linda Dodds, Alexandra Legge, Janet Bryanton, & Snia Semenic, *Factors influencing the reasons why mothers stop breastfeeding*, 105 CAN. J. PUBLIC HEALTH e179 – 85 (2014); Pei-Chi Chang, Sin-Fong Li, Hsin-Yi Yang, Li-Chu Wang, Cing-Ya Weng, Kuan-Fen Chen, Wei Chen, & Sheng-Yu Fan, *Factors associated with cessation of exclusive breastfeeding at 1 and 2 months postpartum in Taiwan*, 18 INT'L BREASTFEEDING J. 14 (2019).

<sup>17</sup> Indu B. Ahluwalia, Brian Morrow, & Jason Hsia, *Why Do Women Stop Breastfeeding? Findings from the Pregnancy Risk Assessment and Monitoring System*, 116 PEDIATRICS 1408 – 12 (2005).

express breast milk. Her proposal also continues the existing requirement that workers be permitted to supplement this time with their remaining paid break or meal time.

Paid break time to express breast milk would enable more working parents, particularly low-income working parents, to continue to breastfeed – and reap the attendant health benefits for themselves and their infants – once they return to work. For these reasons, the NYCLU appreciates the Governor’s proposal.

The NYCLU also recognizes that for most people, a 20-minute break will not be sufficient to express breastmilk in the workplace. It can take 15 to 20 minutes just to express breastmilk.<sup>18</sup> Workers may also need to travel to a lactation room, set-up lactation equipment, store expressed milk, clean lactation equipment, and commute back to their desks or work stations. This entire process will take more than 20 minutes for the vast majority of workers, and workers do not cease to need bathroom breaks or breaks for meal time simply because they lactate. The legislature should offer a sufficient period of time for workers to actually express breastmilk in their one hour budgets. Unfortunately, unless a longer paid break period is offered, too few workers and their babies will be able to benefit from this proposal.

#### **IV. COVID-19 Sick Leave**

In Part M of her ELFA Article VII legislation, Governor Hochul proposes to sunset the state’s COVID-19 sick leave at the end of July 2024.

COVID-19 was the fourth leading cause of death in the United States in 2022, the most recent year for which the CDC has released data.<sup>19</sup> The U.S. is currently experiencing “its second-largest COVID surge ever,”<sup>20</sup> and there is no reason to believe that it will be our last surge.<sup>21</sup> Indeed, each new COVID-19 variant is generally more transmissible than the ones that came before it.<sup>22</sup>

The CDC continues to recommend that people isolate following a positive COVID test to avoid spreading the virus to others.<sup>23</sup> Without dedicated COVID-19 paid sick leave, too many workers will be unable to stay home when they are sick with COVID-19. Without COVID

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<sup>18</sup> *Time for breaks*, U.S. DEPT OF HEALTH & HUMAN SERVICES OFFICE ON WOMEN’S HEALTH, Feb. 22, 2021, <https://www.womenshealth.gov/supporting-nursing-moms-work/break-time-and-private-space/time-breaks>.

<sup>19</sup> See Deidre McPhillips, *Covid-19 was the fourth leading cause of death in 2022, CDC data shows*, CNN, May 4, 2023, <https://www.cnn.com/2023/05/04/health/covid-fourth-leading-cause-of-death/index.html>.

<sup>20</sup> Maura Hohman, *The US is starting 2024 in its second-largest COVID surge ever, experts say*, TODAY, Jan. 5, 2024, <https://www.today.com/health/news/covid-wave-2024-rcna132529>.

<sup>21</sup> See Jamie Ducharme, *We’re In a Major COVID-19 Surge. It’s Our New Normal*, TIME, Jan. 12, 2024, <https://time.com/6554340/covid-19-surge-2024/>.

<sup>22</sup> See S. S. Manathunga, I. A. Abeyagunawardena, & S. D. Dharmaratne, *A comparison of transmissibility of SARS-CoV-2 variants of concern*, 59 VIROLOGY J. 59 (2023).

<sup>23</sup> *Isolation and Precautions for People with COVID-19*, CDC, May 11, 2023, <https://www.cdc.gov/coronavirus/2019-ncov/your-health/isolation.html>.

sick leave, working parents whose children have COVID-19 may be forced to send their children to school sick and contagious, because they simply do not have the paid sick leave available to stay home with their children.

In addition to the obvious public health risks associated with this policy change, it is likely to disproportionately impact workers at small employers, who are otherwise only required to offer unpaid sick leave.<sup>24</sup> It will also disproportionately impact Black, Brown, and immigrant communities, who, thanks to a toxic cocktail of socioeconomic factors, physical environment, and inferior access to health care,<sup>25</sup> are disproportionately likely to suffer from COVID-19.<sup>26</sup>

For these reasons, the NYCLU urges the legislature to omit the Governor's ELFA Part M from their one house budgets.

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The NYCLU thanks the legislature for the opportunity to provide testimony and for your work on the budget.

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<sup>24</sup> See *New York Paid Sick Leave*, NEW YORK STATE, <https://www.ny.gov/programs/new-york-paid-sick-leave> (last visited Jan. 24, 2024).

<sup>25</sup> *NCHHSTP Social Determinants of Health*, CENTERS FOR DISEASE CONTROL, <https://www.cdc.gov/nchhstp/socialdeterminants/index.html> (last visited May 14, 2020); see also Ibram X. Kendri, *Stop Blaming Black People for Dying of the CoronaVirus*, ATLANTIC, Apr. 14, 2020, <https://www.theatlantic.com/ideas/archive/2020/04/race-and-blame/609946/>.

<sup>26</sup> *Fatalities*, NYS DEP'T OF HEALTH, <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n> (last visited May 26, 2020); see also *The Color of Coronavirus: COVID-19 Deaths By Race And Ethnicity in the U.S.*, AMP RESEARCH LAB, May 20, 2020, <https://www.apmresearchlab.org/covid/deaths-by-race>; John Eligon, Audra D.S. Burch, Dionne Searcey, & Richard A. Opperl Jr., *Black Americans Face Alarming Rates of Coronavirus Infection in Some States*, N.Y. TIMES, Apr. 14, 2020, <https://www.nytimes.com/2020/04/07/us/coronavirus-race.html>.