

# **CHILDCARE AND THE BURDEN ON THE AMERICAN FAMILY: Can the Tax Code Provide a Solution in a Post-Pandemic World?**

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## ABSTRACT

Childcare, and how to pay for it, is one of the central issues facing families and society today. The challenges of childcare adversely impact women who bear the primary responsibility for such care, both paid and unpaid. During the COVID-19 pandemic, women were more likely to bear the professional and personal impact of shuttered preschools and the absence of daycare centers. Even wealthy families faced these same challenges, along with the common concerns of protecting their health and those of vulnerable family members. Post-COVID, all households have seen the rising costs of childcare, as licensed care centers have permanently closed and informal care is in short supply. The unaffordability and unavailability of childcare presents a particular challenge for those in the middle and low-income classes as they also struggle with the high costs of food, healthcare, housing, and other daily expenditures.

This Article argues that tax laws should be augmented to elevate the value of care labor while offering greater support for both parents working in the market and those in the home. The tools of tax policy offer powerful potential to open remedial paths for the greater public good. A refundable child dependent care credit, the reinstatement of the per child credit for children under 6 years old, the expansion of the earned income credit for the care provider, a more generous employer family leave credit, as well as new provisions supporting the working parent, the low-income taxpayer, and unpaid caregiver, represent practical initial steps. In addition, tax revenues should be raised in commensurate measure to support this higher valuation of care activities. Attention to this childcare issue will represent an investment in our children, will help assure them equality of opportunity, and provide them the education necessary to make valuable contributions to the nation. Promoting choice through the tax code will help prepare us for a future pandemic.

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## I. INTRODUCTION

I married and started a family relatively late in life. At the time, neither federal nor state government had adopted paid leave provisions, and my employer (university) did not offer a Section 129 dependent assistance plan.<sup>1</sup> Moreover, though my husband was gainfully employed, his wages as a tradesman were inadequate to fully support our household if I took considerable time off from work without pay. Given these realities, we decided to time my first pregnancy to coincide with the commencement of my academic sabbatical. This plan culminated successfully with the birth of our son, Alex.

We were fortunate to have care support in the ensuing months. My husband's mother lived relatively close to us, and a teenage babysitter provided additional care when called upon. However, circumstances changed dramatically just a year later with the onset of my second pregnancy. With the immediate prospect of an expanded household, we moved into a bigger house. Tragedy then struck the family when my mother-in-law succumbed suddenly due to a stroke. These contrasts were capped by the healthy delivery of my daughter, Katie, virtually in the middle of the academic term. I took exactly one week off without pay (though I was expected to make up missed classroom time!).

Turn the clock forward four years. I was now divorced, with full care and financial responsibility for my two children, and without any alimony or child support assistance. As a single mother, conditions dictated that I devise creative strategies to fulfill the care and financial requirements of my reshaped household. I now made a good salary as a full professor at my university, which I augmented by teaching two classes in the summer academic term. This allowed me to satisfy an important parental objective: establish higher education funds for both of my children. In addition, I had a detached carriage house on my property that was suitable as a functional dwelling. This afforded me the realistic option of employing a live-in nanny. I retained a close friend who was not only well-educated, but who had known my kids from birth. This eased both the climate and function of the household considerably and significantly contributed to the personal and professional success of my two children.

Like me, most mothers in the United States work, and nearly two-thirds of mothers with children under age 6 work.<sup>2</sup> Like

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1. See discussion, *infra* Part III(D)(2).

2. Elizabeth Dias, *The Terrible, Horrible, No Good, Very Bad Child-Care Problem*, TIME MAGAZINE (Oct. 12, 2016), <https://web.archive.org/>

me, most mothers struggle to find quality, affordable care for their children.<sup>3</sup> Families with working mothers spend nearly twice as much on childcare expenses as they did 30 year ago,<sup>4</sup> and in 33 states these costs exceed in-state college tuition for a four year public college education.<sup>5</sup> Unlike our counterparts in the Organization for Economic Co-operation and Development (OECD), the U.S. fails to provide paid family leave,<sup>6</sup> universal childcare,<sup>7</sup> or universal health care.<sup>8</sup> These conditions put considerable strain on working mothers who must balance the needs of their children with the demands

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[web/20161013085434/https://time.com/4521548/2016-election-child-care](https://web/20161013085434/https://time.com/4521548/2016-election-child-care) [perma.cc/M8CX-63B6].

3. Child care is the responsibility of the parent in America, not the responsibility of the state. See Nancy E. Shurtz, *Sweden, Singapore, and the States: A Comparative Analysis of the Impact of Taxation on the Welfare of Working Mothers*, 55 *ST. LOUIS U. L.J.* 1087, 1095 (2011) (“When the government takes over responsibility for child care, elder care, education, or other responsibilities of the working mom, the working mother’s welfare is greatly enhanced. Not only will her leisure increase, but her cost of children will be reduced.”); see also Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 *YALE L. & POL’Y REV.* 459, 467 (2019) (“Much of the care for young children is provided by a market that is fractured, poorly-organized, and subject to minimal and/or inconsistent licensing and regulation.”).

4. Dias, *supra* note 3 (citing the U.S. Census); see also Medora Lee, *How Much Does It Cost to Raise a Child? College May No Longer Be the Biggest Expense.*, *USA TODAY* (Sept. 27, 2023), <https://www.usatoday.com/story/money/personalfinance/2023/09/25/cost-of-raising-a-child-college-tuition-car-childcare/70930351007> [perma.cc/K7T8-HLFA].

5. Dias, *supra* note 3.

6. Janelle Watson, *Countries with Paid Maternity: How the US Compares*, *JUSTWORKS* (Sept. 17, 2024), <https://www.justworks.com/blog/countries-with-paid-maternity-leave> [perma.cc/WU8Y-GBJG] (“There are only seven countries that do not require employers to offer paid maternity leave [including] the United States, Papua New Guinea, and some countries in the Pacific Islands.”); see also *Parental Leave Systems*, *OECD FAMILY DATABASE*, [https://www.oecd.org/content/dam/oecd/en/data/datasets/family-database/pf2\\_1\\_parental\\_leave\\_systems.pdf](https://www.oecd.org/content/dam/oecd/en/data/datasets/family-database/pf2_1_parental_leave_systems.pdf) [perma.cc/YQC3-KYCP] (last updated Feb. 2024).

7. Most members of the OECD offer universal access to at least one year of early childhood education and care. See ORGANISATION FOR ECON. CO-OP. DEV., *ENGAGING YOUNG CHILDREN: LESSONS FROM RESEARCH ABOUT QUALITY IN EARLY CHILDHOOD EDUCATION AND CARE* 19 (2018), <http://dx.doi.org/10.1787/9789264085145-en> (noting that the education may vary among the various countries).

8. Most members of the OECD provide universal or near-universal health care for basic health services such as doctor consultations, tests, examinations and hospital care. See *Health Inequity and Universal Health Coverage*, *OECD*, <https://www.oecd.org/en/topics/health-inequality-and-universal-health-coverage.html> [perma.cc/H2AC-6LMK] (last visited Mar. 12, 2025) (noting that the coverage may vary among the various countries).

of the marketplace.<sup>9</sup> Many lower and middle class working mothers often cannot afford formal preschool<sup>10</sup> and often must rely on freely provided, low-pay, and often substandard care.<sup>11</sup> Both middle and low-income families may forgo the payment of their loans, the purchase of a house, the pursuit of a college education for their children, savings for adequate retirement, or other components of the American Dream, as a result of these childcare costs.<sup>12</sup> Meanwhile the women providing paid childcare services, who often have children themselves, are paid low wages with little or no benefits.<sup>13</sup>

COVID has changed the ways we think of childcare in America. When Head Start closed, and with it the two-meal

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9. See discussion, *infra* Part I(A) at note 37 and accompanying text.

10. Throughout this Article I use the words “formal” and “informal” care. Generally formal care is performed outside the home in day care centers or at licensed preschools. Informal care is performed at home and would range from the paid care by a nanny or the occasional low-paid babysitter to unpaid care of a relative or friend. Also, in this Article I usually use the word “childcare” rather than “preschool” but these are essentially the same — that is, care and education of the child prior to public school and Kindergarten.

11. For a discussion of somewhat similar issues in the long-term elder care area, see Nancy E. Shurtz, *Long-Term Care and the Tax Code: A Feminist Perspective on Elder Care*, 20 GEO. J. GENDER & L. 107, 112 (2018) [hereinafter *Elder Care*], (suggesting the following policy changes in the elder care arena: “(1) Modify the 2015 regulations under the Fair Labor Standards Act (FLSA) as to employee coverage; (2) Expand the Family Medical Leave Act (FMLA) to allow for paid leave and extended periods of aggregate sanctioned leave; (3) Restore and fund core elements of the repealed Community Living Assistance Support and Services Act (CLASS) (involving employer-provided long-term care insurance); and (4) Modify Medicaid and Medicare to subsidize expanded home care services for the impaired patients who are not classified as ‘chronically ill,’ and adopt a single-payer comprehensive long-term care health program.”); see Nancy E. Shurtz, *Tax, Class, Women and Long-Term Care*, 43 SEATTLE U. L. REV. 223, 231 (2019), [hereinafter *Tax/Class*] (noting that 70 percent of those in nursing homes are women who either have unavailable home-care or cannot afford quality care).

12. THE SAGUARO SEMINAR, CLOSING THE OPPORTUNITY GAP 6 (2016), <https://cfon.org/assets/2020/02/2016-Opportunity-Gap-Working-Group-Report.pdf> [perma.cc/D75L-BNAT] (arguing that the class- and race-based opportunity gap for children impedes upward mobility and leads to “the shriveling of the American Dream of opportunity for all”).

13. ELLIOT HASPEL, CRAWLING BEHIND: AMERICA’S CHILD CARE CRISIS AND HOW TO FIX IT 78 (2019) (showing a chart that breaks down personnel costs as a percentage of total care programs). The U.S.’s Fair Labor Standards Act (FLSA) does not provide minimum wage or overtime standards for babysitters, and thus they have low pay and no benefits. Other care providers may be subject to FLSA, but over half of early childhood teachers are making such little income that they qualify for public assistance. See discussion, *infra* Part I(B)) at note 73 and accompanying text.

program, poor people were scrambling to find food for their children.<sup>14</sup> Many private care centers were also shuttered, and even grandparents who provided childcare stopped as their health became vulnerable.<sup>15</sup> Informal care by parents, particularly mothers, increased.<sup>16</sup> Wealthy parents often formed “learning pods” with neighbors and hired laid-off teachers to provide personalized and quality care.<sup>17</sup> The government stepped in with grants to childcare businesses,<sup>18</sup> instituted an expanded refundable child tax credit of \$3,600 for children under 6 (payable monthly),<sup>19</sup> issued a moratorium on evictions due to nonpayment of rents,<sup>20</sup> and paused student loan payments.<sup>21</sup>

Now that these tax and non-tax subsidies have ended,<sup>22</sup> the United States should consider instituting policies that will provide our children with quality care, support both working and

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14. See discussion, *infra* Part II(C)(2) notes 229–35 and accompanying text.

15. See discussion, *infra* Part II(A)(4) note 76 and accompanying text.

16. See discussion, *infra* Part I(A) note 49 and accompanying text.

17. See discussion, *infra* Part II(A)(2) note 113 and accompanying text.

18. Anna Lovejoy, *States are Taking Action to Address the Child Care Crisis*, CTR. FOR AM. PROGRESS (Feb. 21, 2024), <https://www.americanprogress.org/article/states-are-taking-action-to-address-the-child-care-crisis> (“The federal government delivered an unprecedented \$52 billion in COVID-19 relief funding for states to prop up the child care industry during the pandemic.”).

19. *How Did the 2021 American Rescue Plan Act Change the Child Tax Credit?*, TAX POL’Y CTR., <https://taxpolicycenter.org/briefing-book/how-did-2021-american-rescue-plan-act-change-child-tax-credit> [perma.cc/F9G9-XWCJ] (updated Jan. 2024).

20. *Addressing Tenant Concerns During the COVID-19 National Emergency*, US DEPT. HOUSING & URBAN DEV., [https://www.hud.gov/sites/dfiles/Housing/documents/MF\\_Tenant\\_Concerns\\_COVID-19\\_Brochure.pdf](https://www.hud.gov/sites/dfiles/Housing/documents/MF_Tenant_Concerns_COVID-19_Brochure.pdf) In addition to the eviction moratorium, rental assistance was often available. See *Emergency Rental Assistance Program*, U.S. DEP’T. OF TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program> [perma.cc/TGB5-3HR5] (last visited Mar. 12, 2025) (the federal government spent \$46 billion for housing security during COVID).

21. *COVID-19 Payment Pause*, NAT’L CONSUMER L. CTR.: STUDENT LOAN BORROWER ASSISTANCE, <https://studentloanborrowerassistance.org/for-borrowers/dealing-with-student-loan-debt/pausing-student-loan-payments/covid-19-automatic-payment-pause> [perma.cc/6C4C-73ZV] (last visited Mar. 12, 2025).

22. *End of Payment Grace Period (On-Ramp)*, EDUCATION DEBT CONSUMER ASSISTANCE PROGRAM, <https://www.edcapny.org/resources-for-borrowers/student-loan-on-ramp-fresh-start> [perma.cc/G4Y6-JF65] (last visited Mar. 12, 2025); see also NAT’L HOUS. L. PROJECT & NAT’L LOW INCOME HOUS. COAL., *FEDERAL MORATORIUM ON EVICTIONS FOR NONPAYMENT OF RENT (2021)*, <https://nlihc.org/sites/default/files/Overview-of-National-Eviction-Moratorium.pdf> [perma.cc/R7TY-X7UA].

nonworking families in their childcare responsibilities,<sup>23</sup> and subsidize the low-paid care worker's desire for the American Dream. The tax system is an ideal mechanism for such a policy, as the Tax Cuts and Jobs Act of 2017 is scheduled to expire at the end of 2025.<sup>24</sup> As currently written, provisions in the Internal Revenue Code (the Code) that support parents and childcare are not optimal.<sup>25</sup> Taxpayers of modest means with preschool children receive meager tax benefits. Mothers who work in the market are not adequately reimbursed for childcare and other work-related expenses. The Code provides minimal tax benefits to low-wage childcare providers. The Code tacitly devalues caregiving activities; the net result of which is an erosion of official policy support for a growing population of children in dire need of a more dedicated commitment from the public sector.

Currently in America there is a growing wealth gap with those in the lower- and middle-income groups struggling to pay for daily expenses, including escalating childcare costs. Such a gap is not only potentially negative for our economy and our political stability, but also for our children's opportunity to pursue their American Dream. Subsidizing childcare choices through the tax system should be the beginning of providing opportunities for our children to reach their full potential. Such attention will advance our collective moral values as a nation and promote the common good.

Part I of this Article demonstrates how the childcare crisis adversely impacts women, both the care provider and the parent responsible for the care. Part II analyzes how this crisis impacts those in various economic groups—the wealthy, the middle class, the low-income and the poor, particularly those in rural areas, single women, immigrant women, and women of color. Part III sets forth

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23. Feminist legal scholarship has long debated promoting market labor work versus supporting unpaid care work. In this Article I advocate for both approaches, as my argument is that choice is the most important criterion. See discussion, *infra* Part III(A)(2). So often the arguments on an issue are either/or when they should be *both*. So, for example, in other areas of the law, like environmental law, law reviews often advocate one position, like carbon taxes, over cap-and-trade. See Shi-Ling Hsu, *Carbon Taxes and Economic Inequality*, 15 HARV. L. & POL. REV. 551 (2021). Unlike most, I have argued for both in that context as well. See Nancy E. Shurtz, *Carbon Pricing Initiatives in Western North America: Blueprint for Global Climate Change Policy*, 7 SAN DIEGO J. CLIMATE & ENERGY L. 61 (2016) (arguing for *both* a worldwide linked cap-and-trade system with national, state and local carbon taxes).

24. See discussion, *infra* Part III(B).

25. In this Article, Tax Code references are to the current Code. However, when a provision of the code has been changed by the Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, 131 Stat. 2054 (2017), or by the American Rescue Plan Act of 2021, Pub. L. No. 117–2, 135 Stat. 4 (2021), reference is made to that act.

different philosophies on childcare and discusses the failure of our tax system to help unpaid persons giving the care, working parents, and low-paid care providers. It suggests several tax measures to address these shortcomings. Part IV offers some conclusory remarks.

## II. CHILDCARE IS A WOMEN'S ISSUE

Childcare is a challenge for all, but particularly for women. Women are primarily responsible for providing childcare, even when they are married. Mothers tend to make sacrifices in their careers and future financial security to provide care for their children, whether they choose to leave the work force or limit their career objectives. Furthermore, in the childcare industry, the care providers are primarily women and these women, too, are sacrificing their future financial security due to their largely low-paying, no-benefit work environment. These conditions adversely impact women by combining economically undervalued labor with detrimental long-term effects on future financial stability; thus, perpetuating the feminization of poverty and adversely impacting the advancement of their hopes and dreams.

### A. *Mothers are the Principal Caregivers in the Family Unit and are More Likely to Make Professional and Other Sacrifices Because of this Care Role*

Mothers are typically responsible for providing care for their children, whether they provide it themselves, seek care from family members and friends, or pay for more formal care.<sup>26</sup> Only about 25 percent of mothers in 2023 were able to stay at home full time and care for their children, down from 58 percent at the height of the pandemic.<sup>27</sup> Of those mothers with children under 18, a majority work full time in the market, while 11 percent are employed part-time.<sup>28</sup> Sixty-four percent are the primary breadwinner or

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26. Liana Christin Landivar, Nikki L. Graf & Giorleny Altamirano Rayo, *Childcare Prices in Local Areas: Initial Findings from the National Database of Childcare Prices*, U.S. DEP'T OF LAB.: WOMEN'S BUREAU (Jan. 2023), [https://www.dol.gov/sites/dolgov/files/WB/NDCP/508\\_WB\\_IssueBrief-NDCP-20230213.pdf](https://www.dol.gov/sites/dolgov/files/WB/NDCP/508_WB_IssueBrief-NDCP-20230213.pdf) [perma.cc/4W2V-XL34].

27. *Report Reveals that Stay-At Home Moms Nearly Double Among Millennials, Gen Z*, FOX 13: SALT LAKE CITY (May 11, 2023), <https://www.fox13now.com/news/local-news/report-reveals-stay-at-home-moms-nearly-double-among-millennials-gen-z> [perma.cc/P8HM-EQYZ].

28. NAT'L WOMEN'S L. CTR., *THE REALITY OF THE WORKFORCE: MOTHERS ARE WORKING OUTSIDE THE HOME* 1 n.2 (Feb. 2008), <https://nwlc.org/wp-content/uploads/2015/08/WorkingMothersMarch2008.pdf> [perma.cc/VF2B-XTR7] (“[O]f all mothers of children ages 6 to 17, 57 percent work full time; of all mothers of children under 6, 43 percent work full time; of all mothers of

co-breadwinner of the household.<sup>29</sup> Many work multiple jobs,<sup>30</sup> and do so because of economic necessity.<sup>31</sup> While men are becoming more engaged in caregiving, mothers invest an average of 100 percent more time giving care than men do.<sup>32</sup> Childcare “increased from 8.7 hours per week before the pandemic, to 17.3 hours early in the pandemic, to around 22.4 hours by fall 2020 . . . .”<sup>33</sup> During the first seven months of COVID, “two million mothers of young children left the workforce at more than double the rate of fathers.”<sup>34</sup>

Mothers make significant financial, personal, and health sacrifices to accommodate their caregiving responsibilities, and the impact can be dramatic and significant. A mother who stays at home may sacrifice her future financial security in the case of a later divorce or death of a spouse.<sup>35</sup> The mothers of small children

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children under 1, 36 percent work full time.”).

29. SARAH JANE GLYNN & KATIE HAMM, *THE ECONOMICS OF CAREGIVING FOR WORKING MOTHERS 1* (Ctr. For Am. Progress 2019), <https://www.americanprogress.org/wp-content/uploads/sites/2/2019/12/MaternalLaborForce-report.pdf> [perma.cc/E27P-MYZN] (more than 84.4 percent of Black mothers and 60.3 percent of Latinx mothers earn a significant portion of their family’s income).

30. Gili Malinsky, *60% of People Who Work Multiple Hourly Jobs are Women*, CNBC (Apr. 5, 2024), <https://www.cnbc.com/2024/03/19/60-percent-of-those-holding-multiple-hourly-jobs-are-women.html> [perma.cc/9879-395Z].

31. *Id.*; see also Claire Cain Miller, *The Pandemic Created a Child-Care Crisis. Mothers Bore the Burden.*, N.Y. TIMES (May 17, 2021), <https://www.nytimes.com/interactive/2021/05/17/upshot/women-workforce-employment-covid.html> [perma.cc/6X6B-5YVN] (describing women’s loss of their identity associated with their career); discussion, *infra* Part III(A)2).

32. KIM PARKER & WENDY WANG, *MODERN PARENTHOOD: ROLES OF MOMS AND DADS CONVERGE AS THEY BALANCE WORK AND FAMILY 3* (Pew Rsch. Ctr. 2013), [https://www.pewresearch.org/wp-content/uploads/sites/20/2013/03/FINAL\\_modern\\_parenthood\\_03-2013.pdf](https://www.pewresearch.org/wp-content/uploads/sites/20/2013/03/FINAL_modern_parenthood_03-2013.pdf) [perma.cc/ZA5D-2CV7] (women spend 14 hours per week providing unpaid care, compared to 7 hours for men).

33. Claudia Goldin, *Understanding the Economic Impact of COVID-19 on Women*, 2022 BROOKINGS PAPERS ON ECON. ACTIVITY 65, 67 (2022), <https://doi.org/10.1353/eca.2022.0019> (These hours were for college-graduate women who were full time workers with elementary school-aged children in two-parent households.). See also Richard Weissbourd, Milena Batanova, Joseph McIntyre & Eric Torres, *How the Pandemic is Strengthening Fathers’ Relationships with Their Children*, HARV. GRADUATE SCH. OF EDUC. (June 2020), <https://mcc.gse.harvard.edu/reports/how-the-pandemic-is-strengthening-fathers-relationships-with-their-children> [perma.cc/5TAA-KQLK] (post-pandemic, “68% of fathers report feeling closer or much closer to their children”); Clint Edwards, *I’m a Working Dad. I’ve Never Spent So Much Time with My Kids, and It’s Wonderful*, WASH. POST (Dec. 22, 2020), <https://www.washingtonpost.com/lifestyle/2020/12/22/time-with-kids/> [perma.cc/8FR5-FLG8].

34. Rebecca Marcus-Nicholls, *Childcare: The Privatized Pandemic: A Call for a Federal Childcare Safety Net*, 54 U. TOL. L. REV. 295, 295 (2023).

35. See *Study: Women Put Financial Security at Risk by Deferring*

who work typically juggle the demands of professional life with the responsibilities of childcare. These conditions often require the caregiver to lose or forego financial resources on account of their caregiving commitments.<sup>36</sup> The caregiver working mother may need to leave work early, stay at work late, cut back on hours, make up for missed time, and in severe cases, choose to work part-time, pass up promotions, or leave the workforce entirely.<sup>37</sup> According to a 2020 study, nearly 60 percent of parents say lack of childcare is the reason for leaving the workforce.<sup>38</sup> Most of these workers, as was the case for me, do not receive paid family leave from their employer or their state and cannot afford to take unpaid leave.<sup>39</sup>

Workplace discrimination against mothers is on the rise.<sup>40</sup> Nearly 100 states and cities now have laws that prohibit caregiver discrimination, or “family responsibilities discrimination.”<sup>41</sup> A

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*Long-Term Financial Decisions to Spouses*, OHIO SOCIETY OF CPAs (Mar. 27, 2019), <https://ohiocpa.com/for-the-public/news/2019/03/27/study-women-put-financial-security-at-risk-by-deferring-long-term-financial-decisions-to-spouses> [perma.cc/Z78K-3NX3] (“Three quarters (76%) of widows and divorcees wish they had been more involved in long-term financial decision while they were married . . . with 74% of women discovering negative financial surprises after a divorce or death of their spouse.”).

36. See GLYNN & HAMM, *supra* note 30, at 13 (“When mothers leave the labor force for extended periods of time to care for their children, each year out of paid employment can cost their family more than three times the parent’s annual salary in lifetime income.”).

37. See Kelly Nolan, *Career or Kids: When to Stay, Leave, or Scale Down Your Career for Kids—at Least for Now*, BRIGHT METHOD (Aug. 12, 2021), <https://kellynolan.com/career-or-kids> [perma.cc/T3U8-6V2R].

38. Stephanie Ferguson Melhorn, *Understanding America’s Labor Shortage: The Impact of Scarce and Costly Childcare*, U.S. CHAMBER OF COM. (June 26, 2024), <https://www.uschamber.com/workforce/understanding-americas-labor-shortage-the-scarce-and-costly-childcare-issue> [perma.cc/FYC6-3TGM]; see also Stephanie Ferguson Melhorn & Isabella Lucy, *Data Deep Dive: A Decline of Women in the Workforce*, U.S. CHAMBER OF COM. (June 26, 2024), <https://www.uschamber.com/workforce/data-deep-dive-a-decline-of-women-in-the-workforce> [perma.cc/8HVC-X9R4].

39. The FMLA is unpaid and is not available to most workers (and definitely not available to the low-paid childcare worker in the home). See Dylan Miettinen, *As the Family and Medical Leave Act Turns 30, Millions of American Still Lack Access to Paid Leave*, MARKETPLACE (Feb. 3, 2023), <https://www.marketplace.org/2023/02/03/a-fmla-turns-30-millions-of-americans-still-lack-access-to-paid-leave> [perma.cc/9VGP-8TJF]. Code Section 45S gives employers a credit for certain workers who take paid family leave. See discussion, *infra* Part III(D)(3).

40. Leanne Fuith & Susan Trombley, *COVID-19 and the Caregiving Crisis*, 77 BENCH & B. MINN., no. 8, Oct. 2020, at 27, 28 (“Caregiver discrimination was on the rise even before the pandemic” and gives specific statistics.).

41. *Id.*

2016 study found that employees with caregiving responsibilities “frequently face adverse actions in the workplace, including exclusion from job opportunities based on assumptions about employee’s caregiving obligations, differential treatment compared to other employees, and materially adverse actions” taken by their employers.<sup>42</sup> Provisions of the Families First Coronavirus Response Act<sup>43</sup> provided full-time and part-time employees with paid leave when the employee was caring for a child whose school or place of care was shuttered (or whose childcare provider was unavailable) for reasons related to COVID.<sup>44</sup> These provisions have now expired.

The individual impact of lost and foregone financial resources on caregivers is dramatic across the board, but it is especially harmful for women. A study by the Center for American Progress stated that parents give up \$28.9 billion a year in wages to care for their children.<sup>45</sup> Another pre-pandemic study estimated that workers suffered \$31.9 billion in annual lost wages due to childcare issues.<sup>46</sup> During COVID, “the unprecedented job losses . . . hit women harder than men and reports repeatedly emphasized how the loss of childcare set women back in the workplace.”<sup>47</sup> When preschools

42. *Id.* at 29 (citing CYNTHIA THOMAS CALVERT, CAREGIVERS IN THE WORKPLACE: FAMILY RESPONSIBILITY LITIGATION UPDATE 2016 9 (2016)).

43. Families First Coronavirus Response Act, Pub. L. No. 116–127, 134 Stat. 178 (2020). Other laws may provide some limited protections for caregivers that are discriminated against in the workplace., such as the Pregnancy Discrimination Act, Pub. L. No. 95–555, 92 Stat. 2076 (1978), Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (2008), and other gender discrimination statutes. *See also* Fuith & Trombley, *supra* note 41, at 28.

44. A full-time employee who has been employed for 40 hours by a covered employer (with fewer than 500 employees) for at least 30 days may be eligible for an additional 10 weeks of partially paid leave. *Fact Sheet #28I: Counting Leave Use under the Family and Medical Leave Act*, Wage and Hour Division, US DEPT. OF LABOR (March 2025) <https://www.dol.gov/agencies/whd/fact-sheets/28i-fmla-leave-calculation#:~:text=ABOUT%20THE%20FMLA,50%20employees%20within%2075%20miles>. A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period. *See discussion, infra* Part III(D)(3).

45. SARAH JANE GLYNN & DANIELLE CORLEY, THE COST OF WORK-FAMILY POLICE INACTION 2 (Ctr. for Am. Progress 2016), <https://www.americanprogress.org/wp-content/uploads/sites/2/2016/09/CostOfWorkFamilyPolicyInaction-report.pdf> [perma.cc/6FJR-6ESU].

46. Sarah Jane Glynn, *The Rising Cost of Inaction on Work-Family Policies*, CTR. FOR AM. PROGRESS (Jan. 21, 2020), <https://www.americanprogress.org/article/rising-cost-inaction-work-family-policies> [perma.cc/Z958-Z5HQ].

47. *See* Naomi R. Cahn & Linda C. McClain, *Gendered Complications of Covid-19: Towards a Feminist Recovery Plan*, 22 GEO. J. GENDER & L. 1, 4 (2020) (COVID-19 also had a “negative effect on their children, particularly children in low-income families”).

were shuttered and daycare centers closed many mothers were “forced to take extended time away from their work obligations to care for their children.”<sup>48</sup> Many mothers just quit their jobs. In September 2020, “865,000 women dropped out of the labor force.”<sup>49</sup> In fact, women’s aggregate labor participation rate hit a 33-year low in January 2021.<sup>50</sup> Whenever women lose their jobs, this can impact their future Social Security benefits and they can lose their employer pension if no vesting has occurred.<sup>51</sup> Employers,<sup>52</sup> state

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48. Fuith & Trombley, *supra* note 41, at 28. *See also* Goldin, *supra* note 34, at 70 (“But the big divide is less between men and women and more between the more educated and the less educated. Although educational differences have been present in other recessions, the ability of the educated to work remotely and more safely would be expected to have exacerbated educational differentials relative to those in typical recessions.”). As many have said, COVID-19 deserves the name “she-cession.” *See* Meghan Thoreau, *The She-cession: How the Pandemic Forced Women from the Workplace and How Employers Can Respond*, Ohio State U. Extension CFAES (Jan. 20, 2022), <https://ohioline.osu.edu/factsheet/cdfs-4110>.

49. Soo Youn, *Quitting Was Her Only Option. She is One of 865,000 to Leave the Workforce Last Month*, WASH. POST (Oct. 7, 2020), <https://www.washingtonpost.com/gender-identity/quitting-was-her-only-option-she-is-one-of-865000-women-to-leave-the-workforce-last-month> [perma.cc/T6W7-466Y].

50. Courtney Connley, *Women’s Aggregate Labor Rate Hit a 33-Year Low, According to New Analysis*, CNBC (Feb. 8, 2021), <https://www.cnbc.com/2021/02/08/womens-labor-force-participation-rate-hit-33-year-low-in-january-2021.html> [perma.cc/B4XX-BLH9]; JULIE KASHEN, SARAH JANE GLYNN & AMADA NOVELLO, *HOW COVID-19 SENT WOMEN’S WORKFORCE PROGRESS BACKWARD: CONGRESS’ \$64.5 BILLION MISTAKE 1* (Ctr. for Am. Progress 2020), <https://www.americanprogress.org/wp-content/uploads/sites/2/2020/10/Womens-Labor-Force-Participation.pdf> [perma.cc/HRZ6-AJFF].

51. *See Women and Retirement Savings*, Employee Benefits Security Administration DEPT. OF LABOR <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/publications/women-and-retirement-savings#:~:text=You%20may%20lose%20the%20retirement,to%20another%20qualified%20retirement%20plan>.

52. HASPEL, *supra* note 14, at 7 (“Nationally businesses lose out on nearly \$13 billion every year because of employees missing work due to childcare breakdowns, while workers themselves . . . drop more than \$8 billion of lost wages on the floor.”); *see also* KATHERINE B. STEVENS, *WORKFORCE OF TODAY, WORKFORCE OF TOMORROW: THE BUSINESS CASE FOR HIGH-QUALITY CHILDCARE* 8 (U.S. Chamber of Com. Found. June 21, 2017), <https://www.uschamberfoundation.org/education/workforce-of-today-workforce-of-tomorrow> [perma.cc/ZWJ7-9FJN] (employers can suffer economically from absenteeism and decline in productivity).

economies,<sup>53</sup> and even the IRS<sup>54</sup> can all suffer from the loss of women's market work due to their caregiving responsibilities.

In addition to the financial losses, caregiving can have negative emotional, mental, and physical impacts on the caregivers as well as the care receivers—the children. Nearly 80 percent of primary family caregivers who report that caregiving is stressful are women.<sup>55</sup> Many caregivers suffer from anxiety and depression at a rate much higher than those not engaged in caregiving activities.<sup>56</sup> This stress and depression may be due in part to “second shift” work—when the caregiver's market-labor job is layered with domestic duties.<sup>57</sup> Others are “sandwiched” between taking care of parents or grandparents and children.<sup>58</sup> These burdens of care responsibilities can hurt the caregiver's ability to provide care for themselves, can lead to long-term higher health care problems, and thus adversely affect the quality of life for themselves and their children.

The pandemic also had an adverse impact on young children. Among the areas impacted were “child development, school readiness, education attainment, socialization skills [and] mental [health].”<sup>59</sup> Studies show that the pandemic significantly impacted

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53. *New Research Shows States Lose Billions in Annual Economic Opportunity Due to Childcare Gap*, U.S. CHAMBER OF COM. (Nov. 30, 2021), <https://www.uschamberfoundation.org/education/new-research-shows-states-lose-billions-annual-economic-opportunity-due-childcare-gaps> [perma.cc/F5GQ-AVNT] (“The research finds that due to breakdowns in the childcare system, these states miss an estimated average of \$2.7 billion annually for their economies.”).

54. See generally KASHEN, GLYNN & NOVELLO, *supra* note 51 (estimating that the government lost billions of lost tax revenue from mothers' lost wages during the pandemic).

55. Nidhi Sharma, Subho Chakrabarti & Sandeep Grover, *Gender Differences in Caregiving Among Family—Caregivers of People with Mental Illnesses*, 6 *WORLD J. PSYCHIATRY* 7, 7 (2016), <https://doi.org/10.5498/wjp.v6.i1.7> (“Stress-coping theories propose that women are more likely to be exposed to caregiving stressors.”); see also Jessica Grose, *What American Families Experienced is Not Something That You Get Over*, *NY TIMES* (Mar. 13, 2024), <https://www.nytimes.com/2024/03/13/opinion/child-care.html> [perma.cc/RC4X-H96B].

56. *Family Caregiving Roles and Impacts, in FAMILIES CARING FOR AN AGING AMERICA* (Richard Schulz & Jill Eden eds., 2016), <https://doi.org/10.17226/23606>.

57. See generally ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (2d ed. 2012).

58. See generally LEONEL GUERROERO, *THE SANDWICH GENERATION HANDBOOK: PRACTICAL GUIDE TO BALANCING CARE FOR YOUR CHILDREN AND ELDERLY PARENTS* (2024).

59. Sarah B. Mulkey, Cynthia F. Fearer & Eleanor J. Molloy, *Indirect Effects of the COVID-19 Pandemic on Children Relate to the Child's Age and Experience*, 94 *PEDIATRIC RSCH.* 1586, 1586 (2023), <https://doi.org/10.1038/>

younger children,<sup>60</sup> and that their recovery will be especially acute.<sup>61</sup> In addition, more than 140,000 children lost a primary or secondary caregiver due to COVID.<sup>62</sup> I know full well that a loss of a parent can permanently change one's life, as my father died in the Korean War when I was two. His death was devastating to our family but enabled me to utilize the GI Bill and escape Eastern Ohio Appalachian poverty.

#### B. *Women Provide the Vast Majority of Low-Paid Caregiver Services*

Paid caregiving services can be informal and provided in homes, or they can be more formal, provided in governmental or church preschools or privately licensed daycare centers. Recent studies indicate that women represent 95 percent of childcare workers,<sup>63</sup> and they provide hands-on care for more than 12.5 mil-

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s41390-023-02681-4 (“Children under the age of 2 years do not learn well from screen watching and benefit most from in-person interactions. Early language and social development really require in-person experiences and peer-play time.”); *see also Study Finds COVID-19 Pandemic Led to Some, But Not Many Developmental Milestone Delays in Infants and Young Children*, JOHNS HOPKINS MEDICINE (Apr. 22, 2024), <https://www.hopkinsmedicine.org/news/newsroom/news-releases/2024/04/study-finds-covid-19-pandemic-led-to-some-but-not-many-developmental-milestone-delays-in-infants-and-young-children> [perma.cc/T5CT-CWYN].

60. Kalya Belsha, *The Pandemic Set Younger Kids Back. The Recovery is Especially Acute, Data Shows*, CHALKBEAT (July 3, 2024), <https://www.chalkbeat.org/2024/07/03/pandemic-left-younger-students-struggling-to-make-academic-progress> [perma.cc/69DZ-DWWS] (“Fewer children enrolled in preschool and kindergarten [during the pandemic], and many young children struggled with remote learning. Increased parental stress and screen time may also be factors.”).

61. *Id.* (noting researchers’ suggestion that “schools . . . consider changing up their academic interventions to focus more on early elementary schoolers”).

62. *More than 140,000 Children Lost a Primary or Secondary Caregiver Due to the COVID-19 Pandemic*, NAT’L INSTS. OF HEALTH (Oct. 7, 2021), <https://www.nih.gov/news-events/news-releases/more-140000-us-children-lost-primary-or-secondary-caregiver-due-covid-19-pandemic> [perma.cc/QE5M-LVHY] (reporting on Susan D. Hillis et al., *COVID-19-Associated Orphanhood and Caregiver Death in the United States*, 148 PEDIATRICS, no. 6, Dec. 1, 2021, <https://doi.org/10.1542/peds.2021-053760>); *see also* Meredith Johnson Harbach, *Parans Patriae After the Pandemic*, 101 N.C. L. REV. 1427, 1428 (2023) (“Around 232,500 children lost at least one primary caregiver to COVID-19.”).

63. Erica Phillips, *After Years of Silent Sacrifices and Unseen Struggles, Black Women are Still Holding Up the Child Care Industry*, HECHINGER REPORT (Mar. 5, 2024), <https://hechingerreport.org/opinion-after-years-of-silent-sacrifices-and-unseen-struggles-black-women-are-still-holding-up-the-child-care-industry> [perma.cc/Q3A9-7NBZ].

lion children.<sup>64</sup> Before COVID, 1.05 million worked in childcare, hitting a low of approximately 675 million during COVID, and rebounding to a little over 1 million in 2023.<sup>65</sup> On average, these care providers are 36 years of age and many have children themselves.<sup>66</sup> Childcare workers are also disproportionately women of color and immigrant women.<sup>67</sup>

Care workers, even those working in a formal preschool setting, are generally poorly paid. In addition, their jobs are physically and mentally challenging, with easy burnout.<sup>68</sup> The U.S. Bureau

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64. *Fast Facts: Child Care*, NAT'L CTR. FOR EDUCATION STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=4> [perma.cc/W64B-XHFQ] (last visited Mar. 12, 2025) (“In 2019, approximately 59 percent of children age 5 and younger and not enrolled in kindergarten were in at least one weekly nonparental care arrangement [like a daycare center, preschool, or care provided by a relative]”); see, Allie Schneider & Hailey Gibbs, *Data Dashboard: An Overview of Child Care and Early Learning in the United States*, CTR. FOR AM. PROGRESS (Dec. 14, 2023), <https://www.americanprogress.org/article/data-dashboard-an-overview-of-child-care-and-early-learning-in-the-united-states> [perma.cc/T5V9-GCLA] (“The estimated number of workers in the child care sector declined by 373,100 from February 2020 to April 2020, after the start of the COVID-19 pandemic . . . . Notably, job recovery in the child care sector has been slower than in other pandemic-affected sectors such as retail trade and leisure and hospitality. At the same time, child care job postings remain high, indicating that the sector is facing hiring challenges. Low wages and poor benefits across the sector lead to high turnover rates and challenges finding and retaining qualified educators.”).

65. Rose Khattar & Maureen Coffey, *The Child Care Sector is Still Struggling to Hire Workers*, CTR. FOR AM. PROGRESS (Oct. 19, 2023), <https://www.americanprogress.org/article/the-child-care-sector-is-still-struggling-to-hire-workers> [perma.cc/EL6G-EPHY] (paid care workers are still in short supply, down by 40,000 compared to pre-pandemic numbers).

66. Linda K. Smith, Kathlyn McHenry Suzann Morris & Hannah Chong, *Characteristics of the Child Care Worker* BIPARTISAN POLICY CENTER (Feb. 2021), <https://bipartisanpolicy.org/blog/characteristics-of-the-child-care-workforce/>; Kat Mercado, *The Hidden Early Care and Education Child Workforce*, NAT'L WOMEN'S L. CTR. (Jan. 19, 2022), <https://nwlc.org/the-hidden-early-care-and-education-workforce> [perma.cc/V7BB-J4Z7]; *Standing Up and Stepping In*, GUARDIAN LIFE, <https://www.guardianlife.com/reports/caregiving-in-america> [perma.cc/6Z9G-EP98].

67. About 18 percent of paid caregivers are Black and a similar number are immigrants. See Phillips, *supra* note 64 (“Early education and child care represent the most racially diverse and lowest-paid sector of the teaching workforce.”).

68. *How to Increase Staff Retention and Limit Turnover Rates at Your Child Care Center*, ILLUMINE, <https://illumine.app/blog/staff-retention-strategies-for-childcare-centers-illumine> [perma.cc/QJ3W-QDRD] (last visited Mar. 12, 2025) (“Their job is physically as well as mentally laborious. It’s laden with the responsibility of extremely dependent and vulnerable beings at their most pivotal age.”).

of Labor Statistics reports that on average the care worker made around \$14.22 per hour in May of 2022, or a little over \$29,570 per year.<sup>69</sup> Care workers routinely receive meager or no fringe employment benefits, including paid sick leave, time-off for holidays, health insurance, or retirement/pension plans—benefits generally offered to other marketplace workers.<sup>70</sup> Furthermore, childcare providers lack opportunities for promotion and higher pay.<sup>71</sup> The lack of employer benefits and job advancement further exacerbates the paid worker’s financial situation. Due to these low-pay standards, “[a]lmost one-half of these workers live below 200 percent of the Federal poverty guidelines and about half rely on public assistance.”<sup>72</sup> When such large numbers of women workers are employed in low-paying jobs, the likelihood of the feminization of poverty becomes much greater.<sup>73</sup>

During the pandemic, many paid care providers were forced to leave their jobs.<sup>74</sup> Almost a quarter of childcare workers lost

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69. *Occupational Employment and Wage Statistics, May 2022: Childcare Workers*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/oes/2022/may/oes399011.htm> [perma.cc/4WJA-SKLN] (last visited Mar. 12, 2025).

70. ELISE GOULD, CHILD CARE WORKERS AREN’T PAID ENOUGH TO MAKE ENDS MEET 6–7 (Econ. Pol’y Inst. Nov. 5, 2015), <https://files.epi.org/2015/child-care-workers-final.pdf> [perma.cc/LRF5-JTFC].

71. Jessica Milli, *Why Investing in Child Care Providers is Essential for Providers, Children and Families*, CLASP, <https://www.clasp.org/publications/report/brief/why-investing-in-child-care-providers-is-essential-for-providers-children-and-families/#:~:text=In%20addition%2C%20the%20current%20structure%20of%20most,to%20advance%20into%20higher%2Dlevel%20and%20higher%2Dpaying%20roles.&text=Child%20care%20workers%20are%20passionate%20about%20the,can%20be%20as%20high%20as%2030%20percent> (“the current structure of most child care programs provides few opportunities for teaching staff to advance into higher-level and higher-paying roles.”)

72. U.S. DEP’T OF LAB., GUIDANCE ON SUPPORTIVE SERVICES FOR CHILD CARE AND LONG-TERM CARE 4 (2024), <https://bit.ly/43Hr9iz> [perma.cc/U6RZ-HGRV]; see also Celine McNicholas & Margaret Poydock, *Who Are Essential Workers? A Comprehensive Look at Their Wages, Demographic, and Unionization Rates*, ECON. POL’Y INST.: WORKING ECON. BLOG (May 19, 2020), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates> [perma.cc/3NMT-JM45] (women comprise 76% of workers in health and 73% in governmental and community services).

73. See generally GERTRUDE SCHAFFNER GOLDBERG & ELEANOR KREMEN, THE FEMINIZATION OF POVERTY: ONLY IN AMERICA? (1990).

74. Caitlin Millat & Melissa Murray, *Education as Childcare*, 101 N.C. L. REV. 1463, 1484–85 (2023) (“Hundreds of thousands of childcare workers lost or left their jobs as the pandemic spread, exacerbating childcare availability in a landscape already plagued by significant ‘child care deserts’ with limited or no care options.”).

their jobs and almost a half of childcare centers closed.<sup>75</sup> Head Start, a federally-run program, was shuttered throughout the United States,<sup>76</sup> as were many state- and city-run preschools.<sup>77</sup> Only “67 percent of the 2019 center-based childcare and early education workforce was employed in October 2020 (seven months into the pandemic).”<sup>78</sup> In addition, during the pandemic, childcare workers experienced high levels of housing insecurity,<sup>79</sup> greater difficulties paying for usual household expenses,<sup>80</sup> as well as substantial food insecurity.<sup>81</sup> Those women childcare workers that kept their jobs during the pandemic often sacrificed their personal health (as well as the health of their household) to act in service in the childcare industry.<sup>82</sup> As the jobs returned after the pandemic, mothers of small children and minorities took longer to recover.<sup>83</sup>

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75. See Cahn & McClain, *supra* 48 note, at 18 nn. 94–95.

76. SARA SHAW ET AL., HEAD START’S RESPONSE TO THE COVID-19 PANDEMIC 1 (Off. of Planning Rsch. & Evaluation 2023), [https://acf.gov/sites/default/files/documents/opre/head\\_start\\_response\\_to\\_covid\\_19\\_brief\\_mar2023.pdf](https://acf.gov/sites/default/files/documents/opre/head_start_response_to_covid_19_brief_mar2023.pdf) [perma.cc/F7W9-HPF3] (“In March 2020, Head Start and Early Head Start grantees had to quickly adjust to meet new public health requirements put in place by the Office of Head Start (OHS) as well as mandates from governors and state agencies in response to the COVID-19 pandemic.”).

77. Lauren Camera, *How the Pandemic Devastated State-Run Early Education*, U.S. NEWS (Apr. 26, 2022), <https://www.usnews.com/news/education-news/articles/2022-04-26/how-the-pandemic-devastated-state-run-early-education> [perma.cc/T7GV-CEYA] (“Enrollment in state-funded preschool dropped for the first time in 20 years with the pandemic, erasing a decade of growth and resulting in a nearly 20% decline in a single year.”).

78. JESS BELLEDONNE & NINA CHIEN, CHILD CARE WORKERS’ EXPERIENCE OF ECONOMIC HARDSHIP DURING THE COVID-19 PANDEMIC, FROM 2021 TO 2022 2 (Off. of Hum. Services Pol’y 2024), <https://aspe.hhs.gov/sites/default/files/documents/d4f10ff2344a518238e3726f344201f8/child-care-workers-economic-hardship-covid.pdf> [perma.cc/6RRH-2VB2] (“Latino and Black households [were] most affected by pandemic-related child care disruptions”).

79. *Id.* at 4 (from a low of 11 percent to a high of 25 percent reporting housing insecurity from April 2021 to May 2022, as well as showing an even great degree of energy insecurity.); see also later discussion, *infra* Part II(B)(2).

80. *Id.* at 6 (between April 2021 and August 2022, a low of 49 percent and a high of 79 percent).

81. *Id.* at 7 (from 25 percent to a high of 63 percent from April 2021 to August 2022); see later discussion, *infra* Part II(B)(2) & (C)(1).

82. Simón Rios, *Frontline Coronavirus Workers Need Emergency Child Care. Hundreds of Providers Are Stepping Up*, WBUR (Mar. 22, 2020), <https://www.wbur.org/news/2020/03/22/coronavirus-child-care-massachusetts> [perma.cc/933R-UXNZ] (including child care workers among the “vulnerable” groups).

83. Heather Long et. al., *The COVID-19 Recession is the Most Unequal in Modern U.S. History*, WASH. POST (Sept. 30, 2020), <https://www.washingtonpost.com/graphics/2020/business/coronavirus-recession-equality> [perma.cc/FFX5-TZBK].

### III. CHILDCARE IS A CLASS ISSUE

The difficulty of paying for childcare expenses can vary significantly across class categories. Wealthy families have a great number of childcare choices. However, quality care choices may not be available to them, due to market failure, geographic location, or other factors. Middle and lower-class families face daunting childcare and other costs and are often forced to rely on friends and family members to provide makeshift care. Both middle and lower-class parents often forgo debt repayment and wealth creation, and with that their hope of upward mobility. Rural women, immigrant women, and women of color tend to have both lower incomes and support systems, and each of these vulnerable groups has their own unique set of problems.

#### A. *Wealthy Families Have the Greatest Childcare Choices*

Families with ample financial resources have a wide variety of childcare choices. First, a wealthy parent can leave the labor force and choose to stay home with his or her children. Second, a wealthy family can afford a pricey private quality preschool or a live-in nanny or au pair. Third, these families may even qualify for subsidized government provided preschool. However, even wealthy families are exposed to market failure and other challenges.

##### 1. A Wealthy Parent Has the Ability to Choose to Stay at Home

Only a small number of parents can choose to stay at home and take care of their children. That was not a choice open to me as my husband earned very low wages as a tradesmen.<sup>84</sup> In 2023, about 25 percent of mothers and 7 percent of fathers were able to stay at home full-time with their children.<sup>85</sup> They were usually able to do so because of a supporting partner.<sup>86</sup> This one-earner couple

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84. Generally, a woman needs a trust fund, wealth, supporting grandparents, or a working partner or husband to afford this luxury. Interestingly, I attended some homeschooling seminars in hopes of teaching my own kids full time. Unfortunately, my husband was not interested in child care as he thought that was my responsibility.

85. Mike P. Taylor, *The State of Moms and Dads in America* (2022), NAT'L FATHERHOOD INITIATIVE (May 24, 2022), <https://www.fatherhood.org/championing-fatherhood/the-state-of-moms-and-dads-in-america-2022> [perma.cc/2UBL-9N3K].

86. David H. Montgomery, *Who's Not Working? Education and the Choice to Be a Stay-At-Home Parent*, FED. RSRV. BANK OF MINNEAPOLIS (Aug. 30, 2023), <https://www.minneapolisfed.org/article/2023/whos-not-working-education-and-the-choice-to-be-a-stay-at-home-parent> [perma.cc/P4YG-F3LK] (“[F]ull-time caregivers are more common among married couples” and “[m]ore than 90

model, however, is not the norm, comprising only 23.5 percent of married couples in 2023,<sup>87</sup> down from a whopping 91 percent in 1920.<sup>88</sup> Currently, 63 percent of parents in the two-earner married household are both employed in the marketplace.<sup>89</sup>

Survey-based studies have shown that the high costs of child-care is a reason for the rise in the number of stay-at-home mothers in the last several years.<sup>90</sup> By staying at home the mother can save on work-related expenses, such as nondeductible commuting, parking, business clothes, and extra meal expenses, as well as avoid the regressive and high social security taxes on her wage income.<sup>91</sup> In addition, she can jointly file taxes with her spouse, splitting her income and substantially saving on taxes.<sup>92</sup> Studies also show that children prefer to be taken care of by their loved ones who can stay in their house to provide care.<sup>93</sup> Care from a parent is generally of percent of married fathers work, compared with less than 75 percent of married mothers.”).

87. *Economic News Release, Employment Characteristics of Families Summary*, U.S. BUREAU OF LAB. STAT. (Apr. 24, 2024), <https://www.bls.gov/news.release/famee.nr0.htm> [perma.cc/7FRC-2K9P].

88. Howard Hayghe, *Husbands and Wives as Earners: An Analysis for Family Data*, MONTHLY LAB. REV., Feb. 1981, at 47, <https://www.bls.gov/opus/mlr/1981/02/art5full.pdf> [perma.cc/8WVM-VEE] (showing 9% of wives employed in 1920).

89. Jennifer Petriglieri, *How Dual-Career Couples Make It Work*, HARV. BUS. REV. (2019), <https://hbr.org/2019/09/how-dual-career-couples-make-it-work> [perma.cc/W7ZW-QJYV]; see also *A New Approach to Making Work Pay*, HAMILTON PROJECT (Mar. 26, 2024), <https://www.hamiltonproject.org/news-and-commentary/a-new-approach-to-making-work-pay> [perma.cc/8NSM-TVZ3] (“Today, roughly two-thirds of married couples with children rely on the earnings from two workers to make ends meet”); Serdar Birinci & Aaron Amburgey, *COVID-19’s Effects on Dual-Earner Households*, FED. RSRV. BANK OF ST. LOUIS (May 4, 2021), <https://www.stlouisfed.org/on-the-economy/2021/may/covid19-effects-dual-earner-households> [perma.cc/MH6T-DAFS] (in 2020 and 2021, two-earner households made up about 50 percent of married-couple families).

90. Cassie Werber, *The Number of Stay-At-Home Mothers Rose Dramatically in the US Last Year*, QUARTZ (May 16, 2023), <https://qz.com/the-number-of-stay-at-home-mothers-rose-dramatically-in-1850440544> [perma.cc/W44K-W7FX]. There may be other reasons as well. See discussion, *infra* Part III(A)(1), note 321.

91. See EDWARD J. McCAFFERY, *TAXING WOMEN* (1997) (pointing out that the “secondary worker” is usually the woman); but see Nancy E. Shurtz, *Gender Equity and Tax Policy: The Theory of “Taxing Men”*, 6 S. CAL. REV. L. & WOMEN’S STUD. 485, 522 (1997) (criticizing McCaffery’s general preference for deductions over refundable credits when it comes to making some of these personal expenditures deductible).

92. McCAFFERY, *supra* note 92; also see discussion, *infra* Part III(G)(1).

93. Heidi Redlich Epstein, *Kindship Care is Better for Children and Families*, AM. BAR ASSOC.: CHILD L. PRAC. TODAY (July 1, 2017), <https://www>.

higher quality than that provided by a stranger because the parent has a stronger ethical commitment and personal attachment to the child. However, this is not always the case, as child abuse often occurs in the familial setting.<sup>94</sup> By staying at home, however, the mother may be sacrificing her future financial security.<sup>95</sup>

## 2. Wealthy Families Can Afford Quality Expensive Care

Perhaps the single biggest drawback of childcare is its cost. In a 2018 survey commissioned by the New York Times, the top reason childbearing-age adults gave for having fewer children was the cost of childcare.<sup>96</sup> The average weekly cost of a licensed daycare in 2023 was \$284 a week.<sup>97</sup> Live-in nannies or au pairs are among the highest paid of all caregivers, at around \$736 a week for 2023.<sup>98</sup> The annual cost of private preschool is between \$4,000 and \$13,000 per year.<sup>99</sup> Religious private preschools cost less, at around \$4,840

[americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families](https://americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families) [perma.cc/W29C-XC6A] (“Children in the care of relatives experienced increased stability, with fewer placement changes, decreased likelihood of disruption and not as many school changes.”).

94. *National Statistics on Child Abuse*, NAT’L CHILD.’S ALL., <https://www.nationalchildrensalliance.org/media-room/national-statistics-on-child-abuse> [perma.cc/U3DH-4XQH] (last visited Apr. 26, 2025) (1 in 4 girls and 1 in 13 boys experience child abuse per year in the U.S.); see also Gina Glaros, *CDC: Students Report Home Abuse During Pandemic, Affecting Mental Health*, WTHR (Apr. 1, 2022), <https://www.wthr.com/article/news/health/coronavirus/cdc-students-report-home-abuse-during-pandemic-affecting-mental-health-covid/531-fd2db04f-02a9-46ee-b2b7-40e7c1bdaf42> [perma.cc/4FNT-B3AV] and Liam Connolly, *Study Finds Fewer Reports of Child Physical Abuse During COVID-19 Pandemic*, UC DAVIS HEALTH (July 13, 2021), <https://health.ucdavis.edu/news/headlines/study-finds-fewer-reports-of-child-physical-abuse-during-covid-19-pandemic/2022/07> (showing that child abuse did not go up during the pandemic) but see, Ashley Rapp, Gloria Fall, Abigail C. Radomsky & Sara Santarossa, *Child Maltreatment During the COVID-19 Pandemic*, 68 PEDIATRIC CLINICS OF NORTH AM. 991 (2021), <https://doi.org/10.1016/j.pcl.2021.05.006> (showing mixed results).

95. See discussion, *supra* Part I(A) notes 36–40 and accompanying text.

96. HASPEL *supra* note 14, at 2 n. 1 (citing Claire Cain Miller, *Americans Are Having Fewer Babies. They Told Us Why.*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/upshot/americans-are-having-fewer-babies-they-told-us-why.html>).

97. *This is How Much Child Care Costs in 2023*, CARE.COM (Jan. 17, 2024) [hereinafter *Care Study*], <https://www.care.com/c/cost-of-child-care-survey-2023-report> [perma.cc/AA5H-3AX3].

98. *Id.*

99. Haley Longman, *Preschool: How Much Does It Cost?*, BABYCENTER (Oct. 10, 2022), [https://www.babycenter.com/family/money/preschool-how-much-does-it-cost\\_6061](https://www.babycenter.com/family/money/preschool-how-much-does-it-cost_6061) [perma.cc/2SZF-YKBH]; Tamatha Hazen, *How Much Does Preschool Cost?*, TRUSTEDCARE (Jan. 28, 2025), <https://trustedcare.com/>

a year.<sup>100</sup> Estimates of these costs vary by region and locality, but, according to the Bureau of Labor Statistics between January 2020 and September 2024, the price of day care and preschool rose about 22%.<sup>101</sup> In some states or localities, such as Boston, New York City, and San Francisco, childcare can cost much more.<sup>102</sup> Still, none of these expenses should create much of a problem for wealthy families nor should this expense alone impede their desire to have more children.<sup>103</sup> Wealthy families have more options across the board—including not having to perform full-time market labor and having leisure time to travel, pursue hobbies, or other activities—endeavors that could displace child creation as a priority value.

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costs/preschool-cost [perma.cc/9WXD-5EK4]; Ivana Pino, *Average Cost of Child Care in 2023*, BANKRATE (May 29, 2023), <https://www.bankrate.com/credit-cards/news/average-cost-of-childcare> [perma.cc/KZ4Y-XU9S].

100. *How Much Do Private Schools Cost: Breakdown of Tuition (2025)*, RAISERIGHT, <https://www.raiseright.com/blog/how-much-do-private-schools-cost> (last visited Mar. 12, 2025) [perma.cc/T3UV-S55U].

101. Rebecca Leppert, *5 Facts About Child Care Costs in the U.S.*, PEW RESEARCH CENTER (Oct. 25, 2024), <https://www.pewresearch.org/short-reads/2024/10/25/5-facts-about-child-care-costs-in-the-us/#:~:text=Some%20forms%20of%20child%20care,6%25%20just%20since%20September%202023>. This could be due to inflation and/or the fact that many childcare facilities have permanently closed.

102. *Id.* (finding private preschool costs to be higher on the East Coast than in the South or Midwest); see also Emily Carte, *How Much Childcare Costs by State in the USA in 2025*, ILLUMINE, <https://illumine.app/blog/how-much-childcare-costs-by-state-in-usa> [perma.cc/MC4B-X49T] (last visited Mar. 12, 2025) (providing data showing California, New York, Wisconsin and Colorado with the highest costs and the lowest in Southern states, such as Alabama and Arkansas).

103. Melissa S. Kearney & Phillip Levine, *US Births Are Down Again, After the COVID Baby Bust and Rebound*, BROOKINGS INST. (May 31, 2023), <https://www.brookings.edu/articles/us-births-are-down-again-after-the-covid-baby-bust-and-rebound> [perma.cc/8S25-DZPY] (following a decline after COVID and then a slight rebound, births are now back down below 2019 levels); see also *U.S. Fertility Rate Drops to Another Historic Low*, CDC: NAT'L CTR. FOR HEALTH STAT. (Apr. 25, 2024), [https://www.cdc.gov/nchs/pressroom/nchs\\_press\\_releases/2024/20240525.htm](https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2024/20240525.htm) [perma.cc/N95G-JZUH] (fertility rate decreased 3 percent from 2022). Recent census data reveals that our national fertility rate is the lowest in a century. Lauren Keenan, *Fertility Rate for US Women in 2023 Hits Lowest Level in a Century: CDC*, SAN (April 25, 2024) <https://san.com/cc/fertility-rate-for-us-women-in-2023-hits-lowest-level-in-a-century-cdc/>. This acute “baby bust” only highlights the longer-developing trend of low birth rates. This trend will strain health and retirement systems that rely on a *growing* supply of younger working taxpayers to fund the public safety nets. In addition, young workers are needed to drive the general economy and foster innovation and growth. The government’s response to this crisis has been inadequate. Weak subsidies for families are partly to blame here. See proposals, *infra* Part III(C) – (F).

For wealthy parents, quality need not take a backseat. Licensed formal care tends to use an established curriculum and follow certain standards, and early childhood teachers in formal settings often have college training.<sup>104</sup> Rating services show a high satisfaction among parents for both private and parochial preschools and in-home licensed day care centers.<sup>105</sup> The gold-standard rating system for formal childcare providers is known as CLASS (Classroom Assessment Scoring System), which breaks down quality into different categories depending on age level: Classroom Organization, Emotional Support, and Instructional Support.<sup>106</sup> These are qualities that many wealthy parents can afford.

During COVID many wealthy families hired nannies because of the health risks associated with large group settings.<sup>107</sup> This in-home care was particularly important where “professional mothers required external help to maintain their workforce participation.”<sup>108</sup> Although nannies and au pairs in general are paid at the top of the caregiver range, they are not subject to the Fair Labor Standards Act (FLSA), so they do not even have to be paid minimum wage.<sup>109</sup> Nor are they subject to any of the FLSA hour restrictions.<sup>110</sup> Thus, wealthy families may be able to “exploit”

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104. Leslie Booren, *Children in Preschools Receive Higher-Quality Care than Those in Home-Based Care, Study Finds*, STAN. GRADUATE SCH. OF EDUC. (June 1, 2016), <https://ed.stanford.edu/news/children-preschools-receive-higher-quality-care-are-better-prepared-home-based-care> [perma.cc/LG4S-27BC]; but see HASPEL, *supra* note 14, at 73 (stating that there is high-quality as well as low-quality formal care.)

105. See, e.g., *Child Care Qualify Ratings*, CHILD CARE AWARE OF AM., <https://www.childcareaware.org/families/child-care-quality-ratings> [perma.cc/TG4T-A8WQ] (last visited Mar. 12, 2025) (rating facilities state by state).

106. HASPEL, *supra* note 14, at 74 (“Classroom Organization refers to behavior management and how the day is structured. Emotional Support refers to the presence of a warm, welcoming environment. Instructional Support refers to the intentional cultivation of pre-academic knowledge and skills.”).

107. Rebecca Horwitz-Willis & Leanna Katz, *The Interdependence of Family, State, and Market: Childcare in the Shifting Landscape of the COVID-19 Pandemic*, 30 GEO. J. ON POVERTY L. & POL’Y 405, 432 (2023), (citing Emily Peck, *More Parents Hiring Nannies Amid Big Shift in Child Care*, AXIOS (Sept 26, 2022), <https://www.axios.com/2022/09/26/more-parents-hiring-nannies-amid-big-shift-in-child-care>).

108. *Id.*

109. See discussion of FLSA, *supra* notes 12 & 62.

110. See *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167–72 (2007) (The Supreme Court unanimously held that the Fair Labor Standards Act (FLSA) did not cover a home worker hired by a home care agency who often slept in her client’s home and worked 24-hour shifts. Further, the Court stated that home care agency workers were akin to a casual babysitter who provides “companionship services for individuals who (because of age or

the care worker, at the same time as they may be able to obtain quality care.<sup>111</sup>

During the pandemic many wealthy parents hired laid-off teachers or tutors and formed “learning pods” or “pod schools”<sup>112</sup>—banding together with other families to educate and socialize their children during school shutdowns.<sup>113</sup> The average cost here ranged from an average \$300 a week<sup>114</sup> to a monthly \$2,500.<sup>115</sup> Studies have shown that these informal settings provided high satisfaction from both the families’ and the paid care worker’s perspective. Both groups reported positive results from the small-group atmosphere and direct feedback channels.<sup>116</sup> Other studies have shown strong learning outcomes from these experiences.<sup>117</sup> On the other hand,

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infirmity) are unable to care for themselves.” The Court held, in the absence of clear Congressional authority to the contrary, the intent of the FLSA was not to cover these types of workers. Care providers that work independently and who are not specialized are also not covered under the FLSA.).

111. Horwitz-Willis & Katz, *supra* note 108, at 432–33 (“[T]he informal nature of the nanny-family relationship can expose nannies to exploitative family relationships and violations of labor standards . . . . [W]hen White middle-class women hire care, often low-income immigrant women of color, they reinforce the commodification of women unable to exit the workforce themselves.”).

112. CIVIS, GATES COVID-19 TRACKER, WAVE 14-NATIONAL (2021), [https://www.civisanalytics.com/wp-content/uploads/2021/01/COVID\\_Tracker\\_Wave\\_14\\_Toplines\\_Report\\_National.pdf](https://www.civisanalytics.com/wp-content/uploads/2021/01/COVID_Tracker_Wave_14_Toplines_Report_National.pdf) [perma.cc/8NTA-E8DY] (Fewer than 1 in 5 children participated in these pods during the pandemic and they were mostly comprised of wealth students. Only 10 percent of low-income families joined a pod.).

113. Carolyn Thompson & Adriana Gomez Licon, *Why Parents Are Forming ‘Learning Pods’—and How They Might Deepen Inequality*, PBS NEWS (Aug. 4, 2020), <https://www.pbs.org/newshour/education/why-parents-are-forming-learning-pods-and-how-they-might-deepen-inequality> [perma.cc/XBE6-R8GN]; see also Sarah D. Sparks, *Lessons Learned From Pandemic Learning Pods*, EDUCATIONWEEK (Feb. 23, 2022), <https://www.edweek.org/leadership/lessons-learned-from-pandemic-learning-pods/2022/02> [perma.cc/CL4H-DJ22].

114. Sparks, *supra* note 114.

115. *Pandemic Learning Pods: The Good and the Bad*, LINEWIZE (Aug. 19, 2020), <https://www.linewize.com/blog/pandemic-learning-pods-the-good-and-the-bad> [perma.cc/T3YZ-NMBT]; see also Carrie Whitney, *The Pros and Cons of Pandemic Learning Pods*, HOWSTUFFWORKS (July 28, 2020), <https://people.howstuffworks.com/learning-pods.htm> [perma.cc/F366-SQC2].

116. Sparks, *supra* note 114 (In the study, half of the “participating families earned over \$125,000”); ASHLEY JOCHIM & JENNIFER POON, CRISIS BREEDS INNOVATION: PANDEMIC PODS AND THE FUTURE OF EDUCATION (Ctr. on Reinventing Pub. Educ. 2022), [https://crpe.org/wp-content/uploads/CRPE-Pandemic-Pods-Report\\_Pages\\_FINAL.pdf](https://crpe.org/wp-content/uploads/CRPE-Pandemic-Pods-Report_Pages_FINAL.pdf) [perma.cc/EPD5-NSFE] (a key finding was that “families valued pods’ student-centered learning environments”).

117. Jennifer Poon, *Pandemic Pods, Personalized Learning, and the Future*

these pods tended to exclude many poor families, thus arguably increasing the education and wealth inequality between income groups.<sup>118</sup> Many families have continued these arrangements after COVID, although on a more limited scale.<sup>119</sup> In fact these types of informal care have helped spur a surge in home schooling,<sup>120</sup> along with state laws that encourage this model.<sup>121</sup>

Whether provided by a babysitter, family member, neighbor or nanny, home care is a convenience to parents.<sup>122</sup> Studies show that both parents and children prefer this familial-type care.<sup>123</sup> I was fortunate to have a live-in nanny who was a good friend with a college degree. Thus, I had certain financial and logistical resources that assisted me to shape a successful structural framework to satisfy the comprehensive needs of my family life with my growing children. However, most mothers in the United States are not blessed with a menu of ready options that offer high flexibility in meeting the material, educational and emotional needs of their children. These needs are universal. However, public policy in America

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*of Education*, AURORA INST. (Mar. 2, 2022), [https://aurora-institute.org/cw\\_post/pandemic-pods-personalized-learning-and-the-future-of-education](https://aurora-institute.org/cw_post/pandemic-pods-personalized-learning-and-the-future-of-education) [perma.cc/M55P-ZAH8] (advocating that the more intimate and personalized learning in these pods should be duplicated in schools).

118. Thompson & Licon, *supra* note 114; *also see*, Cahn & McClain, *supra* note 48, at 22 (noting also that “parents with a graduate school education were almost twice as likely” to form these pods and that schools in “wealthier, whiter neighborhoods” were less likely to be closed during COVID).

119. Sparks, *supra* note 114; *see also* Nancy Walser, *Pods Live On: School Districts are Using Pandemic-Era Invention to Help Kids Recover From ‘Learning Loss,’* HECHINGER REPORT (Dec. 14, 2022), <https://hechingerreport.org/pods-live-on-school-districts-are-using-the-pandemic-era-invention-to-help-kids-recover-from-learning-loss> [perma.cc/KW9F-7E59].

120. Prior to the pandemic 2.5 million students were homeschooled but that number has risen to almost 4 million. *See* Sarah Hernhold, *Rise of Homeschooling is Making a Transformative Impact On Education*, FORBES (Apr. 30, 2024), <https://www.forbes.com/sites/sarahhernholm/2024/04/30/rise-of-homeschooling-and-its-transformative-impact-on-education> [perma.cc/EH53-NY6J] (“In recent years, homeschooling has experienced an unprecedented surge largely driven by the pandemic-induced shift to the remote learning mode.”).

121. Ryan Dailey, *Florida’s Home School Voucher Program Is Expected to Double in Size Next Year*, ORLANDO WKLY. (May 28, 2024), <https://www.orlandoweekly.com/news/floridas-home-school-voucher-program-is-expected-to-double-in-size-next-year-36972030> [perma.cc/ZGG2-M6T6].

122. Anna Powell, Tobi Adejumo, Lea J.E. Austin & Abby Copeman Petig, *Parent Preference in Family, Friend, Neighbor and Nanny Care*, CTR. FOR STUDY OF CHILD CARE EMP. (May 2, 2023), <https://csce.berkeley.edu/publications/report/parent-preferences-in-family-friend-neighbor-and-nanny-care> [perma.cc/9A65-7P8W].

123. *Id.*; *see* Epstein, *supra* note 93.

does not adequately acknowledge the primacy and social necessity of providing support for the best developmental outcomes of our youngest citizens.

### 3. Wealthy Families May Be the Beneficiary of Free State or City-Provided Preschool

Currently, forty-three states offer some form of early childhood education.<sup>124</sup> While seventeen offer some form of universal preschool,<sup>125</sup> only three states—Florida, Georgia and Oklahoma—provide care services to both poor and wealthy families.<sup>126</sup> In five states, more than 70 percent of four-year-old children were enrolled in state provided preschool prior to COVID.<sup>127</sup> For example 77 percent of four-year-olds in Florida and 75 percent of four-year-olds in Vermont were enrolled in state provided preschool.<sup>128</sup> Numerous cities also offer their own versions of universal preschool education,<sup>129</sup> and like Florida, Georgia, and Oklahoma, they serve all children regardless of family income or child ability.<sup>130</sup>

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124. Sheila B. Kamerman & Shirley Gatenio-Gabel, *Early Childhood Education and Care in the United States: An Overview of the Current Policy Picture*, 1 INT'L J. CHILD CARE & EDUC. POL'Y 23, 28 (2007), <https://doi.org/10.1007/2288-6729-1-1-23> (“Forty-four states now provide pre-kindergarten programs at least in some jurisdictions.”).

125. Libby Stanford, *Which States Offer Universal Pre-K? Its' More Complicated Than You Might Think*. *Education Week* (Jan. 25, 2023), <https://www.edweek.org/teaching-learning/which-states-offer-universal-pre-k-its-more-complicated-than-you-might-think/2023/01> [perma.cc/Q28M-KZAQ] (stating that the definition of “universal” is unclear).

126. Kamerman & Gatenio-Gabel, *supra* 125, at 28 (“Only three states, Florida, Georgia, and Oklahoma, however, approach offering a state-wide program of universal preschool for all four year olds.”).

127. Camera, *supra* note 78 (Prior to the pandemic six states—Florida, Iowa, Oklahoma, Vermont, West Virginia, and Wisconsin—and the District of Columbia “were serving at least 70% of 4-year-olds.”).

128. *Id.* (Prior to the pandemic the District of Columbia, one of the most expensive places for childcare, enrolled 85 percent of four-year olds.).

129. Boston, New York City, and Washington D.C. are a few that offer such care. See Amelia Harper, *More Cities Implement Universal PreK When State, National Efforts Fall Short*, K-12 DIVE (July 23, 2018) <https://www.k12dive.com/news/more-cities-implement-universal-pre-k-when-state-national-efforts-fall-sho/528273/>

130. *Universal PreK Programs in the United States and Worldwide*, EARLY EDGE CALIFORNIA, <https://earlyedgecalifornia.org/wp-content/uploads/2021/03/Universal-PreK-Programs-in-the-United-States-and-Worldwide.pdf> (also lists 4 other states and DC); See also, *State of Preschool: 2023 Yearbook*, NIEER, <https://nieer.org/yearbook/2023/executive-summary#:~:text=The%20District%20of%20Columbia%20and,than%20in%20the%20prior%20year.> (“Georgia, Illinois, Maine and New York have universal policies that they have not fully implemented . . . California, Colorado, Hawaii, and New Mexico have

More commonly, however, criteria for program enrollment qualifications vary widely by state, ranging from income thresholds, age restrictions, and health screening.<sup>131</sup> In addition to different prices for different income levels, these schools also vary in spending per pupil and quality of care.<sup>132</sup> If the quality is deemed substandard,<sup>133</sup> wealthy parents are unlikely to enroll their child in such programs, even if it is free. Unlike K-12 education, no mandate exists that requires parents to enroll their children in a state or city-provided preschool.<sup>134</sup> Wealthy parents can opt for what they consider to be the highest quality of childcare available. However, during COVID-19 many of these schools closed down and their enrollments have not rebounded.<sup>135</sup> Thus, even wealthy parents may not have access to this type of care.

#### 4. Some Challenges Still Remain for Wealthy Families

Families in higher socioeconomic groups might encounter market failures surrounding the availability of quality paid childcare services. During the pandemic, families in all income categories were forced to teach and care for their children themselves. Licensed care centers, if available, were often closed down, and even informal

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recently passed laws to provide universal preschool . . . Governors in Illinois, Michigan, and New Jersey also announced support for universal preschool.”)

131. (cite the State of Preschool 2023, at 37 (beginning of the State Profile section for all fifty states); see *Get Help with Child Care Costs and Learn about Head Start*, USA GOV, <https://www.usa.gov/child-care-head-start> (“Eligibility requirements are different in each state.”))

132. Steven Barnett & Allison Friedman-Krause, *Opportunities and Challenges for Preschool Expansion*, 24 J. OF NAT’L ASSOC. STATE BOARDS OF EDU. (May 2024), <https://www.nasbe.org/opportunities-and-challenges-for-preschool-expansion/#:~:text=State%20funding%20per%20child%20for,top%20spenders%20are%20wealthy%20states> (“State funding per child for preschool varies greatly by state” and “[n]ot all public preschool programs have delivered the promised results.”).

133. Karin Garver et al., *State Preschool in a Mixed Delivery System: Lessons From Five States*, LEARNING POL’Y INST. (Mar. 15, 2023), <https://learningpolicyinstitute.org/product/state-preschool-mixed-delivery-system-report> [perma.cc/SS32-7E6N] (reviewing the preschools of five states).

134. No states mandate preschool. However, 17 states and the District of Columbia require children to attend kindergarten. See *50-State Comparison: State K-3 Policy*, EDUC. COMM’N STATES, <https://www.ecs.org/50-state-comparison-state-k-3-policies-2023> [perma.cc/D393-TD6F].

135. Camera, *supra* note 78; see also Erik L. Hernandez & Kevin McElrath, *Significant Declines in Preschool Enrollment During COVID-19 Pandemic*, US CENSUS BUREAU (Aug. 30, 2023), <https://www.census.gov/library/stories/2023/08/preschool-enrollment.html> (“Many schools closed because of public health and safety concerns” and “further research will show . . . if enrollment will bounce back to prior levels.”) .

care was in short supply as lock-down mandates were imposed. All socioeconomic classes faced the difficulty of retaining competent childcare in the midst of a health emergency. In general, low-paid private caregivers are noted for a high turnover rate and unreliability.<sup>136</sup> Even more formally trained preschool teachers face burnout, and because of low wages, a lack of benefits, and a difficult work environment, may decide to quit.<sup>137</sup> Furthermore, many of the paid caregivers that provide childcare services are often in transition into post-high school training or education, or into a higher paying job.<sup>138</sup> Thus, wealthy parents face challenges, as do all parents, in finding reliable quality childcare .

Childcare options may also be restricted due to geographic challenges, as many Americans live in childcare deserts.<sup>139</sup> Almost half of Americans across 22 states live in areas with an undersupply of childcare options.<sup>140</sup> Less than one fourth of children are served by licensed childcare facilities across 19 states.<sup>141</sup> Fifty-eight percent of rural areas qualify as childcare deserts.<sup>142</sup> The extensive regulatory challenges of operating child care centers drive profit margins down, result in higher costs to parents, and even long waitlists.<sup>143</sup>

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136. See Sarah Butrymowicz & Jackie Mader, *High Turnover and Low-Pay for Employees May Undermine Child Care System*, HECHINGER REPORT (Feb. 7, 2016), <https://hechingerreport.org/high-turnover-and-low-pay-for-employees-may-undermine-states-child-care-system> [perma.cc/6AWH-3TMV].

137. See discussion, *supra* note 69 & accompanying text.

138. See Asha Banerjee, Elise Gould & Marokey Sawo, *Setting Higher Wages for Child Care and Home Health Care Workers is Long Overdue*, ECON. POL'Y INST. (Nov. 18, 2021), <https://www.epi.org/publication/higher-wages-for-child-care-and-home-health-care-workers> [perma.cc/FB9X-3VQQ]; Mill, *supra* note 72 (“child care workers leave the sector for higher-paying options”);

139. Rasheed Malik & Katie Hamm, *Mapping America's Child Care Deserts*, CTR. FOR AM. PROGRESS (Aug. 30, 2017) [hereinafter *Mapping*], <https://www.americanprogress.org/article/mapping-americas-child-care-deserts> [perma.cc/VQY9-RZQP].

140. *Id.*

141. Steven Jessen-Howard, Rasheed Malik & MK Falgout, *Costly and Unavailable: America Lacks Sufficient Child Care Supply for Infants and Toddlers*, CTR. FOR AM. PROGRESS (Aug. 4, 2020), <https://www.americanprogress.org/article/costly-unavailable-america-lacks-sufficient-child-care-supply-infants-toddlers> [perma.cc/3KX2-MQVW].

142. See Malik & Hamm, *supra* note 139; see also Jazmin Orozco Rodriguez, *Child Care Gaps in Rural America Threaten to Undercut Small Communities*, CHALKBEAT (Jan. 8, 2024), <https://www.chalkbeat.org/2024/01/08/rural-child-care-gaps-threaten-to-undercut-small-communities> [perma.cc/GUJ2-MQGC].

143. *Understanding Childcare Challenges in Rural America*, FOUNDATION FOR RURAL SERVICE (2024), <https://www.ntca.org/sites/default/files/documents/2024-10/understanding-childcare-challenges-in-rural-america.pdf> (“The number of children needing early childhood development often exceeds

## B. *Middle- and Lower-Income Families Struggle with Childcare Costs*

Middle and lower-income families have fewer childcare choices than wealthy families because they have fewer assets and lower income streams from wage income. Due to the daunting costs of childcare, middle and lower-income families are often forced to rely on friends and family members to provide substandard care. Middle and lower-income families are more vulnerable to the threats of inflation and escalating healthcare, housing costs, and other personal expenditures. Studies have shown that, because of these expenses, parents often forgo debt repayment and wealth creation, and with that their American Dream.

### 1. Middle- and Lower-Income Families Have Fewer Childcare Choices than Wealthy Families

Middle and lower-income families often cannot afford private preschools, formal licensed day care centers, or live-in nannies. During the pandemic these families were less likely to be able to work from home, to access paid leave, and were more commonly considered essential workers.<sup>144</sup> Thus, turning to friends and relatives was perhaps the only option for many families during COVID when the availability of childcare was virtually nonexistent. Such informal care is actually preferred by many working parents and can be more pliable during COVID-like conditions than governmental preschools and regulated day care centers that shuttered during the pandemic.<sup>145</sup>

Informal unpaid care by friends or family members or low-paid babysitters is also a relatively inexpensive alternative for

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available seats at early childcare providers. As a result, childcare wait lists are frequently long for limited seats and can last for years . . . ”Extensive and sometimes burdensome licensing, quality and compliance requirements affect the operational cost of early childcare providers, driving profit margins down.”)

144. See Horwitz-Willis & Katz, *supra* note 108, at 433 (“Working class mothers are less likely to be able to work remotely, and still cannot access paid leave due to the two-thirds salary reduction that accompanies the extended ten-week.”).

145. See BIPARTISAN POL’Y CTR., UNDERSTANDING EMPLOYED PARENTS USING INFORMAL CHILD CARE (June 2022), [https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2022/08/BPC\\_One-Third\\_June-2022\\_Analysis-002.pdf](https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2022/08/BPC_One-Third_June-2022_Analysis-002.pdf) [perma.cc/5JGN-3X9M] (concluding (1) safety and trust are the most important factors for parents and concerns about COVID-19 as well as other matters explained why parents prefer informal care, (2) parents need flexible arrangements that can accommodate working remotely and that are available on weekends and in evenings, and (3) parents are both satisfied with the quality of care from informal arrangements and happy with the costs).

middle or lower-income families. Babysitters are the cheapest of childcare options, costing a national average of \$15.48 per hour (in 2024).<sup>146</sup> Informal childcare can provide invaluable relief to mothers who perform market labor during daytime hours and chores in off-hours. However, transaction costs of finding such care can be daunting, particularly during a pandemic. Of course, care by grandparents or other elder parties had its risks during this time as the elderly were more vulnerable to illness. Like care provided by parents, this care can provide physical, psychological, and mental comfort to the young child. Even though very convenient to the parent it is probable that qualitative standards of this type of care are highly variable.

A more formal care alternative available to this middle and low-income group is church-affiliated centers, which often cater to parents with a lower net-worth.<sup>147</sup> Monthly fees at church-affiliated facilities may run as low as zero but may range upwards to the price of those charged by privately run facilities.<sup>148</sup> Some church-affiliated organizations offer subsidies to poorer parents and reported levels of satisfaction at these church centers was generally high during

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146. *What is the Average Babysitting Rate in the US?*, BABYSITS [hereinafter *Babysitting Rates*] <https://www.babysits.com/community-resources/3103/the-average-babysitting-rate-usa> [perma.cc/E8UV-7RAQ] (last visited Mar. 12, 2025) (the range is from \$10 to \$30 but can vary by location).

147. Suzann Morris & Linda K. Smith, *Examining the Role of Faith-Based Child Care*, BIPARTISAN POL'Y CTR. (June 4, 2021), <https://bipartisanpolicy.org/report/faith-based-child-care> [perma.cc/W27D-YZMU] (“As COVID-19 impacted child care’s already fragile system, lessons learned from the faith-based community are a valuable asset to understand how to strengthen the overall child care market and support parent preferences.”).

148. *Babysitting Rates*, *supra* note 147, at 59; Monica Rohacek, Gina Adams, Kathleen Snyder, *Child Care Centers, Child Care Vouchers, and Faith-Based Organizations*, at 7, THE URBAN INSTITUTE, [https://www.urban.org/sites/default/files/publication/71326/411666\\_faith-based-organizations.pdf](https://www.urban.org/sites/default/files/publication/71326/411666_faith-based-organizations.pdf) (Church affiliated facilities “may receive different types and levels of support from the organization with which they are affiliated.”) However, since COVID these fees have sky rocketed. See Elliot Haspel, *Perspective: The Most Serious Problem Threatening Faith-Based Child Care*, DESERET NEWS (Mar. 25, 2022), <https://www.deseret.com/2022/3/25/22992740/perspective-the-most-serious-problem-threatening-faith-based-child-care-daycare> [perma.cc/432K-6P2H] (“Low wages and staff shortages are affecting both the availability and quality of care.”); see also Qing Zhang, Maria Sauval & Jade Marcus Jenkins, *Impacts of the COVID-19 Pandemic on the Child Care Sector: Evidence From North Carolina*, 62 EARLY CHILDHOOD RSCH. Q., first quarter 2023, at 17, 24 (July 26, 2022), <https://doi.org/10.1016/j.ecresq.2022.07003> (finding “that the [COVID-19] pandemic reduced child care enrollment across [North Carolina] by 41% and reduced the total number of providers by 2% by December 2020.”).

COVID.<sup>149</sup> Another alternative may be a parent-run cooperative preschool. Cooperative preschools generally cost less but require more of a parent's time.<sup>150</sup> Thus, these co-ops may be feasible for the parent who does not work full-time. The major thesis of this Article is that the widest array of childcare options should be subsidized by the public sector, facilitating flexibility and balance for parents in diverse life circumstances, and providing broader foundational support for our nation's children.<sup>151</sup> This Article also advocates for adjunct support in areas such as affordable housing and healthcare support. Such support will bolster family stability among vulnerable populations and elevate the availability and quality of prospective childcare providers. These measures can also serve as a hedge against the inevitability of another pandemic or similar national calamity.<sup>152</sup> A single model approach to the childcare crisis is grossly inadequate for addressing such a broad and complex public policy priority.<sup>153</sup>

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149. Rachel Anderson, Laura Luchies, & Rachel Venema, *Faith-Based Child Care Policy Brief*, CTR. FOR PUB. JUSTICE (Sept. 2022), <https://cpjustice.org/wp-content/uploads/2023/02/Updated-MichiganChildCareBrief2022-1.pdf> [perma.cc/9GB5-YCQT] ("Faith-based child care centers are the second most ideal arrangement" after providing care for their own children.). *Examining the Role of Faith-Based Child Care*, Bipartisan Policy Center, at 5 (May 2021), [https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2021/06/ECI-Faith-Based-Brief\\_RV2-1-1.pdf](https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2021/06/ECI-Faith-Based-Brief_RV2-1-1.pdf) ("the most important factors for choosing faith-based child care were quality of caregivers, facility cleanliness, trust, values of providers, safe setting, and opportunities for cognitive development.")

150. Zoe Sullivan, *After Falling Off the 'Benefits Cliff,' This Mom Decided to Build a Child-Care Safety Net*, WASH. POST (Apr. 13, 2021), <https://www.washingtonpost.com/lifestyle/2021/04/05/child-care-coop-network-low-income> [perma.cc/JJ2L-PCGF].

151. See Lauren Smith, *The American Rescue Plan As a Guide for Helping Mothers Permanently Secure Accessible High-Quality Childcare and Out-of-School Time Care*, 31 GEO. J. ON POVERTY L. & POL'Y 169 (2023).

152. *Disease X—What It Is, and What It Is Not*, CEPI (Jan. 17, 2024), <https://cepi.net/disease-x-what-it-and-what-it-not> (the "chance of a pandemic with a similar impact to COVID-10, is about 1 in 50 in any year").

153. Numerous law review articles have advocated for universal, government funded preschool. See, e.g., Wilson Green, *Universal Preschool: A Costly But Worthy Goal*, 35 J. L. & EDUC. 555 (2006); Natalie Gomez-Velez, *Why Matter of Devera Matters: Universal Pre-K, Quality, Oversight, and the Need to Restore Public Values in New York Statutory Interpretation*, 23 CUNY L. REV. 328 (2020); see also ELIZABETH ROSE, *THE PROMISE OF PRESCHOOL: FROM HEAD START TO UNIVERSAL PRE-KINDERGARTEN* (2010).

## 2. Middle and Lower-Income Families May Sacrifice their Upward Mobility Because of Childcare Costs

Childcare is a significant financial burden for many middle and lower-class families, with approximately 24 percent or more of their income on average dedicated solely to childcare expenses.<sup>154</sup> In America, 40 percent of citizens have minor children in their households and “43 percent of families earning less than \$75K will spend more than \$18,000, amounting to 24 (percent)” of their household income on childcare, and “39 percent of families earning less than \$50K per year will spend . . . a whopping 36 (percent)” of their household income on childcare.<sup>155</sup> In over half the states, the cost of childcare exceeds by more than \$1,000 that of in-state college tuition.<sup>156</sup>

In addition to the costs of childcare, supplies for raising a baby are also very expensive.<sup>157</sup> A baby’s first year alone can require 6–12 diapers a day, possibly more depending on the baby. Families could spend almost \$1,000 for the first year, which totals to \$18 a week on diapers alone.<sup>158</sup> While the baby might have low costs of food from breastfeeding, supplies facilitating breast pumps are expensive.<sup>159</sup> If breastfeeding is not an option, parents turn to baby formula, which averages around \$70 to \$150 monthly.<sup>160</sup> Furthermore, essential baby gear like cribs, car seats, and strollers can be extremely expensive.<sup>161</sup>

Due to a variety of factors, overall food costs have also increased dramatically post-COVID. According to the Bureau of Labor Statistics (BLS), overall food prices increased by 3.7 percent

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154. *Care Study*, *supra* note 98.

155. *Id.* (“45% of families earning less than \$100K annually will spend more than \$18,000 on childcare in 2023, amounting to 18% of their household income (HHI).”).

156. *See* Diaz, *supra* note 3 (citing 33 states, plus Washington D.C.); *see also* Baylee Patel, *The U.S. States Where Childcare Costs More than College Tuition*, NETCREDIT (Aug. 31, 2023), <https://www.netcredit.com/blog/cost-of-child-care-by-state> [perma.cc/Z8SZ-ZNSW] (28 states).

157. *See* *Care Study*, *supra* note 98; *see* Ashley Marcin, *How Much Does It Cost to Raise a Baby?*, HEALTHLINE (July 1, 2021), <https://www.healthline.com/health/parenting/how-much-does-it-cost-to-raise-a-baby-and-what-you-can-do-to-prepare> [perma.cc/VNK7-QMQY].

158. Marcin, *supra* note 158.

159. *Id.* (Breast feeding pumps could cost up to \$350, and other supplies such as nursing bras/shirts/clothing are \$20+, nursing covers are \$10 to \$40, nursing pillows range from \$10 to \$50, nursing stools are \$5 to \$35, breast milk storage bags from \$10 to \$15, and a lactation consultant \$0 to \$300 or more.)

160. *Id.*

161. *Id.* (Cribs are \$70 to \$650, car seats can cost between \$780 to \$400, and strollers are priced from \$100 to \$1,000.)

from September 2022 to September 2023.<sup>162</sup> Specifically, the BLS noted that grocery prices average 2.4 percent higher each year.<sup>163</sup> According to USDA data, the average American family in 2023 spent 11.2 percent of their disposable income on food.<sup>164</sup> Since COVID-19, spending on grocery shopping has increased by 6.6 percent.<sup>165</sup> Unlike poorer families, many struggling lower to middle-class children may not be able to partake in free meal programs (or other government assistance) as they do not meet the income criteria in order to receive these meals.<sup>166</sup> During COVID many of these meal and lunch programs closed down entirely, leaving many families scrambling for food.<sup>167</sup>

Healthcare expenses declined at the initial start of the pandemic but then increased.<sup>168</sup> Of the four components of healthcare—health insurance, medical services, drugs, and medical supplies—“only health insurance expenditures rose” during the pandemic as consumers were presumably “willing to pay a monthly premium to protect against the possibility of incurring a much larger expense (like emergency treatment).”<sup>169</sup> However,

162. *Consumer prices up 3.7 percent from September 2022 to September 2023*, US BUREAU OF LABOR STATISTICS, (Oct. 19, 2023) <https://www.bls.gov/opub/ted/2023/consumer-prices-up-3-7-percent-from-september-2022-to-september-2023.htm#:~:text=Consumer%20prices%20up%203.7%20percent%20from%20September%202022%20to%20September%202023,-October%2019%2C%202023&text=Over%20the%20year%20ended%20September,over%20this%2012%2Dmonth%20period> [perma.cc/BR6Y-WY6S]

163. Lauren Schwan, *Average Grocery Cost Per Month and How Much to Spend*, NERDWALLET (Apr. 18, 2025), <https://www.nerdwallet.com/article/finance/how-much-should-i-spend-on-groceries> [perma.cc/GM5B-UQLH] (in 2021 households spent an average of \$5,259 solely on groceries).

164. *Food Prices and Spending*, U.S. DEP’T. OF AGRIC. (Feb. 14, 2025), <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-prices-and-spending> [perma.cc/2HE6-BG4R].

165. *Id.*

166. *School Meals and Food Programs for Children*, USA.GOV (Dec. 4, 2024), <https://www.usa.gov/school-meals> [perma.cc/7HVK-GSQG].

167. Hojatollah Kakaei et al., *Effects of COVID-19 on Food Security, Hunger, and Food Crisis*, in COVID-19 AND THE SUSTAINABLE DEVELOPMENT GOALS 3, 6 (Mohammad Hadi Dehghani et al. eds., 2022) (“At the beginning of the COVID-19 pandemic, social quarantine by governments caused people to flock to food products sales centers, leading to shortages of some food products . . .”).

168. Grace Hill, *How Did the COVID-19 Pandemic Affect Healthcare Spending?*, 12 BEYOND THE NUMBERS, no. 14, Nov. 2023, <https://www.bls.gov/opub/btn/volume-12/how-did-the-covid-19-pandemic-affect-healthcare-spending.htm> [perma.cc/UR5Y-FP8J] (“By 2021, healthcare expenditures increased to \$5,452—5.0 percent higher than they were in 2019.”).

169. *Id.*

COVID lockdowns reduced the availability of in-person services and forced many to delay much-needed surgeries.<sup>170</sup> The uninsured rate dropped 18 percent during COVID.<sup>171</sup> The health burden was twice as much for Medicare households in 2022—those households spent an average of \$7,000 or 13.6 percent of their total income on health care.<sup>172</sup> Black and Hispanic families had higher credit card debt after large healthcare expenditures.<sup>173</sup> Medical debt is a growing problem affecting millions across various class and demographic populations.<sup>174</sup> In 2023, Bureau of Labor Statistics data shows that the average household spent 8 percent of their disposable income on health for their families.<sup>175</sup>

In addition to expensive childcare, baby supplies, groceries, and health care expenses, middle and lower income-class families often suffer from increasing housing expenses. A recent report from Harvard shows that 22.4 million households now spend more than 30 percent of their income on rent, with nearly 12.1 million spending more than 50 percent.<sup>176</sup> Rents have increased by nearly 10 percent during 2023<sup>177</sup> and the emergency COVID-19 moratorium

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170. *Id.* (as a result expenditures on health care were reduced, but nursing costs increased 17 percent as many in the health industry left the field).

171. *Id.*

172. Nancy Ochieng, Juliette Cubanski & Anthony Damico, *Medicare Households Spend More on Health Care Than Other Households*, KFF (Mar. 14, 2024), <https://www.kff.org/medicare/issue-brief/medicare-households-spend-more-on-health-care-than-other-households> [perma.cc/8YGS-XBQX].

173. Fiona Greig & Erica Deadman, *Healthcare Spending Through the Pandemic: The Impact of High-Cost Medical Events on Household Finances*, JPMORGAN CHASE INST. (May 2022), <https://www.jpmorganchase.com/institute/all-topics/financial-health-wealth-creation/spending-during-the-pandemic> [perma.cc/M8S4-WZCY].

174. *Survey: 79 Million Americans Have Problems with Medical Bills or Debt*, COMMONWEALTH FUND, <https://www.commonwealthfund.org/publications/newsletter-article/survey-79-million-americans-have-problems-medical-bills-or-debt> [perma.cc/3QBB-ZENW] (“In fact, 41 percent of working-age Americans—or 72 million people—have medical bill problems or are paying off medical debt, up from 34 percent in 2005.”).

175. *Consumer Expenditures—2023*, U.S. BUREAU OF LAB. STAT. (Sept. 25, 2024), <https://www.bls.gov/news.release/cesan.nr0.htm> [perma.cc/Q2G6-U54D].

176. *More Renters Than Ever Before Are Burdened by Rent*, N.Y. TIMES (May 22, 2024), <https://www.nytimes.com/2024/01/25/realestate/rent-prices-housing.html> [perma.cc/L38Q-FUFP] (“The center’s analysis of 2022 census data found that 22.4 million renter households are burdened, with a record 12.1 million spending more than half their income on housing.”); see also Patricia E. Salkin, *A Quiet Crisis in America: Meeting the Affordable Housing Needs of the Invisible Low-Income Healthy Seniors*, 16 GEO. J. POVERTY L. & POL’Y 285, 288 (2009).

177. Tim Henderson, *Rent is Eating Up a Greater Share of Income in Almost Every State*, STATELINE (Sept. 12, 2024), <https://stateline.org/2024/09/12/>

on evictions for non payment of rent has ended.<sup>178</sup> Most renters will struggle to have the opportunity to buy a home as their high monthly rental expenses make them unable to save for the house down-payment. Furthermore, mortgage interest rates in 2023 have reached a 23 year high.<sup>179</sup> In 2021, mortgage rates were the lowest in recent history and a family was able to qualify for a loan on a median priced house (\$326,900) with a salary at \$49,680.<sup>180</sup> Now, a salary of more than \$107,000 is needed for a purchase of a median priced home of (\$420,800).<sup>181</sup> In order for housing to become affordable, “the mortgage rate has to fall by 5.5 [percent], the median price of homes needs to decrease by 22 [percent], or the median income needs to increase by 28[percent].”<sup>182</sup> Unfortunately, none of these factors is likely to happen.

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rent-is-eating-up-a-greater-share-of-tenants-income-in-almost-every-state [perma.cc/E4AT-YBEF] (“Arizona and Nevada had the biggest spikes with renters paying more than 30 percent of their income on housing.”).

178. See *supra* note 23. See also Jack Tsai, *Expected and Possible Unexpected Consequences of Ending the Eviction Moratorium*, 4 THE LANCET REGIONAL HEALTH-AMERICAS (Dec. 2021) <https://www.sciencedirect.com/science/article/pii/S2667193X21001010#:~:text=With%20the%20end%20of%20the,and%20poor%20health%20%5B3%5D> (“Accumulation of eviction filings, unpaid rent, tenant moral hazards, deteriorated tenant-landlord relationships and increased transmission of COVID-19 and rate of homelessness are possible consequences that need to be prepared for as the federal eviction moratorium has ended.”) *During COVID-19, Access to Federal Emergency Rental Assistance Increased, but Some Challenges and Risk Remain Unaddressed*, GAO (Feb. 15, 2022), <https://www.gao.gov/blog/during-covid-19-access-federal-emergency-rental-assistance-increased-some-challenges-and-risks-remain-unaddressed> COVID-19 Emergency Rental Assistance: Analysis of a National Survey of Programs, [https://nlihc.org/sites/default/files/HIP\\_NLIHC\\_Furman\\_Brief\\_FINAL.pdf](https://nlihc.org/sites/default/files/HIP_NLIHC_Furman_Brief_FINAL.pdf).

179. Tim Mullaney, *What it Will Take to Make Homes Affordable Again for Millions of Americans*, CNBC (Oct. 25, 2023), <https://www.cnbc.com/2023/10/25/will-americans-ever-be-able-to-afford-to-buy-a-home-again.html> [perma.cc/WH3N-PVGQ].

180. Anna Bahney, *Home Prices in 2021 Rose 16.9%, the Highest on Record*, CNN Bus. (Jan. 20, 2022), <https://www.cnn.com/2022/01/20/homes-us-nar-home-sales-december-and-2021/index.html> [perma.cc/PXV2-646C].

181. *Id.*; Statista Research Department, *Typical Price of Single-Family Homes in the United States from 2021 to 2024, By State*, Statista (Jan. 30, 2025), <https://www.statista.com/statistics/1041708/typical-home-value-single-family-homes-usa-by-state>.

182. Tim Mullaney, *What it Will Take to Make Homes Affordable Again for Millions of Americans*, CNBC The Bottom Line (Oct. 25, 2023), <https://www.cnbc.com/2023/10/25/will-americans-ever-be-able-to-afford-to-buy-a-home-again.html#:~:text=%22At%20the%20current%208%25%20mortgage,broaden%20slowdown%20in%20mortgage%20applications> (this assumes a current mortgage rate of 8%).

With increasingly hot weather associated with climate change<sup>183</sup> energy costs have skyrocketed in many parts of the U.S.<sup>184</sup> These costs can seriously impact middle and lower-income households, who according to the U.S. Department of Energy, spend from 2–6 percent of their disposable income on such expenses.<sup>185</sup> Research from the U.S. Energy Information Administration even shows that 20 percent of households “give up necessities, such as food and medicine,” to cover these costs.<sup>186</sup> About 14 percent have even received a disconnection notice and 10 percent say they keep their houses “at unhealthy or unsafe temperatures” to avoid these high expenditures.<sup>187</sup> Similarly, utility costs and other home-related expenditures afflict middle-class families who own their own home. Currently with an 8 percent mortgage rate, mortgage payments are around 38 percent of household median income.<sup>188</sup> Real estate taxes are also rising with the escalating prices of homes.<sup>189</sup> Between 2022

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183. *Temperature, Energy Demand, and Energy Supply*, U.S. EPA (Dec. 22, 2016), [https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-energy\\_.html](https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-energy_.html).

184. Solcyre Burga, *How Will Extreme Heat Affect Energy Bills*, TIME (July 15, 2024), <https://time.com/6989571/energy-bill-extreme-heat-effects> [perma.cc/G48G-LPP7]. See *Electricity Rates by States* (July 2024), <https://www.usatoday.com/money/homefront/deregulated-energy/electricity-rates-by-state/> Li Cohen, Tracy J. Wholf & Marina Jurica, *Electricity Prices are on the Rise. Is it Inflation or an Underlying Issue?* CBS News (Sept. 2, 2024), <https://www.cbsnews.com/news/electricity-prices-rising-inflation-climate-change-clean-energy/> (“According to CBS News’ price tracker, the cost of electricity has increased from \$0.14 kilowatt hour in 2019 to \$0.18 per kilowatt hour in 2024—a change of more than 28.5%,” caused by “back-to-back months of heat records.”); see *States With the Highest Energy Costs*, ELECTRICITY RATES (Mar. 2, 2025), <https://electricityrates.com/how-to-compare/states-with-the-highest-energy-costs> [perma.cc/B8RB-K78U].

185. *Id.* (“The average American is now paying nearly \$300 a month just in utilities.”); *Lower Income Energy Affordability Data (LEAD) Tool and Community Energy Solutions*, <https://electricityrates.com/how-to-compare/states-with-the-highest-energy-costs/> (lower income groups spend three times more than the average household); see *A Resource for Energy-Burdened Communities*, NRDC, <https://www.nrdc.org/bio/maria-correa/resource-energy-burdened-communities#:~:text=Households%20with%20a%20high%20energy,already%20historically%20underrepresented%20and%20marginalized.> (Households with a high energy burden pay more than 6 percent of their income on energy bills.”)

186. Burga, *supra* note 185, at 10.

187. *Id.*

188. Mullaney, *supra* note 180.

189. Christopher J. Brooks, *Here’s Where U.S. Homeowners Pay the Most—and Least—in Property Taxes*, CBS NEWS: MONEY WATCH (Apr. 8, 2024), <https://www.cbsnews.com/news/property-tax-real-estate-taxes-highest-lowest-states-us> [perma.cc/K684-JN9W].

and 2023, real estate taxes increased by as much as 31 percent in some parts of the country.<sup>190</sup> In addition, the costs for maintenance and service repairs have far outpaced inflationary trends in other segments of economic activity.<sup>191</sup>

Slow growth and supply of new housing, especially in areas of robust economic growth, contribute to the upward cost of both rent and homes. Political resistance to higher density housing units in many areas also contributes to rent and home price increases by arbitrarily creating a greater demand for fewer available housing units.<sup>192</sup> Little has been done on the federal, state, or local fronts to address these issues of housing affordability and quality.<sup>193</sup>

If one were to add up all these costs, they could easily approach 75 percent of household income (23 percent for childcare, 10 percent for food and health, 30–38 percent for housing and 2–6 percent for energy). Thus, middle and lower income-class families are often forced to sacrifice their American Dream, whether it is to purchase a home, send their children to college, or have a good retirement.<sup>194</sup> Child cost planning involves a risky trade-off for middle- and lower-income families that have more pressing needs. The trade-offs are less-than-optimal levels of childcare versus their costs. Middle

190. *Id.*

191. Salkin, *supra* note, 177 at 287–88.

192. *Addressing Challenges to Affordable Housing in Land Use Law: Recognizing Affordable Housing as a Right*, 135 HARV. L. REV. 1104 (2022) (“[T]he desire to limit higher-density residential construction continues to drive modern land use law. Homeowners, who financially benefit from higher land prices, leverage outsized political influence at the local level to lobby for zoning laws protective of property values, which in turn fuel a housing shortage, dramatically inflating housing costs in urban and rural areas alike.”); Issi Romem, *California’s Housing Prices Need to Come Down*, CITYLAB (Mar. 28, 2018), <http://www.butte-housing.com/resources/news/articles/citylab-03282018.pdf> [perma.cc/9R4C-TQXT].

193. Peggy Bailey, *Addressing the Affordable Housing Crisis Requires Expanding Rental Assistance and Adding Housing Unites*, CTR. ON BUDGET & POL’Y PRIORITIES 7 (Oct. 27, 2022), <https://www.cbpp.org/sites/default/files/10-27-22/hous.pdf> [perma.cc/PZ5T-WM7C] (“Policymakers should reform LIHTC to incentivize states and developers to make more units affordable to people with incomes below the program’s eligibility limit.”); *but see Harris Campaign Releases Plans to Lower Housing Costs*, NAT’L LOW INCOME HOUSING COALITION (Aug. 19, 2024), <https://nlihc.org/resource/harris-campaign-releases-plans-lower-housing-costs> [perma.cc/W497-8BLT] (recommending the increase the supply of new houses plus a \$25,000 first time house purchase subsidy).

194. NANCY E. SHURTZ, ALEXANDER B. FITCH & ROBERT TIRRELL, 529 PLANS: WHAT EVERY PLANNER NEEDS TO KNOW (2021) (stating that saving for a 529 Plan may be the best way to finance a college education but pointing out that savings are often not possible for all and thus other techniques, like scholarships and financial aid may be necessary).

and lower-income families simply do not have the option to spend money on expensive quality care. Because of all of these financial hardships, new provisions in the Tax Code should be adopted to help these families.<sup>195</sup>

C. *Poor Families May Be Eligible for Government Assistance but Face Many Challenges*

Similar to the middle and lower-income families, poor families face daunting childcare, housing, energy, grocery and other costs of living expenses. Unlike families in upper-income groups, many poor families lack the liquid resources to exercise all options of quality childcare. However, poor families, unlike their middle-income counterparts, are eligible for government assistance. Unique circumstances arise for some poor families, such as those living in rural areas, single moms, immigrant women, and women of color. Unfortunately, many of these families are forced to focus on survival and quality childcare may take a back seat to food and housing security.

1. *Poor Families Face Severe Economic, Health, and Childcare Challenges*

Poor families face the same high costs of childcare and other living expenses that other income groups face, but do not have the income or assets to pay for these costs. According to the Supplemental Poverty Measure (SPM) calculation,<sup>196</sup> 12.9 percent of the American population, or 40.9 million people were living in poverty.<sup>197</sup> This overall poverty rate was a 5.1 percent increase from 2021, marking continued rise in the SPM poverty rate since 2021.<sup>198</sup> In 2023, 11 million children under the age of 18 were impoverished.<sup>199</sup> According to the SPM calculation method, the child poverty rate nearly doubled from 5.2 percent in 2021 to 12.4 percent in 2022, and increased to 13.7 in 2023<sup>200</sup>

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195. See suggestions, *infra* Part III(E)(3).

196. “The official poverty measure defines poverty by comparing pretax money income to a poverty threshold that is adjusted by family composition.” The new SPM incorporates the federal and state taxes, work, and medical expenses. It “accounts for geographic variation in poverty thresholds, while the official poverty measure does not.” Emily A. Shrider, *Poverty in the United States: 2023*, U.S. CENSUS BUREAU (Sept. 10, 2024), <https://www.census.gov/library/publications/2024/demo/p60-283.html> [perma.cc/L3ZR-UBBY].

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

The racial breakdown of the children affected by poverty is shocking. According to the Census Bureau's SPM analysis, more than one in five or 22 percent of Hispanic children are impoverished, which more than doubled the 8 percent rate measured in 2021.<sup>201</sup> Other child populations of color, such as American Indian and Alaska Natives, also experienced dramatic spikes in their poverty rates.<sup>202</sup> African American children's poverty rate more than doubled, from 8 percent in 2021 to 18 percent in 2022, and continued to grow to 20 percent in 2023.<sup>203</sup> The multiethnic Asian and Pacific Islander category also experienced significant increases in childhood poverty, varying (by subgroup) from 6 percent to 14 percent.<sup>204</sup> Lastly, the poverty rate among White children has more than doubled, from 3 percent in 2021 to 7 percent in 2022, and remained constant in 2023.<sup>205</sup> Poor families often face food insecurity.<sup>206</sup> In 2021, the United States had 12.5 percent of households with children experiencing food insecurity, and in 2022, this percentage rose to 17.3 percent, and stood at 17.9 percent in 2023, indicating a drastic 4.8 percent increase.<sup>207</sup> This resulted in 6.5 million households with children facing food insecurity.<sup>208</sup> In one percent of households, numbering approximately 374,000, one or more children experienced "reduced food intake and disrupted eating patterns."<sup>209</sup> Meanwhile, parents in 3.3 million households resorted to limiting their own food intake to ensure their children go to bed without growling stomachs.<sup>210</sup>

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201. *Child Poverty Rates Remained High in 2023: At Least 10 Million Kids in Poverty*, ANNIE E. CASEY FOUND. (Sept. 30, 2024), <https://www.aecf.org/blog/new-child-poverty-data-illustrates-the-powerful-impact-of-americas-safety-net-programs> [perma.cc/Y85R-H8ZB].

202. *Id.* Using the Census Bureau's official poverty data criteria, the child poverty rate for American Indian and Alaska Native populations ballooned from 7 percent to an astounding 27 percent in the 2023 survey.

203. *Id.* (for children who are multiracial, the SPM calculated that the poverty rate also more than doubled from 5 percent in 2021, to 12 percent in 2022).

204. *Id.*

205. *Id.*

206. Allison M. Lacko & Geraldine Henchy, *Hunger, Poverty, and Health Disparities During COVID-19 and the Federal Nutrition Programs' Role in an Equitable Recovery*, FOOD RSCH. & ACTION CTR. (Sept. 2021), <https://frac.org/research/resource-library/foodinsecuritycovid19> [perma.cc/2YDR-UAFF].

207. *Key Statistics and Graphics*, ECONOMIC RESEARCH SERVICE: U.S. DEPARTMENT OF AGRICULTURE, <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-u-s/key-statistics-graphics> [perma.cc/YP2M-UYN7] (last updated Jan. 8, 2025).

208. *Id.*

209. *Id.*

210. *Id.*

Poor families were particularly hit hard by COVID, facing more morbidity and illness while having little to no safety net.<sup>211</sup> The closure of schools, including Head Start, during the pandemic disrupted access to childcare and free daily meals.<sup>212</sup> During the pandemic this group became highly dependent on unpaid care of family and friends, and many even had to quit their jobs.<sup>213</sup> The pandemic revealed what many call the “color of COVID” because of all the negative impacts on people of color.<sup>214</sup> Although President Biden’s administration provided increased childcare tax credits and some rent and student loan subsidies, all of these COVID programs have now expired.<sup>215</sup>

## 2. Poor Families May Be Eligible for Head Start and Other Government Assistance

The United States has six primary welfare programs.<sup>216</sup> These include Medicaid,<sup>217</sup> Supplemental Security Income (SSI),<sup>218</sup> Supplemental Nutrition Assistance Program (SNAP),<sup>219</sup> Child’s

211. See Long, *supra* note 84; Jennifer Tolbert, Sammy Cervantes, Clea Bell & Anthony Damico, *Key Facts About the Uninsured Population*, KFF (Dec. 18, 2024), <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population> [perma.cc/3C3H-HWWZ] (“Many uninsured people cite the high cost of insurance as the main reason they lack coverage” and “[u]ninsured people often face unaffordable medical bills when they do seek care.”).

212. Nafeesah Allen, *Families Are Feeling the Effects of Rising Costs in an Uncertain Economy*, PARENTS (Apr. 2, 2024), <https://www.parents.com/families-feel-the-effects-of-inflation-as-a-recession-nears-6822912> [perma.cc/AQA8-RWND] (Although a COVID-19 free meal program was in place, it has now since expired.).

213. See earlier discussion, *supra* notes 35 & 84.

214. Catherine Powell, *Color of Covid and Gender of Covid: Essential Workers, Not Disposable People*, 33 YALE J.L. & FEMINISM 1 (2021).

215. See earlier discussion, *supra* notes 21–22; see discussion, *infra* Part III(D)(1).

216. The Earned Income Tax Credit is a welfare program of sorts for those who work and have low wages. See discussion, *infra* Part III(E)(2).

217. Medicaid, a health insurance program designed for low-income individuals and the elderly, along with the Child’s Health Insurance Program (CHIP), offers affordable healthcare options for children from financially disadvantaged families.

218. SSI is a public assistance program for children and adults who have a disability, such as neurological challenges, blindness, etc. See *2023 Annual Report of the SSI Program*, SOCIAL SECURITY ADMINISTRATION (May 30, 2023), [https://www.ssa.gov/oact/ssir/SSI23/II\\_Highlights.html](https://www.ssa.gov/oact/ssir/SSI23/II_Highlights.html) [perma.cc/35GD-MBQ9] (In 2023, around 76 million people received \$622 in income each month from SSI).

219. SNAP, often referred to as the Food Stamp Program, is run by each state and utilizes voucher cards to low-income households to buy low-cost foods. Each year over 42 million or 12.6 percent of American citizens utilize SNAP

Health Insurance Program (CHIP),<sup>220</sup> Temporary Assistance to Needy Families,<sup>221</sup> and Title 8 housing assistance.<sup>222</sup> Each state has

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vouchers to purchase groceries for their households. Two other programs that assist households are Special Supplemental Food Program for Women, Infants, and Children (WIC) and the Child Nutrition Program. The WIC program assists with everything a mother and child needs such as vouchers, food, education, support, and referrals for pregnancy before and after, and breastfeeding until age five. See *Food Security and Nutrition Assistance*, ECONOMIC RESEARCH SERVICE: US DEPT. OF AGRICULTURE (last updated Jan. 8, 2025), <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-security-and-nutrition-assistance> [perma.cc/7A5B-SGMB] (The percentage receiving SNAP benefits varies by state ranging from 4.6 percent in Utah to 23.1 percent in New Mexico).

220. The Child Nutrition Program is the overarching program of the National School Lunch Program, the School Breakfast Program, and the Summer Food Service Program. These programs guarantee that low-income students receive free or reduced cost breakfast and lunch during the school year, as well as summer break. See Drew Desilver, *What the Data Says About Food Stamps in the U.S.*, PEW RESEARCH CENTER, <https://www.pewresearch.org/short-reads/2023/07/19/what-the-data-says-about-food-stamps-in-the-u-s> [perma.cc/M7MY-M3XR] (In 2022, over 41 million households benefited from SNAP and in April 2023, 12.5 percent of populations received food stamps.).

221. The Temporary Assistance to Needy Families (TANF) was created in order to “prevent recipients from abusing the welfare program by mandating that all recipients find a job within two years or risk losing their welfare benefits.” A yearly grant of \$16.5 billion is distributed amongst the states in order to operate their state specific welfare programs. In 2023, 2.8 million US citizens received TANF benefit, the majority of whom were children. See *The Temporary Assistance for Needy Families (TANF) Block Grants: Responses to Frequently Asked Questions*, CONGRESSIONAL RESEARCH SERVICE (Apr. 1, 2024), <https://sgp.fas.org/crs/misc/RL32760.pdf> [perma.cc/A6G7-Y8X6] (over 1.9 million of the recipients of TANF were children).

222. The Housing Assistance welfare is a federal program where vouchers are given to low-income families, people with disabilities, and the elderly. These vouchers are distributed by the local housing agencies which receive funding from the U.S. Department of Housing and Urban Development office. This program has largely been ineffective due to long waiting periods. See Lucy Tompkins, *Voucher Program is Supposed to Help Poor Families Rent a Home. Nearly Half the Time, It Fails*, USA TODAY (Aug. 14, 2024), <https://www.usatoday.com/story/news/investigations/2024/08/13/federal-housing-vouchers-fail-low-income-families/74499904007> [perma.cc/SY8F-P2G2]; Meryl Finkel & Larry Buron, *Study on Section 8 Voucher Success Rates*, US DEPT. OF HOUSING AND DEVELOPMENT (Nov. 2001), [https://www.huduser.gov/portal/publications/pdf/sec8success\\_1.pdf](https://www.huduser.gov/portal/publications/pdf/sec8success_1.pdf) (success was lower in tight housing markets, like urban areas). The Coronavirus Aid, Relief, and Economic Security Relief (CARES) Act was a temporary nontax relief for American citizens during COVID-19 pandemic. The CARES Act, signed into law in March 2020, expanded unemployment insurance beyond the normal 26 weeks and allocated \$2.2 trillion dollars in emergency funds to mitigate the negative impacts of the pandemic on “individuals, families, businesses, public assistance programs, American Indian tribes, and state and local governments.” One-time direct payments were sent

different qualifications for receiving these assistance programs, commonly based on one's income, poverty line within the state one lives, family size, and/or a disability.<sup>223</sup> In addition, state and local governments also provide benefits and services to the poor. They pay for K-12 education, some preschool programs, unemployment insurance, and public pension plans.<sup>224</sup> All of these can provide important safety nets to the poor and are a backstop to the federal programs.

In order to receive SNAP, TANF and other government assistance, the recipient may have to meet certain work requirements. For example, the Fiscal Responsibility Act of 2023 modified the Personal Responsibility Act of 1996 (the welfare-to-work legislation of President Clinton) to require all able-bodied adults between the ages of 18–55 to work, as well as those receiving TANF.<sup>225</sup> To receive these benefits the recipient is required to have a valid Social Security number and if not, to reside in the U.S. for five or more years, and engage in market work.<sup>226</sup> These programs often focus on work first and do not allow for training or education.<sup>227</sup> Thus, the poor are often stuck in low-paying jobs (assuming they can even obtain work) that may even pay less than the low-paid caregiver.<sup>228</sup> Balancing these work requirements with the care of children is particularly challenging without government help.

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to qualifying individuals and families of \$1,200 per adult (\$2,400 filing joint tax return) and \$500 per child for families. In addition, The CARES Act was extended one more year, and all the provisions ultimately expired in 2022. See Anna Price, *United States: President Signs Cares Act in Response to Coronavirus Pandemic*, THE LIBRARY OF CONGRESS (Mar. 27, 2020), <https://www.loc.gov/item/global-legal-monitor/2020-03-27/united-states-president-signs-cares-act-in-response-to-coronavirus-pandemic> [perma.cc/3GTV-YWAS].

223. *Frequently Asked Questions Related to the Poverty Guidelines and Poverty*, HEALTH & HUMAN SERVICES (ASPE), <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/frequently-asked-questions-related-poverty-guidelines-poverty> [perma.cc/R3MG-ZYFF]; see also Adam Hayes, *Welfare: Definition, Different Types, Who Qualifies*, INVESTOPEDIA (Feb. 1, 2025), <https://www.investopedia.com/terms/w/welfare.asp> [perma.cc/BEN7-QUBM].

224. Micheal B. Sauter, Alexander E.M. Hess & Thomas C. Frohlich, *States With the Most Government Benefits*, USA TODAY (Jan. 26, 2014), <https://www.usatoday.com/story/money/business/2014/01/26/states-with-the-most-government-benefits/4899375> [perma.cc/F6EL-QFPN].

225. See Nancy E. Shurtz, *Work Requirements and New Tax Policy Equity Under the Fiscal Responsibility Act of 2023* (forthcoming in U. OF FLORIDA POLICY LAW REVIEW) (discussing and criticizing the “work first” policy as a way to help balance the budget).

226. *Id.*

227. *Id.*

228. *Id.*

Head Start is the preschool program that provides childcare and with it two-meals a day. The Head Start Program was first started under President Johnson in 1965 with his “War on Poverty” initiative,<sup>229</sup> to “foster children’s growth in social, emotional, cognitive, and physical development” in low-income families.<sup>230</sup> It primarily centered on closing racial and economic achievement gaps by breaking the cycle of entrenched poverty in this country. Head Start offers summer school programs and services to migrant farm workers and children under the age of three.<sup>231</sup> It operates by providing grants to local public and private non-profit and for-profit agencies to provide comprehensive child development services. A special focus is on helping preschoolers develop the skills they need to be successful in school. Before COVID, Head Start enrolled one million students and provided services to approximately 8 percent of children between the ages of three and five.<sup>232</sup> In fiscal year 2022, 833,000 children were benefited by this program.<sup>233</sup> During COVID, Head Start closed down as well as all “public institutions created to protect and regulate children—child welfare agencies . . .—were forced to dramatically change and reduce day-to-day operations.”<sup>234</sup> Post-COVID saw a surge in Head Start teacher turnover that impacted curriculum and early childhood development.<sup>235</sup> Thus,

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229. Shiva Kooragayala, *Preschool for All: Plyer v. Doe in the Context of Early Childhood Education*, 15 NW. J.L. & Soc. POL’Y 98, 101 (2019).

230. See *Data & Reports*, OFFICE OF HEAD START (June 30, 2024), <https://www.acf.hhs.gov/ohs/reports>; <https://obamawhitehouse.archives.gov/blog/2015/05/18/day-history-creation-head-start>. David Hudson, *This Day in History: The Creation of Head Start*, THE WHITE HOUSE (May 18, 2015), <https://obamawhitehouse.archives.gov/blog/2015/05/18/day-history-creation-head-start>. [perma.cc/SK3A-2LQ4].

231. Head Start Program, 75 Fed. Reg. 57,704, 57,704 (Sept. 22, 2010); see also Kooragayala, *supra* note 229, at 102.

232. Kamerman & Gatenio-Gabbel, *supra* note 125.

233. *Head Start Program Facts: Fiscal Year 2022*, US DEPT. OF HUMAN SERVICES, <https://eclkc.ohs.acf.hhs.gov/data-ongoing-monitoring/article/head-start-program-facts-fiscal-year-2022> [perma.cc/57LX-WK6J].

234. Harbach, *supra* note 63, at 1428 n.6.

235. Kendall LaParo, *Understanding the Pandemic Surge in Head Start Teacher Turnover*, RESEARCH FOR ACTION (Aug. 1, 2024), <https://www.researchforaction.org/news-events/early-childhood-education/understanding-the-pandemic-surge-in-head-start-teacher-turnover> [perma.cc/GVV3-VH8H] (“Head Start’s success hinges on a stable workforce. A consistent teaching staff is crucial for building strong relationships with children and families, fostering early development, and implementing high-quality curriculum. High turnover can lead to disruptions in curriculum implementation and program quality, ultimately impacting children’s outcomes.”) Head start teachers are generally paid much less than comparable teachers in the private sphere. Alia Wong, *New Biden Plan Raises Salary for Head Start Teachers, Who Face Meager Pay and*

poor families cannot always rely on government programs to provide a safety net in times of crisis.

### 3. Special Issues Arise for Rural Women, Single Women, Immigrant Women, and Women of Color

Rural women tend to rely on informal care from relatives and friends, but with recent demographic trends have seen family members (and the support systems they represent) move away to more affluent urban settings. Rural women also face a multitude of other problems, such as transportation, health, and housing issues. Single women, particularly those who have never married, tend to suffer severe economic hardships plus added stress from balancing work and childcare. Immigrant women are denied many governmental subsidies and excluded from beneficial tax provisions. Women and children of color face unique challenges.

#### a. Rural Women

Rural women do not have the same access to formal preschool education or licensed private childcare centers as their urban counterparts.<sup>236</sup> According to the Healthcare Resources and Services Administration, 65 percent of localities facing shortages of formal preschools are in rural or semi-rural areas.<sup>237</sup> The lack of formal childcare in rural America causes rural women to have an increased dependency on informal care. Thus, rural women tend to rely on lower-paid and often substandard care. If rural families have family members or friends available, childcare can be relatively inexpensive.<sup>238</sup> However, securing unpaid care at home becomes more difficult with family members increasingly moving to geographically remote locales—illustrating the well-publicized brain drain phenomenon plaguing many rural enclaves across the nation.<sup>239</sup> In general, the smaller size of contemporary families coupled with

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*Grueling Work*, USA TODAY (Nov. 16, 2023), <https://www.usatoday.com/story/news/education/2023/11/15/head-start-teacher-pay-may-increase/71592951007/>.

236. *Id.* (citing a study by Carrie Henning-Smith, a University of Minnesota professor); see discussion, *supra* notes 140 & 143 and accompanying text.

237. *Childcare Need and Availability in Rural Areas*, NAT'L ADVISORY COMMITTEE ON RURAL HEALTH & HUM. SERVS. (Jan. 2023), <https://www.hrsa.gov/sites/default/files/hrsa/advisory-committees/rural/nac-rural-child-care-brief-23.pdf> [perma.cc/35LM-UVYT].

238. See discussion of the financial, physical and emotional impact on this caregiving, *supra* Part I(D).

239. Patrick J. Carr & Maria J. Kefalas, *The Rural Brain Drain*, CHRONICLE OF HIGHER EDUC. (Sept. 21, 2009), <https://www.chronicle.com/article/The-Rural-Brain-Drain/48425> [perma.cc/B52N-AX8U].

modern demographic shifts leaves fewer family members available to care for children.<sup>240</sup>

In addition to childcare challenges, rural women often face a multitude of other problems—low incomes, inadequate infrastructure, poor medical services, and substandard housing. In general, the poverty rate is higher in rural areas and the income levels are much lower than their urban counterparts.<sup>241</sup> In addition, one of the leading impediments to providing childcare services to rural parents is the widespread lack of transportation.<sup>242</sup> According to Transportation for America, 40 percent of rural residents live in counties with no public transportation.<sup>243</sup> This problem adversely affects execution of everyday functions as well as restricts access to a variety of basic resources, including childcare services.<sup>244</sup> Furthermore, even when informal care is within close proximity to the parent, many rural communities feature roads with no sidewalks and narrow shoulders, cracked or cratered pavements, unlit pathways, and other hazards to safety and health.<sup>245</sup> In addition, rural women face constant challenges in obtaining good quality health services for themselves and their children. Access to quality medical care may be limited, as many physicians in rural areas simply do not

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240. Children of rural-dwelling parents often do not live in close proximity. In the years following the Great Recession, the availability of family childcare providers has dropped precipitously in rural enclaves, increasing the financial and emotional strain on the remaining resident rural family. See Shelley Clark, Elizabeth M. Lawrence & Shannon M. Monnat, *Support from Adult Children and Parental Health in Rural America*, 37 J. RURAL SOC. SCI. 2 (2022) (discussing this phenomena as to elder care).

241. *Families with Low Incomes—Rural Services Integration*, RURAL HEALTH INFO. HUB (Mar. 13, 2025), <https://www.ruralhealthinfo.org/toolkits/services-integration/1/need> [perma.cc/9URX-Z9TS] (In 2019, 15.4 percent of people living in rural areas were below the federal poverty level, 19.7 percent in the rural South, and 13.4 percent in the rural Midwest.).

242. *Id.*

243. Madelaine Criden, *The Stranded Poor: Recognizing the Importance of Public Transportation for Low-Income Households*, NAT'L ASS'N FOR STATE CMTY. SERVS. PROGRAM (2008), <https://nascsp.org/wp-content/uploads/2018/02/issuebrief-benefitsofruralpublictransportation.pdf> [perma.cc/T7WG-HFPY] (citing study by Transportation for America, a Washington, D.C.-based alliance of public and private transportation advocates).

244. See *Safety Benefits of Walkways, Sidewalks, and Paved Shoulders*, US DEPT. OF TRANSP. (Jan. 1, 2010), [https://safety.fhwa.dot.gov/ped\\_bike/tools\\_solve/walkways\\_brochure/walkways\\_brochure.pdf](https://safety.fhwa.dot.gov/ped_bike/tools_solve/walkways_brochure/walkways_brochure.pdf) [perma.cc/YD3P-THA9].

245. Tim Mandell, *Lack of Sidewalks in Rural Towns Create Safety and Public-Health Concerns*, RURAL BLOG (Aug. 8, 2016), <http://irjci.blogspot.com/2016/08/lack-of-sidewalks-in-rural-towns-create.html> [perma.cc/BP29-N5TZ].

take on Medicaid patients.<sup>246</sup> A lack of primary care and specialty doctors is a problem in the country, so this phenomenon makes a scarce supply situation more acute.<sup>247</sup>

Nearly 30 percent of rural households, representing more than 7.3 million people, live with at least one significant housing issue involving affordability, structural quality, or household crowding.<sup>248</sup> A large percentage of rural residents rent their homes, and like their urban counterparts, are experiencing escalating rental prices.<sup>249</sup> Nearly half of rural renters spend more than 30 percent of their monthly incomes on rent.<sup>250</sup> Rural renters are more than twice as likely to live in substandard dwellings as homeowners.<sup>251</sup> This high percentage is spent on housing siphons off resources that could be dedicated to other basic needs, such as nutrition, clothing, transportation, medical services, or childcare.

*b. Single Women*

Single women often struggle with the high costs of childcare while earning a single, generally low-income wage. The childcare responsibilities of the single mom can lead to inability to work full time and thus pursue career advancement.<sup>252</sup> Furthermore poor single women face difficulties in receiving government assistance as these systems are complex with confusing income thresholds and long waitlists.<sup>253</sup> In addition, single women may lack extended family

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246. Marci Nielsen, Darrin D'Agostino & Paula Gregory, *Addressing Rural Health Challenges Head On*, 114 Mo. J. OF MED 363 (2017).

247. *Id.* Additionally, these affected parents simply do not have the practical option to travel to better-staffed and better-equipped facilities in the city to attend to needed personal health care attention for their family.

248. RAPOZA ASSOCIATES, *THE LOW-INCOME HOUSING TAX CREDIT: OVERCOMING BARRIERS TO AFFORDABLE HOUSING IN RURAL AMERICA 1* (2013), [https://www.novoco.com/sites/default/files/atoms/files/rapoza\\_rural-lihtc-report\\_081313.pdf](https://www.novoco.com/sites/default/files/atoms/files/rapoza_rural-lihtc-report_081313.pdf) [perma.cc/93X4-R6XE] [hereinafter Rapoza].

249. *Id.* See Alison Lintal, *Shared Housing as a Missing Middle Solution for Rural Communities*, 102 NEB. L. REV. 615 (2024).

250. *Nearly Half of Renter Households Are Cost-Burdened, Proportions Differ by Race*, US Census (Sept. 12, 2024), <https://www.census.gov/newsroom/press-releases/2024/renter-households-cost-burdened-race.html>.

251. *Id.*

252. Leila Schochet, *The Child Care Crisis is Keeping Women Out of the Workforce*, CTR. FOR AM. PROGRESS (Mar. 28, 2019), <https://www.americanprogress.org/article/child-care-crisis-keeping-women-workforce> [perma.cc/F7PS-8DYU].

253. Ann Schimke, *Low-Income Families Are Struggling to Many States. Here's Why*, CHALKBEAT (Oct. 21, 2024), <https://www.chalkbeat.org/colorado/2024/10/21/fewer-families-get-child-care-subsidies-as-covid-aid-expires-new-rules-take-effect> [perma.cc/AE65-UERN]; see also Karen Schulman, *Overdue for Investment: State Childcare Assistance Policies 2018*, NAT'L WOMEN'S L. CTR. (Oct. 2018), <https://nwlc.org/wp-content/>

or community connections that can contribute to feelings of isolation and increased stress.

Unmarried<sup>254</sup> women are five times more likely than single men to live with children.<sup>255</sup> As of 2022, 10.9 million one-parent families had at least one child under the age of 18 years old.<sup>256</sup> One parent families are 80 percent led by a mother.<sup>257</sup> In 2023, 15.09 million children lived with single mothers, while 3.05 million children lived with single fathers.<sup>258</sup> An ethnic breakdown of household composition reveals that a high proportion of minority households with minor children are led by single mothers: 64 percent for African American, 52 percent for Native American, and 42 percent for Hispanic.<sup>259</sup> These single parent families are more likely to live in poverty, especially since only one in four single mothers receive child support.<sup>260</sup> Without child support, many children living under one-parent households are below the poverty line.<sup>261</sup>

Single women suffer economic disadvantages from lower lifetime wages, lower pensions, and work disruptions for childbirth and childcare.<sup>262</sup> As a consequence of these conditions, single

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uploads/2018/11/NWLC-State-Child-Care-Assistance-Policies-2018.pdf [perma.cc/7GH7-JLY4].

254. Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RSCH. CTR. (Sept. 24, 2014), <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married> [perma.cc/ZXT9-CSQ4] (Just 50 percent of adult Americans are married and 20 percent have never been married—the highest figure to date.. “Men are more likely than women to have never been married (23 percent vs. 17 percent in 2012) (“The median age at first marriage has never been higher for brides (26.5 years) and grooms (28.7).”).

255. Erin Duffin, *Number of Children Living with Single Mother or a Single Father in the U.S. from 1970 to 2019*, STATISTA (Jan. 13, 2020), <https://www.statista.com/statistics/252847/number-of-children-living-with-a-single-mother-or-single-father>.

256. *Census Bureau Releases New Estimates on America’s Families and Living Arrangements*, U.S. CENSUS BUREAU (Nov. 17, 2022), <https://www.census.gov/newsroom/press-releases/2022/americas-families-and-living-arrangements.html> [perma.cc/F7E8-F8FV].

257. *Id.*

258. Veera Korhonen, *Number of Children Living with a Single Mother or a Single Father in the U.S. from 1970 to 2023*, STATISTA (July 5, 2023), <https://www.statista.com/statistics/252847/number-of-children-living-with-a-single-mother-or-single-father> [perma.cc/6VT6-YR3R].

259. *Id.*

260. *Less than 1 in 4 Single-Mother Families Receive Child Support*, ANNIE E. CASEY FOUND. (Mar. 16, 2023), <https://www.aecf.org/blog/only-1-in-4-single-mother-families-receive-child-support> [perma.cc/5QKR-9XMH].

261. *Id.* (discussing why child support is important).

262. Elise Gould, Jessica Schieder & Kathleen Geir, *What Is the Gender Pay Gap and Is It Real?*, ECON. POL’Y INST. (Oct. 20, 2016), <https://www.epi.org/>

women tend to have much less income and wealth than their male counterparts.<sup>263</sup> Single women often do not work at the type of job that contributes to their own financial security.<sup>264</sup> Women often earn less than a man for the same work.<sup>265</sup> Moreover, the income of single mothers is significantly less than a married woman, with single mothers averaging \$51,168 compared to \$106,921 earned by a married woman.<sup>266</sup>

In contrast to married women, single women have few direct financial resources available to pay the high costs of childcare. Generally, women fare much better economically when attached to a partner.<sup>267</sup> For instance, married women can benefit from income pooling, joint tax returns, higher potential Social Security benefits, and prospects for garnering inherited assets from their spouses.<sup>268</sup> Even unmarried but partnered women can still enjoy shared income and the benefits of economies of scale.<sup>269</sup> Furthermore, divorced women who have been married at least ten years can access a former spouse's Social Security benefits.<sup>270</sup> Single women who have

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publication/what-is-the-gender-pay-gap-and-is-it-real [perma.cc/JZ3B-RLRR].  
263. *Id.*

264. Stephen J. Rose & Heidi I. Hartman, *Still a Man's Labor Market: The Slowly Narrowing Gender Wage Gap*, INST. FOR WOMEN'S POL'Y RSCH. (2018), [https://iwpr.org/wp-content/uploads/2020/08/C474\\_IWPR-Still-a-Mans-Labor-Market-update-2018-2.pdf](https://iwpr.org/wp-content/uploads/2020/08/C474_IWPR-Still-a-Mans-Labor-Market-update-2018-2.pdf) [perma.cc/7BVG-NPXP]; Jennifer Fernandez, Ana Kent & Anna Tranfaglia, *Facing the Future Solo: Understanding Obstacles of Single Women and Retirement*, FEDCOMMUNITIES (June 25, 2024), <https://fedcommunities.org/facing-future-solo-understanding-obstacles-single-women-retirement/#:~:text=The%20lack%20of%20wealth%20among,programs%2C%20may%20be%20better%20aimed>.

265. See NAT'L EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESSING THE PAST, TAKING STOCK OF THE FUTURE 4 (June 2013), [https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal\\_pay\\_task\\_force\\_progress\\_report\\_june\\_2013\\_new.pdf](https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf) [perma.cc/3WX6-XBNK] (caring for children in particular has an adverse impact on women's earnings and ability to save).

266. *Id.*

267. Rose & Hartman, *supra* note 264 (The idea that marriage allays poverty has been a dilution in Washington for decades, spanning both Democrats and Republicans); see also Melanie Hicken, *Why Many Retired Women Live in Poverty*, CNN MONEY (May 13, 2014), <http://money.cnn.com/2014/05/13/retirement/retirement-women> [perma.cc/A3JT-8JPC].

268. Joint returns allow for the splitting of income benefits. 26 U.S.C. § 1; see discussion *infra*, Part III(G)(1).

269. See Alicia Brokars Kelly, *Navigating Gender in Modern Intimate Partnership Law*, 14 J.L. & FAM. STUD. 1 (2012) (proposing that "for both unmarried and married couples, law should be based on economic sharing behavior and the benefits and burdens it recurrently produces."

270. David A. Weaver, *Widows and Social Security*, 70 SOC. SECURITY BULL. 3 (2010), <https://www.ssa.gov/policy/docs/ssb/v70n3/v70n3p89.html> [perma.

never been married are in the worst relative financial positions. Financial hardships are exacerbated for women of color, who face even more challenges.

Single mother households face the same stress, both physically and financially, as discussed earlier.<sup>271</sup> Not only do they need to balance work and care but have to worry about food and housing insecurity. Many single mothers work hourly jobs.<sup>272</sup> Adjusting schedules often leads to lower income and loss of health insurance.<sup>273</sup> In 2022, 30 percent of single mothers working hourly jobs had to take on a second job, while 29 percent had to juggle multiple jobs.<sup>274</sup> Almost 25 percent of households headed by single women are also experiencing food insecurity.<sup>275</sup> Furthermore, during COVID many

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cc/2L88-BHA3.

271. See discussion *infra* Part I(A), notes 45–55 (mothers are more likely to make financial, personal, and health sacrifices to accommodate their caregiving responsibilities); see Emily Wielk & Ben Gitis, *Four Charts on the Challenges of Single Working Moms* (Sept. 28, 2022) BIPARTISAN POLICY CENTER, <https://bipartisanpolicy.org/blog/challenges-single-working-moms/#:~:text=Forty%2Dseven%20percent%20of%20single%20moms%20delayed%20major,other%20family%20members:%2026%20of%20single%20moms> (“single working mothers put future financial security on hold at slightly higher rates than married mothers: 39% delayed or decreased contributions to their retirement savings and 24% reduced payments on their student loans.”).

272. Rosanna Hertz, Jane Mattes & Alexandria Shook, *When Paid Work Invades the Family: Single Mothers in the COVID-19 Pandemic*, 42 J. FAM. ISSUES 9 (2020).

273. Anne Martin, et. al., *Economic Hardships During COVID-19 and Maternal Mental Health: Combining Samples with Low Incomes Across Three Cities*, 366 Soc. Sci. & Med. (Feb. 2025), <https://www.sciencedirect.com/science/article/abs/pii/S0277953624010906> (“Lost income was associated with more than twice the odds of anxiety, controlling for job and health insurance loss.”).

274. Kayla Winarsky Green, *Twice the Work and Half the Support: COVID-19 and Single Working Mothers*, OPEN GLOBAL RIGHTS (July 13, 2020), <https://www.openglobalrights.org/covid-19-and-single-working-mothers/#:~:text=Twice%20the%20work%20and%20half%20the%20support:%20COVID%2D19%20and%20single%20working%20mothers.&text=As%2C%20according%20to%20the%20National%20Women's%20Law,two%20jobs:%20childcare/education%20and%20their%20current%20employment> (“according to the *National Women's Law Center* (NWLC), 76.2% of single mothers caring for children under age 18 are in the labor force, these women have been suddenly forced to juggle two jobs: childcare/education and their current employment.”). (Similarly, 27 percent of single fathers had to reduce their working hours and 25 percent had to work multiple jobs, according to a 2007 study. *Survey: Working dads want more family time*, *CareerBuilder.com* (2007), available at (<https://www.cnn.com/2007/US/Careers/06/13/dads.work/index.html?iref=newssearch>).

275. *Child Food Insecurity in America* ANNIE E. CASEY FOUND. (July 21, 2024), <https://www.aecf.org/blog/child-food-insecurity> [perma.

single women changed their living arrangements to include more people.<sup>276</sup> The combination of economic disparity, escalating rents, and food insecurity highlights the difficulties that single mothers face in providing childcare for their families.

*c. Immigrant Women*

Immigrant women not only make up a large part of the low-paid caregiving profession but often have young children of their own. Thus, they both provide and struggle to afford quality childcare. Immigrants make up 14 percent of the US population, 18 percent of childcare workers, and are the parents of around 25 percent of children in the U.S.<sup>277</sup> Immigrants, in general, face discrimination, language barriers, cultural differences, and limited eligibility for public assistance. Because they are not citizens, they cannot access the traditional welfare programs, nor were they eligible for COVID relief. Also, under the TCJA of 2017, tax benefits were specifically denied to them.<sup>278</sup>

Stimulus payments under the CARES Act excluded families where one spouse filed taxes with an Individual Taxpayer Identification Number (ITIN) instead of a Social Security Number.<sup>279</sup> This provision excluded 3.7 million US citizen children and 1.4 million spouses from the first stimulus payments. Although Congress modified this rule in subsequent COVID legislation, it still excluded “2.2 million U.S.-citizen or legal-immigrant children who have only unauthorized immigrant parents, and 9.3 million unauthorized immigrants.”<sup>280</sup>

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cc/8U8M-PVWM] (According to the USDA, 17 percent of all households with children in 2022 were experiencing food insecurity.).

276. Mariana Amorim & Natasha Pikauskas, “Excess” Doubling Up During COVID: Changes in Children ‘Shared Living Arrangements, 60 DEMOGRAPHY 1283 (2023).

277. Juan Carlos Gomez & Vanessa Meraz, *Immigrant Families During the Pandemic On the Frontlines but Left Behind*, CTR. FOR L. & SOC’Y POL’Y (Feb. 2021), <https://www.clasp.org/publications/report/brief/immigrant-families-pandemic-frontlines> [perma.cc/3UTL-K55N] (“Immigrants are disproportionately overrepresented among essential workers and are uninsured at higher rates, making them particularly vulnerable to both contracting and dying from COVID-19.”).

278. Maria Fernanda Alfaro, *Taxation Without Representation of Undocumented Immigrants: Counting Unlawfully Earned Tax Dollars While Intentionally Ignoring Unlawful Presence*, 21 THE SCHOLAR 311 (2019); see also Part III(C)(1) *infra* & note 360 (an extra refundable child credit was available for children under the age of 6 as costs of their care can be greater).

279. *Id.* at 316 n. 17 (The ITIN is a nine-digit processing number that the IRS uses to “help individuals comply with the US tax law.”); see also 26 U.S.C. § 6109(i).

280. Julia Gelatt, Randy Capps & Michael Fix, *Nearly 3 Million U.S.*

In addition to the lack of government subsidies, the tax code limits the earned income tax credit (EITC) to U.S. citizens.<sup>281</sup> The EITC is a refundable credit that was structured to benefit low-income workers with children so the purpose of that provision is frustrated by discrimination against immigrant families. A parent, who would otherwise qualify, are precluded from taking the EITC unless they have a valid Social Security number.<sup>282</sup> Even if the parent has a valid Social Security number, no children can be claimed under the EITC unless they also have a number. State EITCs are also unavailable to immigrant families as these benefits are tied to the federal requirements.<sup>283</sup> Recent research reveals that our current tax system denied 2.4 million immigrant families the benefit of the EITC.<sup>284</sup>

The tax code also precludes immigrant families from the child tax credit (CTC) and the other dependent credit (ODP) to immigrants.<sup>285</sup> Pursuant to the TCJA of 2017, the child tax credit of \$1,000, now \$2,000 is only available to U.S. citizens, U.S. nationals or U.S. resident aliens.<sup>286</sup> Although President Biden allowed immigrants to obtain the extended American Rescue Plan \$3,600 credit for children under 6, that has since expired. Similarly, the \$500 dependent credit (ODP) requires the “qualifying relative” to be a U.S. citizen.<sup>287</sup>

As has been illustrated, undocumented immigrants are denied a host of government services despite constituting a considerable proportion of the U.S. workforce. This population often misses out on governmental programs that are available to them because of fears associated with interacting with authorities who may deport

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*Citizens and Legal Immigrants Initially Excluded under the CARES ACT Are Covered under the December 2020 COVID-19 Stimulus*, MIGRATION POLICY INSTITUTE (Jan. 2021), <https://www.migrationpolicy.org/news/cares-act-excluded-citizens-immigrants-now-covered#:~:text=Two%20groups%20remain%20excluded%20from,and%209.3%20million%20unauthorized%20immigrants>.

281. 26. U.S.C. § 32; *see* discussion, *infra* Part III(E)(2)

282. *End the Tax Penalty Against Immigrant Workers*, ECON. SEC. PROJECT (Apr. 14, 2020), <https://economicsecurityproject.org/resource/end-the-tax-penalty-against-immigrant-workers> [perma.cc/6YJ6-7CZJ] (Study by the Institute on Taxation and Economic Policy (“ITEP”)).

283. *Id.*

284. *Id.*

285. 26. U.S.C. § 24.

286. *See* discussion, *infra* notes 360–74 and accompanying text (monthly refundable child credits can help alleviate poverty in children.).

287. “The term “dependent“ does not include an individual who is not a citizen or national of the United States unless such individual is a resident of the United States or a country contiguous to the United States.” 26. U.S.C. § 152(b)(3)(A).

them.<sup>288</sup> Translated to the family front, this means less access to quality childcare, higher levels of stress that can adversely affect children's development and mental health,<sup>289</sup> and increased reliance on informal, unlicensed, and substandard childcare arrangements.

*d. Women of Color*

The challenges faced by large immigrant populations are often mirrored by members of long-standing minority populations in the United States. Issues of financial security and family stability are most acutely visited upon women in these populations. In general, African American and Hispanic women are more likely to be poor than their white counterparts.<sup>290</sup> Single parent households, especially those led by women of color, are more likely to experience poverty.<sup>291</sup> The statistics indicate that 31.6 percent of Native American single mothers lived in poverty, along with 28.4 percent of African American and 27.6 percent of Hispanic women.<sup>292</sup> In comparison,

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288. Edith Olmsted, *Trump is Now Threatening to Deport Legal Immigrants*, THE NEW REPUBLIC (Oct. 3, 2024), <https://newrepublic.com/post/186693/donald-trump-threatening-deport-legal-immigrants> [perma.cc/549Q-WC2E] (noting that Trump is expanding the threat to actually deport legal immigrants); see also Nancy E. Shurtz, *Seeking Citizenship in the Shadow of Domestic Violence: The Double Bind of Proving "Good Moral Character,"* 62 ST. LOUIS L. REV. 237 (2017) (showing how women do not report domestic violence for fear they will be deported and lose their opportunity for U.S. citizenship).

289. *U.S. Citizen Children Impacted by Immigration Enforcement*, AM. IMMIGR. COUNCIL (June 24, 2021), <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement> [perma.cc/P7BB-XYTR].

290. Shengwei Sun, *National Snapshot: Poverty Among Women & Families*, NAT'L WOMEN'S L. CTR. (Jan. 2023), [https://nwlc.org/wp-content/uploads/2023/02/2023\\_nwlc\\_PovertySnapshot-converted.pdf](https://nwlc.org/wp-content/uploads/2023/02/2023_nwlc_PovertySnapshot-converted.pdf) [perma.cc/R52J-FYZF] (The poverty rate of white women is 8.9 percent, compared to 18.8 percent of Black women, 17 percent of Latina women, 10 percent of Asian women and 21 percent of Native women.); see also Beverly I. Moran, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996); Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity In the Legal System*, 34 FORDHAM URBAN L.J. 1219 (2007).

291. Veera Korhonen, *U.S. Children Living in a Single Parent Family 1970–2023*, STATISTA (Nov. 28, 2023), <https://www.statista.com/statistics/252847/number-of-children-living-with-a-single-mother-or-single-father> [perma.cc/N97K-QZMX]; Sarah Damaske, Jenifer L. Bratter & Adrienne Frech, *Single Mother Families and Employment, Race, and Poverty in Changing Economic Times*, Soc. Sci. Res., NAT'L LIBRARY OF MEDICINE. (Aug. 25, 2016), <https://pubmed.ncbi.nlm.nih.gov/articles/PMC5300078/#:~:text=Families%20headed%20by%20unmarried%20women,McLanahan%20and%20Percheski%202008;>).

292. Dawn Lee, *Single Mother Statistics*, SINGLE MOTHER GUIDE (Oct. 26, 2023), <https://singlemotherguide.com/single-mother-statistics> [perma.cc/8FTE-AWY8].

19.3 percent of White women and 14.6 percent of Asian mothers heading households live in poverty.<sup>293</sup> These groups differ in their poverty rates, general states of health,<sup>294</sup> and availability of childcare.<sup>295</sup> One shared similarity among all ethnic groups is a general cultural preference for informal childcare.<sup>296</sup> Thus, these groups tend to rely on family members.<sup>297</sup> While this care may be inexpensive, it may not be of high quality.<sup>298</sup> During COVID, these populations of

293. *Id.*

294. For example, almost 60 percent of black women are obese. See Sadie Dingfelder, *African-American Women at Risk*, AMERICAN PSYCH. ASS. (Jan. 2013), <https://www.apa.org/monitor/2013/01/african-american#:~:text=The%20obesity%20epidemic%20has%20affected,with%20experts%20from%20other%20disciplines.>; Sophia Kerby, *State of Women of Color in the United States* (July 17, 2012), CTR. FOR AM. PROGRESS, <https://www.americanprogress.org/issues/race/reports/2012/07/17/11923/the-state-of-women-of-color-in-the-united-states> [perma.cc/94HM-M7DE] (women of color more likely to suffer serious health issues and carry no health insurance.); see Vernellia R. Randall, *Inequality in Health Care is Killing African Americans*, 36 HUM. RTS. 20, 20 (2009) (stating that “Black Americans are sicker than white Americans”); Philip C. Aka, Aref A. Hervani & Elizabeth Arnott-Hill, *Protection Against the Economic Fears of Old Age: Six Micro and Macro Steps for Bridging the Gap in Retirement Security Between Blacks and Whites*, 40 VT. L. REV. 1, 11 n.53 (citing Steven Reinberg, *U.S. Blacks Still Lag Whites in Life Expectancy*, WEBMD (July 18, 2013), <http://www.webmd.com/heart-disease/news/20130718/us-blacks-still-lag-whites-in-lifeexpectancystudy> [perma.cc/TU99-RXSN] (the life expectancies African American average about four years less than white women)).

295. See earlier discussion, *supra* notes 202–216 and accompanying text. Annie Brickley, *New Report Finds Inequities in Early Child Care and Education Access Among Black Children and Families*, FIRST FIVE YEARS FUND (June 18, 2024), <https://www.ffyf.org/resources/2024/06/new-report-finds-inequities-in-early-child-care-and-education-access-among-black-children-and-families> [perma.cc/ZB9B-QHAL] (Research shows that Black children have less access to high-quality early childhood education, which impacts long-term academic and developmental outcomes. The gap is further exacerbated by underfunded schools and childcare facilities in predominantly Black neighborhoods.)

296. See Robert Joseph Taylor, Linda M. Chatters, Amanda Toler Woodward & Edna Brown, *Racial and Ethnic Differences in Extended Family, Friendships, Fictive Kin and Congregational Informal Support Networks*, NAT’L INST. OF HEALTH (July 30, 2014), <https://pmc.ncbi.nlm.nih.gov/articles/PMC4116141> [perma.cc/P7ZX-N344] (research showing Black, Latino, and Native American families tend to show a higher preference for informal childcare provided by family and friends, often due to cultural values emphasizing the importance of family support and community).

297. *Id.*

298. See Shiva Sethi, Christine Johnson-Staub & Katherine Gallagher Robbins, *An Anti-Racist Approach to Supporting Child Care Through COVID-19 and Beyond*, CLASP, <https://www.clasp.org/publications/report/brief/anti-racist-approach-supporting-child-care-through-covid-19-and-beyond/#:~:text=Research%20shows%20how%20inequities%20in,for%20>

color were overrepresented in the number of workers that became unemployed.<sup>299</sup> They were also more likely to die of COVID.<sup>300</sup> Women of color made up a large percentage of low-paid workers in the caring industry and as essential workers, they were more subject to health risks.<sup>301</sup>

#### IV. THE TAX SYSTEM IS A SOLUTION

Over the past few decades we have witnessed a constantly evolving interaction between a changing American demographic, challenging socioeconomic upheaval, and the policy arms of the government whose mission is to balance diverse interests for the great societal good. With regard to policy levers that directly affect families—especially those relating to minor children—few have the impact wielded by the tax system. Congress is currently facing monumental decisions in taxation policy that will dramatically affect both the immediate and longer-term prospect for American families and our children. Associated with the sunset of the Tax Cuts and Jobs Act of 2017 at the end of 2025, Congress will be forced to review childcare policies. While the current tax system provides some benefits to caregiver parents, children, and care providers, tax policies generally fail to provide adequate support and subsidies to families struggling with escalating childcare costs. Inadequate subsidies exist for the parent who works, for children under 6, for the unpaid supportive caregiver, and for the low-paid care provider. The pandemic made childcare issues more visible as schools

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different%20communities%20of%20color. (“Research shows how inequities in child care and early education manifest for different racial and ethnic groups. For example, child care is least affordable for Black and Latinx families with low incomes.”)

299. These populations make up a large percentage of essential workers and Black and immigrant women are disproportionately represented in the childcare workforce, often with low wages and minimal benefits. See earlier discussion, *supra* note 68 (each of these groups make up 18 percent of that workforce).

300. Rasheeta Chandler et al., *The Impact of COVID-19 Among Black Women: Evaluation Perspective and Sources of Information*, NAT’L INST. OF HEALTH (Jan. 1, 2022), <https://pmc.ncbi.nlm.nih.gov/articles/PMC8542278> [perma.cc/Y7DM-LYVY].

301. Eve Mefferd & Dawn Dow, *The US Child Care System Relies on Women of Color, but Structural Barriers Systematically Disadvantage Them*, URBAN INST. (June 14, 2023), <https://www.urban.org/urban-wire/us-child-care-system-relies-women-color-structural-barriers-systematically-disadvantage> [perma.cc/7DS8-KVNX]. (“Black and Latina women disproportionately provide child care and are particularly likely to be home-based providers—which are among the lowest-paid jobs, both within the child care sector and across sectors overall.”).

were shuttered and women and minorities were disproportionately impacted. The tax system should include bold new initiatives that promote both equity and choice, and by doing so, prepare us for the next pandemic.

### A. *Conflicting Philosophies on Childcare*

Childcare is a topic with many issues.<sup>302</sup> The Democratic and Republican parties in the U.S. have differing views on childcare, shaped by their political philosophies and policy priorities. Similarly, feminists have disagreed on the best way to support women with children. The child perspective is important and should be considered in determining any tax policy initiative.

#### 1. Republican vs Democrat

Serious philosophical differences exist on early education policy between the Republicans and Democrats. In general, Republicans believe in personal family responsibility for childcare.<sup>303</sup> They prefer limited federal government involvement and favor private and family solutions. Conservatives, including some red states, and the Supreme Court, have favored “privatization, deregulation . . . school choice”<sup>304</sup> and homeschooling.<sup>305</sup> Democrats, in contrast, generally argue for universal government-provided childcare for all.<sup>306</sup>

When the Senate and House of Representatives are controlled by different parties, division and stalemate often result, causing inaction on important social issues. While both parties believe that childcare should be more affordable and accessible and that workers’ pay should increase, they disagree on how to accomplish this.<sup>307</sup> During COVID, Congress passed the American Rescue Plan (ARP) which sent an additional \$15 billion to low-income families to pay

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302. This most likely would include (1) government involvement, (2) workforce participation (3) private vs public solutions, (4) family paid leave, and (5) affordability and access.

303. US policy often focuses on personal responsibility, in contrast to other western countries that offer more governmental support. *See Shurtz, supra* note 4.

304. Gomez-Velez, *supra* note 154, at 239–40, 242–43.

305. Clare Cain Miller, *Republicans and Democrats Agree Child Care Needs Help. Here’s How They Differ*, N.Y. TIMES (Apr. 8, 2022), <https://www.nytimes.com/2022/04/08/upshot/child-care-republicans-democrats.html> [perma.cc/9WC4-FFJC].

306. Kirby Thomas West, *Learning to Change: New Takes on Education Reform*. 22 FEDERALIST SOC’Y REV. 202, 202 (2021) (The “nation’s lackluster test scores, underperforming schools, and persistent racial and socio-economic achievement gaps have long been symptoms of a system in need of reform.”).

307. *See* Miller, *supra* note 306.

for childcare via the child tax credit.<sup>308</sup> However, recently Congress was deadlocked on President Biden's initiatives for universal preschool education.<sup>309</sup> Much of the debate focused on the price tag, as the estimate was \$100 billion for the first year alone.<sup>310</sup>

The notion of public preschool education as a common good is not universally accepted. This assault began in the 1980's under the Reagan administration and has continued to gain momentum.<sup>311</sup> The No Child Left Behind's punitive accountability measures under the George W. Bush administration and the Race to the Top program's "common core standards" of President Obama were met with backlash.<sup>312</sup> The recent trend of deregulated charter schools and voucher programs has shifted public dollars into the hands of private actors.<sup>313</sup> Charter schools began as an idea grounded in the development of "laboratories of innovation" but have devolved into a movement aimed at deregulating schools funded with public dollars.<sup>314</sup> Now, objection exists to Critical Race Theory curriculum, LGBTQIA+ education, and a general fear of indoctrination and progressivism in K-12 education.<sup>315</sup> As the recall vote of three school

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308. *American Rescue Plan (ARP) Act Child Care Stabilization Funds Frequently Asked Questions (FAQs)*, U.S. DEPT. OF HEALTH & HUM. SERVS. (2021), [https://acf.hhs.gov/sites/default/files/documents/occ/American\\_Rescue\\_Plan\\_Act%20Child\\_Care\\_Stabilization\\_Funds\\_FAQs.pdf](https://acf.hhs.gov/sites/default/files/documents/occ/American_Rescue_Plan_Act%20Child_Care_Stabilization_Funds_FAQs.pdf) [perma.cc/9NWS-QTBW] ("The American Rescue Plan (ARP) Act (Public Law 117-2) included \$39 billion in new child care funding, including \$24 billion for child care stabilization grants to providers and \$15 billion in supplemental Child Care and Development Fund (CCDF) Discretionary Funds.").

309. Everything from immigration reform to family support to climate change mitigation. See Marc Jacob, Baron Lee & Gabriele Gratton, *Is a Gridlocked Congress Causing More Polarization?* PROMARKET (June 26, 2024), <https://www.promarket.org/2024/06/26/is-a-gridlocked-congress-causing-more-polarization> [perma.cc/V2QB-HQHF].

310. Amanda Guarino, *FAQ on the Child Care and Preschool Provisions in the Build Back Better Act*, FIVE YEARS FUND (Dec. 15, 2021), <https://www.fyf.org/faq-on-the-child-care-and-preschool-provisions-in-the-build-back-better-act> [perma.cc/ZX8Y-4JHC] (as \$100 billion was the first year estimate—to continue every year).

311. Gomez-Velez, *supra* note 154.

312. Elaine Weiss, *Mismatches in Race to the Top Limit Educational Improvement*, ECONOMIC POLICY INSTITUTE (Sept. 12, 2013), <https://www.epi.org/publication/race-to-the-top-goals> [perma.cc/QE9G-GA6Q].

313. *Id.*

314. *Id.*

315. Both Republican and Democratic parents opposed school closures during the pandemic (Chicago and San Francisco had similar cases); See Kate Taylor, *In San Francisco, Virus Is Contained But Schools Are Still Closed*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/01/us/san-francisco-coronavirus-schools-reopening.html> [perma.cc/NKA3-7DV6]; Noah Rothman, *Covid School Closures Backfired on Democrats in a Big Way*, NSNBC (Nov.

board members in San Francisco illustrates, even politically liberal parents want the focus to be on quality education and not political correctness.<sup>316</sup> School closures and the shift to virtual learning during the COVID-19 pandemic heightened awareness of the inefficiencies and inequalities that plague American education.

When many schools closed during the pandemic, a shift occurred from public to church schools and from public schools to home schools. Church schools often remained open during COVID-19 and Catholic schools, in particular, staged a surprising enrollment growth. The Catholic Education Association reported a 3.8 percent increase from fall 2020 to fall 2021 in overall enrollments.<sup>317</sup> That is the highest one-year increase and the first enrollment upswing in two decades.<sup>318</sup> In contrast, public school enrollments tumbled 3 percent during COVID-19 and did not rebound.<sup>319</sup> In 2023, the Urban Institute found that most of the 600 districts it analyzed from across the country had a second year of enrollment decline.<sup>320</sup> One of the reasons has been the increase in homeschooling.<sup>321</sup> For example, my

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15, 2021), <https://www.msnbc.com/opinion/covid-school-closures-backfired-democrats-big-way-n1283734> [perma.cc/HZG7-P2QK].

316. Similarly, in the 2021 Virginia governor's race, suburban parents elected a conservative governor who opposed the teaching of critical race theory in public schools. See David Smith, *How Did Republicans Turn Critical Race Theory Into a Winning Electoral Issue?*, THE GUARDIAN (Nov. 3, 2021), <https://www.theguardian.com/us-news/2021/nov/03/republicans-critical-race-theory-winning-electoral-issue> [perma.cc/GAK6-GJPF].

317. Lauren Camera, *Catholic Schools Find Silver Lining in Pandemic: First Enrollment Increase in Two Decades*, U.S. NEWS & WORLD REPORT (Feb. 16, 2022), <https://www.usnews.com/news/education-news/articles/2022-02-16/catholic-schools-find-silver-lining-in-pandemic-first-enrollment-increase-in-two-decades> [perma.cc/4KJV-7UT5].

318. *Id.*

319. *Public School Enrollment*, NATIONAL CENTER FOR EDUCATION STATISTICS (May 2024), <https://nces.ed.gov/programs/coe/indicator/cga/public-school-enrollment> [perma.cc/YD4W-5SEP]; see also Laura Bornfreund, et al., *The State of Children, Families & Educators in the Second Year of COVID: Challenges & Solutions*, NEW AMERICA, <https://www.newamerica.org/education-policy/reports/toolkit-for-using-policy-to-enable-effective-and-supportive-transitions-for-children-families-educators/4-the-state-of-children-families-educators-in-the-second-year-of-covid-challenges-solutions> [perma.cc/P8CT-RF75].

320. Thomas S. Dee, *Where the Kids Went: Nonpublic Schooling and Demographic Chance During the Pandemic Exodus from Public Schools*, URBAN INSTITUTE (Feb. 2023), [https://www.urban.org/sites/default/files/2023-02/Where%20the%20Kids%20Went-%20Nonpublic%20Schooling%20and%20Demographic%20Change%20during%20the%20Pandemic%20Exodus%20from%20Public%20Schools\\_0.pdf](https://www.urban.org/sites/default/files/2023-02/Where%20the%20Kids%20Went-%20Nonpublic%20Schooling%20and%20Demographic%20Change%20during%20the%20Pandemic%20Exodus%20from%20Public%20Schools_0.pdf) [/perma.cc/UL8J-FW52].

321. Ahmed Mohamed, *The Impact of "Learning at Home" on Educational Outcomes*, OREGON STATE UNIVERSITY (Sept. 29, 2023), <https://blogs.oregonstate.edu>.

“blue” state of Oregon, saw a 40 percent increase in homeschooling since the pandemic.<sup>322</sup>

## 2. Feminist Theory: Equality vs Difference

Two major schools of feminist jurisprudential thought exist—“equality” theory and “difference theory.”<sup>323</sup> “Equality” or “liberal” feminist theory “descends from the lineage of classic liberalism . . . with the belief that a woman’s quality of experience, social station and economic well-being are determined in proportion to her personal autonomy and development of individual identity.”<sup>324</sup> “Equality” theorists advocate for the equal treatment of the application of rules between males and females, and favor policies that encourage women’s market work. The theory is that keeping women in the workforce is better for the economy and will better provide them with a social safety net. Thus, women are better off economically if a significant other or spouse dies or they are separated or divorced.<sup>325</sup> Furthermore, equality theorists believe that women do not “identity” or want to be associated with traditional gender roles, but with their market roles. A 2021 New York Times survey showed that women who work do not want to be associated with their gendered role as homemaker and when forced to do so in the pandemic, had a great sense of loss.<sup>326</sup>

In contrast, difference or cultural feminist theory focuses on valuing care and giving women choices to stay at home. They view women’s inequality as a “result of the lack of recognition of the differences in women’s make-up and life realities, reflected in both the everyday behaviors of men and in the arenas of law and public policy which also are largely oblivious to the experiences and sensibilities of women.”<sup>327</sup> The theory is that supporting women’s choice to stay at home would be better for kids and for society.

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edu/edunews/2023/09/29/the-impact-of-learning-at-home-on-educational-outcomes [perma.cc/A8NJ-K65V].

322. Rolando Hernandez, *Why Some Oregon Parents are Making the Switch to Homeschool Their Kids*, OREGON PUBLIC BROADCASTING (Feb. 6, 2023), <https://www.opb.org/article/2023/01/27/why-some-oregon-parents-are-making-the-switch-to-homeschool-their-kids> [perma.cc/28RH-84PW] (study by the Oregon Capital Chronicle).

323. See Shurtz, *supra* note 92, at 486–88 n.7 (describing liberal, cultural, radical, and socialist/Marxist schools of feminist thought); see Nancy E. Shurtz, *Critical Tax Theory: Still Not Taken Seriously*, 76 U. N.C. L. REV. 1837 (1998) (arguing that feminist tax literature has not been accorded enough respect).

324. See Shurtz, *supra* note 92, at 486–88 n. 7.

325. See Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUMBIA L. REV. 2001 (1996).

326. Miller, *supra* note 32.

327. Shurtz, *supra* note 92 at n. 7.

These theorists advocate for increased assistance to caregivers to enable women to choose between caregiving at home or working in the market. In contrast to the N.Y. Times article, a 2015 Gallup poll shows that 56 percent of mothers prefer to stay at home.<sup>328</sup> The arguments in favor of supporting caregiving are the following: (1) caregiving is work and should not be treated separately from market work, (2) caregiving (and reproduction) should be valued as both of those activities are of great social importance, (3) women should have choices and should be supported in these choices. These theorists argue that women should not suffer economic harm as a result of their preferences.<sup>329</sup>

### 3. The Child's Perspective

Studies show that children prefer the care of their family.<sup>330</sup> Leading child policy experts posit that a child can learn in any environment if they are taught by a caring loving adult present.<sup>331</sup> Thus, learning does not depend on where but who gives the care. Analysts have suggested that early childhood experiences can have a profound impact on health, learning, and future financial success of the child, and, in addition, can have a significant positive effect on society as a whole.<sup>332</sup>

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328. Lydia Saad, *Children a Key Factor in Women's Desire to Work Outside the Home*, GALLUP (Oct. 7, 2015), <https://news.gallup.com/poll/186050/children-key-factor-women-desire-work-outside-home.aspx> [perma.cc/Y94W-2BUG]; Darlena Cunha, *I'm One of the 56% of American Mothers Who 'Prefer' to Stay Home*, TIME (Oct. 9, 2015) <https://time.com/4068559/gallup-poll-stay-at-home-mothers> [perma.cc/9TEG-366W] (poll shows that “more than half of women in the U.S. with children under the age of 18, 56 percent, would prefer to stay home over going to work, and 39 percent of women without children under the age of 18 said they wanted the role of homemaker”).

329. In fact, some cultural feminists advocate for family allowances that would assist all caregivers without regard to marital or market work status. *Id.* See Alstott, *supra* note 327, at 2046.

330. See *supra* notes 93 [referring to kinship care] & 122–23 [referring to parent and child preferences].

331. Haspel, *supra* note 14, at 37 (“children can learn anywhere there is a responsive, loving adult and something to pique their interest”).

332. James J. Heckman, *Invest in Early Childhood Development: Reduce Deficits, Strengthen the Economy*, THE HECKMAN EQUATION (Dec. 7, 2012), <https://heckmanequation.org/resource/invest-in-early-childhood-development-reduce-deficits-strengthen-the-economy> [perma.cc/BA7N-K27B] (“Adverse early environments create deficits in skills and abilities that drive down productivity and increase social costs—thereby adding to financial deficits borne by the public.”).

a. *Health and Learning*

Children who are poorly nourished and nurtured, or those who do not receive early stimulation, are likely to learn less in school. Studies show that the most critical brain-growth period of a child is during their first five years of a child's life.<sup>333</sup> When schools closed down during the pandemic so did the meal, health, and other support programs attached to these programs.<sup>334</sup> Communities scrambled to implement alternative programs. In one pre-COVID study, "less than two in three children were arriving at Kindergarten with the literacy, numeracy, social, and behavioral foundations that set them up for success."<sup>335</sup> Studies also show that as adults, pre-K participants will experience fewer episodes of depression and reduced rates of smoking.<sup>336</sup> This will increase the life expectancy of these children as well as reduce public health care system expenditures.

b. *Economic Considerations*

Economic studies show that those who have early education intervention earn more as adults. For example, one 20-year study, showed that disadvantaged young children who were exposed to high-quality early stimulation interventions as infants and toddlers

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333. *The First Five Years & Brain Development*, FIRST THINGS FIRST, <https://www.firstthingsfirst.org/early-childhood-matters/brain-development> [perma.cc/78SY-49KD] (last visited Apr. 5, 2025).

334. The National Report Card (NRC) came out in 2022 & 2023 and documented the learning failures to both third and eighth graders. Although no comparable report has yet been made on pre-Kindergarten programs, the results most likely are similar. See *The NAEP Long-Term Trend Assessment Results for Reading & Mathematics Are Here! NAEP*, <https://nces.ed.gov/nationsreportcard>. See Eliza W. Kinsey, et. al, *School Closures During COVID-19: Opportunities for Innovation in Meal Service*, AM J. PUBLIC HEALTH (Nov. 2020), <https://pmc.ncbi.nlm.nih.gov/articles/PMC7542295/#:~:text=TABLE%202-&text=Note.,implementation%20improved%20school%20meal%20services> ("By the week of March 23, 2020, all states had mandated statewide school closures as a result of the pandemic, and the number of weekly missed breakfasts and lunches served at school reached a peak of approximately 169.6 million; this weekly estimate remained steady through the final week of April.")

335. Haspel, *supra* note 14, at 37.

336. Robert Lynch, *A Cost-Benefit Analysis of The American Families Plan's Proposed Investment in a Nation's Preschool Program*, WASHINGTON CENTER (Sept. 22, 2021), <https://equitablegrowth.org/a-cost-benefit-analysis-of-the-american-families-plans-proposed-investment-in-a-nationwide-public-preschool-program> [perma.cc/Z784-756H].

See *Economic Benefits of Early Childhood Development Investments*, EARLY CHILDHOOD PEACE CONSORTIUM, <https://eccpeace.org/work-content/economic-benefits-early-childhood-development-investments> [perma.cc/MP8C-5VUJ] (last visited Apr. 13, 2025). [No reference to pre-kindergarten in source—see next sentence in text.]

earned up to 25 percent higher wages 20 years later as adults.<sup>337</sup> Indeed, studies of early childhood education show that these programs “can reduce educational and opportunity gaps between children from low and high-income families at kindergarten entry” and as adults “are more likely to be employed full-time, own a home, and have a savings account.”<sup>338</sup> Another study showed that by 2050, “the increase in post-tax compensation due to prekindergarten investment amounts to \$108.4 billion and results in an economy that is \$234 billion or 0.6 percent larger . . . than it otherwise would have been.”<sup>339</sup> “This averages to an increase in compensation of \$1,832 (in 2014 dollars) for each pre-K participant plus an increase in average compensation of \$1,202 (in 2014 dollars) for the guardians of each prekindergarten participant prior to taxes.”<sup>340</sup>

*c. Impact on Society*

Investment in high-quality childcare can also have significant implications for the greater society. Such investments could increase economic activity, reduce crime rates, and improve health outcomes. Children with quality care will contribute to the economy as a whole, as productive workers earning more than if they had not had this experience. They are also more likely to be good citizens with less criminal and other antisocial behaviors. Such investments in early childcare will inure to the quality of the lives of the children, their longevity, and thus to the society as a whole.

High-quality childcare can also benefit government budgets and thus taxpayers in two significant ways. First, higher tax revenues will flow into government coffers because of increasing taxes paid by participating children (and their parents). Second, governments can save on spending on Kindergarten through 12th-grade education as well as expenses of handling child welfare, criminal justice, and public health care. Studies show that governmental or taxpayer savings begin small but grow rapidly over time, eventually outstripping the costs.<sup>341</sup> When the pre-K participants who have

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337. Paul Gertler et al., *Effect of the Jamaica Early Childhood Stimulation Intervention on Labor Market Outcomes at Age 31* (World Bank Policy Group Health, Nutrition and Population Global Practice, Working Paper No. 9787, 2001) (examining labor market return to an early childhood stimulation intervention in Jamaica).

338. *Lifelong Gains*, First Five Years Fund, <https://www.ffyf.org/by-topic/lifelong-gains/>.

339. Robert Lynch & Kavya Vaghul, *The Benefits and Costs of Investing in Early Childhood Education*, WASHINGTON CENTER FOR ECONOMIC GROWTH (Dec. 2015), <https://equitablegrowth.org/wp-content/uploads/2015/12/early-childhood-ed-report-web.pdf> [perma.cc/72F6-PGJ3].

340. *Id.*

341. Lynch, *supra* note 336.

experienced high care quality enter the K-12 public school system, additional budget savings will begin to appear, as these children will be less likely to repeat a grade or need expensive special education services.<sup>342</sup> Further budget savings will begin to be realized as lower juvenile crime rates will require less expenditure on the juvenile justice system, as well as the adult criminal justice system.

B. *The Tax System Can Deliver Effective & Fair Subsidies for Childcare*

According to a 2023 poll, most Americans (both Democrats and Republicans) support some form of preschool or childcare program, by a margin of 2 to 1.<sup>343</sup> However, wide disagreement exists as to the best solution to the childcare crisis.<sup>344</sup> COVID closures have

342. Lynch & Vaghul, *supra* note 339, at 48. Some of these reduced costs are savings to the government in the form of lower criminal justice system costs and public health care spending. (By 2050, these savings to individuals from less crime and better health amount to \$114.7 billion. Including the savings to the government, the savings to society from reductions in criminality and better health due to investments in a universal pre-K program total \$141.5 billion.”). These savings to the government would total about \$26.7 billion in 2050.

343. See *The First Five Things To Know About: A New Poll Showing Voter Support For Child Care Funding*, FIRST FIVE YEARS FUND (July 16, 2023), <https://www.ffyf.org/resources/2023/07/july23poll> (74 percent, including 66 percent of Republicans and 81 percent of Democrats, believe the child tax credit should be increased).

344. See, Rachel Cohen, *Fixing the Child Care Crisis Starts by Understanding it*. VOX (April 17, 2023), <https://www.vox.com/policy/2023/4/17/23667770/child-care-crisis-prek-family-immigration> (“Is the crisis the inability of families to afford child care? The struggle to land spots in licensed centers, or find care close to home or work? Is it a lack of support for parents who want to stay home with their kids, or the failure to provide support to other informal caregivers? Is it the inability to attract child care workers in the competitive labor market? Is it inequitable enrichment opportunities for children, or the challenges parents, particularly mothers, face when trying to work? Is it all of the above, or only some?”)

Childcare was also a question at the June, 2024 Presidential Debate, but was not addressed adequately.

*Moderator:* Let’s turn to the cost of childcare, which many American families struggle to afford. President Trump, both you and President Biden have tried to address this issue, but the average cost of childcare in this country has risen to more than \$11,000 a year per child. For many families, the cost of childcare for two children is more than their rent. In your second term, what would you do to make childcare more affordable?

*Trump:* Just to go back . . . (Remainder of answer does not address childcare.)

*Biden:* . . . The idea that he is . . . doing anything to deal with childcare. He did . . . virtually nothing for childcare. We should significantly increase the childcare tax credit; we should significantly

illustrated that one model, such as universal preschool, may not be the smartest choice.<sup>345</sup> This Article advocates that the Code may provide an answer. The tax system could be an effective avenue of policy redress on these important social initiatives, help support choice, and provide flexibility in case of a future pandemic. Because tax provisions are more “hidden” from direct budgetary scrutiny, they have mustered bipartisan political support in the past and could in the future.<sup>346</sup>

The TCJA is scheduled to expire at the end of 2025, possibly resulting in increased taxes for many people and families. Congress will be forced to extend its provisions or revert to the pre-TCJA law of dependency exemptions and limited childcare credits. Under prior law, a taxpayer was entitled to deduct a \$2,000 (adjusted for inflation) personal exemption for him/herself and for each of qualifying dependents (qualifying children or qualifying relatives) of the taxpayer.<sup>347</sup> Prior to the TCJA, a taxpayer could claim only a \$1,000 per child credit with income limitations starting at \$75,000 for single taxpayers and \$110,000 for married taxpayers.<sup>348</sup> Although

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increase the availability of women and men for single parents to be able to go back to work and we should encourage businesses to . . . have childcare.

*Presidential Debate in Atlanta, Georgia*, THE AMERICAN PRESIDENCY PROJECT (June 27, 2024), <https://www.presidency.ucsb.edu/documents/presidential-debate-atlanta-georgia> [perma.cc/P2U6-X42F].

345. See Harbach, *supra* note 63, at 1443 (“simply making public schooling available to all children does not come close to ensuring equal educational opportunities, much less equitable ones.”).

346. Republicans prefer-tax-based solutions to direct government funding. See *How Republican Approaches to Social Spending Increase Income Inequality in the United States* (Nov. 4, 2015), <https://scholars.org/contribution/how-republican-approaches-social-spending-increase-income-inequality-united-states> (The solution for many Republicans has been to create and expand tax subsidies (also called tax expenditures) for social spending by businesses, individuals, and other private interests, while cutting back on direct public spending.”) They argue that families should be allowed to make their own childcare choices without relying on government-run programs or even want to encourage women to stay at home. See Averi Pakuilis, *How Project 2025 Would Limit Family Choice in Child Care*, FIRST FOCUS ON CHILDREN (Oct. 24, 2024) (this blueprint for the Republican agenda advocates eliminating Head Start and “claims that it wants to increase choice for parents, but would do this by eliminating center-based child care options and instead compensating parents (code: mothers) for staying out of the workforce to care for their children or finding family members to care for children.”

347. 26 U.S.C. §§ 151(d)(1) (for \$2,000 amount), 152 (A deduction is a subtraction and an upside-down benefit for the wealthy. In contrast, a credit is fairer to those with lower incomes, and when refundable, can serve a welfare function.).

348. *Id.* § 24(a) (for \$1,000 rule), 24(b)(2) (for threshold amounts).

this credit was partially refundable it did not provide the amount or flexibility of subsequent law.<sup>349</sup> It is time for Congress to make the current tax code provision more effective and fair and to add new tax initiatives to help parents who care for children in their home, parents who work in the market, and low-income caregivers who perform essential work.

C. *The Tax System Provides Meager Benefits for the Families with Preschool Children*

In general, meager tax benefits are provided for the family with preschool children. The Tax Cuts and Jobs Act (TCJA) of 2017 expanded the per child credit from \$1,000 to \$2,000 for families with adjusted gross incomes of up to \$400,000.<sup>350</sup> The TCJA also instituted a meager \$500 dependent credit and it, along with the expanded child credit, will sunset at the end of 2025.<sup>351</sup> The American Rescue Plan Act (ARPA) of 2021 increased the child credit amount to \$3,600 for children under age 6 and \$3,000 for children aged 6–17, made the credit fully refundable to children and families with low income, included 17 year olds for the first time, and allowed half of the credit through advance monthly payments.<sup>352</sup> However, this expansion expired and has not been extended.<sup>353</sup> More needs to be done to support parents with young children.

1. *The Additional Child Credit for Children Under Six Should Be Reinstated*

The per child credit was first passed in 1997 and has remained a staple in the Code ever since.<sup>354</sup> Congress has expanded the child tax credit twice over the last ten years—once in the TCJA of

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349. David Wessel, *What is the Child Tax Credit? And How Much of it is Refundable*, BROOKINGS (Feb. 1, 2024), <https://www.brookings.edu/articles/what-is-the-child-tax-credit-and-how-much-of-it-is-refundable> [perma.cc/P4ZK-KNZQ].

350. 26 U.S.C. § 24(h).

351. *Id.* § 24(h)(4)(A) (for \$500 dependent credit), (1) (for Dec. 31, 2025 end date).

352. *Policy Basics: The Child Tax Credit*, CENTER ON BUDGET AND POLICY PRIORITIES (Dec. 7, 2022), <https://www.cbpp.org/research/policy-basics-the-child-tax-credit> [perma.cc/D5NJ-HYMY].

353. *How the Expanded 2021 Child Tax Credit Can Help Your Family*, INTERNAL REVENUE SERVICE (June 14, 2021), <https://www.irs.gov/newsroom/how-the-expanded-2021-child-tax-credit-can-help-your-family> [perma.cc/2V7E-U27M].

354. Nancy E. Shurtz, *The Top Ten Twisted Tax Travesties in the Taxpayer Relief Act of 1997*, 76 TAX NOTES 1777 (Sept. 29, 1997).

2017<sup>355</sup> and then again in ARPA of 2021.<sup>356</sup> This credit's purpose is to alleviate the economic burden associated with raising children<sup>357</sup> including the costs of food, clothing, rent, utility bills, and childcare. The credit is available regardless of whether the parent works or is a stay-at-home mom or dad.<sup>358</sup> It has had a significant impact on the average household's tax burden by reducing the amount of taxes paid and even granting a refund to low-income families.

With the TCJA, Congress raised the child tax credit with the first \$1,700 refundable.<sup>359</sup> In order to qualify for the child tax credit, the child had to be 16 or younger at the end of the year, and be a "son, daughter, stepchild, eligible foster child, brother, sister, stepbrother, stepsister, half-brother, half-sister, or a descendant of one of these (for example, a grandchild, niece or nephew)."<sup>360</sup> The child must have lived with the taxpayer for more than 6 months, be claimed as a dependent on the taxpayer's tax return, and be a U.S. citizen, U.S. national or U.S. resident alien.<sup>361</sup> Families are able to claim this tax credit of \$2,000 per qualifying child, with no cap on the amount of children.<sup>362</sup> If the taxpayer meets these requirements and their yearly adjusted gross income is less than \$200,000 when single or head of household, or \$400,000 when filing jointly, then the taxpayer qualifies for the full child tax credit.<sup>363</sup> The credit is a dollar-for-dollar reduction in taxes for the lower- and middle-income groups, and poor taxpayers can claim a partial refund. Because the phase-out begins at \$400,000 for married joint filers and \$200,000 for single filers, this credit benefits upper-middle-income filers. However, it discriminates against upper-income heads of household as they are treated as single taxpayers, even though they maintain a household for dependents. However, the provision significantly benefits middle-class and poor taxpayers. Studies showed that in 2018

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355. *How Did the Child Tax Credit Change Over Time?*, USA FACTS (Mar. 21, 2023), <https://usafacts.org/articles/who-does-the-child-tax-credit-benefit-the-most> [perma.cc/YA96-T8J9].

356. *American Rescue Plan*, THE WHITE HOUSE, <https://bidenwhitehouse.archives.gov/wp-content/uploads/2021/03/American-Rescue-Plan-Fact-Sheet.pdf> [perma.cc/2V37-QT8N].

357. *Id.*

358. *Policy Basics: The Child Tax Credit*, *supra* note 352.

359. David Floyd, *What is the Tax Cuts and Jobs Act (TCJA)?*, INVESTOPEDIA (Jan. 31, 2025), <https://www.investopedia.com/taxes/trumps-tax-reform-plan-explained> [perma.cc/T7MF-7NAE].

360. *Child Tax Credit*, INTERNAL REVENUE SERVICE (Jan. 21, 2025), <https://www.irs.gov/credits-deductions/individuals/child-tax-credit> [perma.cc/5WEQ-ZVFR].

361. *Id.*

362. 26 U.S.C. § 24(a) (as to "each qualifying child").

363. *Id.* 26 U.S.C. § 24(b)(1).

the credit “lifted 4.3 million people—including 2.3 million children” out of poverty.<sup>364</sup>

ARPA of 2021 expanded the per child credit, but just temporarily for the taxable year 2021.<sup>365</sup> The expansion was a response to the pandemic and was intended to benefit parents burdened by closed schools and lost jobs.<sup>366</sup> The ARPA made the child tax credit fully refundable and increased it from \$2,000 per child to \$3,600 per child under six years old and \$3,000 for children between ages six and seventeen years old.<sup>367</sup> From July 2021 to December 2021, half of the child tax credit was made available through advance monthly payments on the 15<sup>th</sup> of each month, and parents would receive the remaining credit at tax filing time.<sup>368</sup> Unlike the TCJA, the ARPA included all families, even immigrants.<sup>369</sup> Like the TCJA, ARPA reduced child poverty. It halved the child poverty rate to a low of 5.2 percent.<sup>370</sup> African American child poverty was reduced by 52 percent, Hispanic child poverty by 43 percent, Native American child poverty by 51 percent, and it significantly reduced White and Asian child poverty.<sup>371</sup> Additionally, 9 million children in rural areas and

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364. *Policy Basics: The Child Tax Credit*, Center on Budget & Policy Priorities, <https://www.cbpp.org/research/policy-basics-the-child-tax-credit> “it lifted approximately 4.3 million people above the poverty line in 2018, including about 2.3 million children, and lessened poverty for another 12 million people, including 5.8 million children.”)

365. *Child Tax Overview*, NCSL (Nov. 22, 2024), <https://www.ncsl.org/human-services/child-tax-credit-overview#:~:text=The%20act%20is%20temporary%20and,child%20up%20to%20age%2017>.

366. See Kris Cox, Samantha Jacoby & Chuck Marr, *Stimulus Payments, Child Tax Credit Expansion Were Critical Part of Successful COVID-19 Response*, CENTER ON BUDGET & POLICY PRIORITIES (June 22, 2022), <https://www.cbpp.org/research/federal-tax/stimulus-payments-child-tax-credit-expansion-were-critical-parts-of-successful#:~:text=Stimulus%20Payments%2C%20Child%20Tax%20Credit,on%20Budget%20and%20Policy%20Priorities>.

367. *Id.* The ARPA also increased the earned income tax credit from \$540 to \$1,500 and increased and expanded the child and dependent care tax credit, and have positively affected American citizens.

368. Erica York & Michael Hartt, *Lawmakers Envision Different Paths for the Child Tax Credit*, TAX FOUNDATION (Aug. 15, 2023), <https://taxfoundation.org/blog/child-tax-credit-reform-debate> [perma.cc/6TK9-V4JB].

369. See *American Rescue Plan*, THE WHITE HOUSE, <https://bidenwhitehouse.archives.gov/american-rescue-plan> [perma.cc/ML6E-CPAZ].

370. *The American Rescue Plan (ARP): Top 15 Highlights from 2 Years of Recovery*, THE WHITE HOUSE, (March 10, 2023), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/03/10/the-american-rescue-plan-arp-top-15-highlights-from-2-years-of-recovery> [perma.cc/N33M-76KK].

371. *Id.*

5 million children in veteran and active-duty military families also benefited from the ARPA provisions.<sup>372</sup>

The surge in child poverty is clear, as a big difference exists in the early statistics and the current 2023 child poverty rate of 16 percent.<sup>373</sup> Children need to have a stable and secure household, and providing these credits has clearly represented a step in the right direction to help alleviate child poverty. When children are raised in poverty, they are more likely to experience poverty as adults.<sup>374</sup> When children are nurtured and supported, and when they are provided with quality childcare, they are more likely to become engaged citizens who are educated and healthy.<sup>375</sup> It is imperative that the government recognizes that children are a public good, as their well-being impacts society collectively. Child welfare should not be seen as a private good in today's economic society, as it is evident that many families are struggling with basic necessities. It is thus critical for the government to implement solutions to effectively address and curb child poverty.<sup>376</sup> A solution is the return of the ARPA monthly advance payments and inclusion of all families, but with an expansion of the credit amount, perhaps setting up a three-tier approach: (1) a larger amount for preschool-aged children, (2) a less generous amount for children under ten years of age, and (3) a standard amount for those between ten and 18. This approach reflects the costs of childcare, as these tend to be more expensive the younger the child.

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372. *Id.*

373. *Id.*; see also Craig Benson & Alemayehu Bishaw, *Child Poverty Rates Dropped in 8 States While Poverty Rates for Older Populations Rose in 10 States*, (Sept. 12, 2024), <https://www.census.gov/library/stories/2024/09/acs-child-poverty.html> (“The child (defined as people under age 18) poverty rate was 16.0% in 2023, 3.5 percentage points higher than the overall rate.”); see discussion, *infra*, notes 196–209.

374. Priyanka Boghani, *How Poverty Can Follow Children into Adulthood*, PBS: FRONTLINE (Nov. 22, 2017), <https://www.pbs.org/wgbh/frontline/article/how-poverty-can-follow-children-into-adulthood> [perma.cc/LJ4J-JTS6] (when children are raised in poverty, they are more likely to experience poverty as adults).

375. Harbach, *supra* note at 63, at 466 n. 23 (“Research establishes that children who receive high-quality care are more likely to have better socio-economic and health outcomes, higher academic achievement, lower externalizing behavior, lower arrests, higher employment, and higher earnings.”).

376. See discussion, *infra* Part III(A)(3).

## 2. The Dependent Tax Credit Should Be Increased to Parallel The Child Credit

The TCJA eliminated the dependency exemption and adopted a new provision: the other dependent tax credit (ODC).<sup>377</sup> In general, credits are better than exemptions for poorer taxpayers, particularly if they are refundable.<sup>378</sup> However, the ODC is not refundable and is just a meager \$500 credit, unadjusted for inflation.<sup>379</sup> This compares to a dependency exemption of \$5,050 (in 2024)<sup>380</sup> and a current per child credit of \$2,000, which is refundable up to \$1,700.<sup>381</sup>

The ODC is allowed only if three dependency requirements are met. First, the dependent must be a “qualifying relative.” A qualifying relative includes any family member, as well as individuals that live in the taxpayer’s abode. A child who is not a “qualifying child” under the child credit provision may qualify under this provision if, for example, they are not a citizen or national. The second requirement to qualify for the dependent credit is the support test, which requires the taxpayer to provide “over half” of the support for the dependent. Support includes all out-of-pocket costs of medical care,<sup>382</sup> transportation,<sup>383</sup> lodging, clothes, meals, as well as the cost of childcare.<sup>384</sup> Like the head-of-household requirement, if the taxpayer pays the rent, utilities, repairs, insurance, mortgage, or real estate taxes, those costs could apply towards the one-half of the support requirement.<sup>385</sup> Like all other tax tests, this support test when applied to an immigrant child, for example, only values the actual expenses of childcare paid to third parties, and not the value of the practical, custodial, or other care services performed

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377. 26 U.S.C. § 24(h)(4)(A).

378. Lisa Phillipps, *Disability, Poverty, and the Income Tax: The Case for Refundable Credits*, 16 J.L. & Soc. Pol’y 77 (2001) (discussing how the tax system can serve as a poverty program). See generally Richard L. Kaplan, *Federal Tax Policy and Family-Provided Care for Older Adults*, 25 VA. TAX REV. 509, 551–59 (2005) (stating that deductions [and exemptions] favor the wealthy).

379. 26 U.S.C. § 24(h)(4)(A).

380. *Key 2024 Inflation-Adjusted Amounts for Individuals*, MILLER KAPLAN (Jan. 9, 2024) <https://www.millerkaplan.com/knowledge-center/key-2024-inflation-adjusted-tax-amounts-for-individuals> [perma.cc/W7ZP-BV2G].

381. 26 U.S.C. § 24(h).

382. All medical expenses including care provided by a paid caregiver count in this calculation.

383. Treas. Reg. § 1.152–1(a)(2)(i) (“food, shelter, clothing, medical, and dental care, education, and the like.”).

384. 26 U.S.C. § 152(d)(1)(C) (if support is the test, then providing food should count).

385. *Publication 501 (2024), Dependents, Standard Deduction, and Filing Information*, IRS (Dec. 19, 2024), <https://www.irs.gov/publications/p501> [perma.cc/MY35-AW2A].

by the unpaid caregivers.<sup>386</sup> The Seventh Circuit of the U.S. Court of Appeals specifically held in *Markarian v. Commissioner* that taxpayers may not count the value of their unpaid services in caring for their dependent relative because no out-of-pocket expenses are involved in such care.<sup>387</sup> Once the “support” is calculated, the “over one-half” test must be met.<sup>388</sup> The third and last requirement is the “gross income” test, which does not allow the dependent to make over the dependency exemption amount (which is \$5,050 in 2024). SSI benefits, welfare benefits or in-kind benefits, like school lunches, would not constitute gross income. Thus, this test is not difficult to meet for a child that does not meet the “qualifying child” definition. Although the ODC requirements are similar to those of head of household status, the benefit here is minuscule compared to the splitting of income from a joint return. Thus, some serious horizontal issues arise with this ODC as the child tax credit is so much greater. What is needed is a higher ODC that is more commensurate with the child tax credit. In fact, taking care of a dependent like a sick parent, can be more expensive than taking care of a child.

D. *The Tax System Provides Inadequate Benefits for the Family Caregiver Who Works in the Market*

The tax code provides two tax benefits directly to working parents with childcare responsibilities. The first is the child and dependent care tax credit (CDCTC) that is phased down, not out, for wealthy families, and is not refundable. The second is the employer- provided dependent care assistance program (DCAP) under Section 129, which is a fringe benefit plan not widely available to most workers. Although the care expenses for these provisions cannot be counted twice, it is possible in a family with two or more children or dependents for a taxpayer to use both tax provisions.<sup>389</sup> The tax code also provides a credit to an employer who, in limited circumstances, can grant parental leave for childcare. However, this provision expires at the end of 2025. Lastly, the code offers a form of income splitting through head of household status, but this only

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386. Thus, the maintenance and personal services or personal/custodial care qualify if the elder is chronically ill. In addition, practical care, including housekeeping tasks, lawn mowing, etc., qualifies. However, under both tests, the value of the services performed by unpaid relatives in providing elder care is not considered.

387. 352 F.2d 870, 872 (7th Cir. 1965).

388. 26 U.S.C. § 152(d)(3).

389. Cahn & McClain, *supra* note 48 (“As with child care, the COVID-19 pandemic highlighted the care needs of older Americans and the precarious condition of the undervalued workforce that provides elder care.”); *id.* at 50–56 (discussing “Elder Care”).

benefits single parents, not married couples. Much more support is needed for families who work.

1. The Child and Dependent Care Tax Credit Is Inadequate and Not Refundable

The child and dependent tax credit (CDCTC) is designed to help pay for the care of an eligible child and other dependents (qualifying persons) to enable the taxpayer to work.<sup>390</sup> This credit delivers limited benefits.<sup>391</sup> The size of the credit is variable and depends on the level of care expenses, the number of dependents, and the taxpayer's adjusted gross income.<sup>392</sup> It provides recovery of only a small portion of the actual care costs.<sup>393</sup> Furthermore, it is phased-down as taxpayer income increases.<sup>394</sup> In addition, the credit is not refundable. Thus, unlike the child credit, lower-income taxpayers with no taxable income will not receive any of the benefits of this provision.

The maximum amount of care expenses calculated in the CDCTC is \$3,000 for one dependent<sup>395</sup> and \$6,000 for two or more dependents.<sup>396</sup> These credits were expanded to \$4,000 and \$8,000

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390. *Topic No. 602, Child and Dependent Care Credit*, IRS (Jan. 2, 2025), <https://www.irs.gov/taxtopics/tc602> [perma.cc/3K5V-8VXN] (A qualifying person defined by the IRS includes a dependent who was under age 13 when care was provided, the taxpayer's spouse or dependent who was mentally or physically incapable of self care, and lived with the taxpayer for more than six months, or an individual who was mentally or physically incapable of self-care, lived with the taxpayer for more than six months, but is not a qualifying dependent under this definition.)

391. 26 U.S.C. §§ 21, 129. *See also Publication 503 (2024), Child and Dependent Care Expenses*, IRS (Jan. 6, 2025), <https://www.irs.gov/publications/p503/ar02.html> [perma.cc/3E27-S3YA]. Sections 129 and 21 share a common goal of providing a tax benefit for taxpayers who incur expenses for the care of dependents seniors so that the taxpayer can work. They also share some common definitions (depend care assistance) and limitations (earn income limitation). Both provide that the exclusion or credit is limited to the earned income of the lesser-earning spouse. 26 U.S.C. §§ 21(d)(1), 129(b)(1)(B).

392. The amount could be \$6,000 in the case of two dependents. *Id.* § 21(b)(1). Even if a parent or relative does not qualify as "dependent" for the dependent tax credit (because their income exceeds the exemption amount), he or she can still be declared dependent for purposes of this provision.

393. Shannon Weeks McCormack, *Caregivers and Tax Reform: Before and After Snapshots*, 40 VA. TAX REV. 53, 56 n.10 (2020).

394. 26 U.S.C. § 21(a)(2).

395. *Id.* § 21(c)(2).

396. *Id.* § 21(c). The employment-related expenses are limited to the earned income of the taxpayer, or the lesser-earning spouse in a joint return situation.

temporarily by the ARPA.<sup>397</sup> However, this is far less than needed to provide adequate childcare, as yearly expenses for childcare expenses average about \$10,000 per year.<sup>398</sup> Furthermore, since many care providers are “sandwiched,” it may be possible that they send their children to daycare at the same time as they send their parents to adult care.<sup>399</sup> A better formula would be to use the median cost of quality childcare, which is around \$10,000 per child,<sup>400</sup> or for two or more children, \$15,000. This amount should also be adjusted for inflation.<sup>401</sup>

The income level at which the phase-down begins should be increased to allow middle-class families or even the upper-income groups to qualify. After all, the per child credit goes up to \$200,000 of AGI for singles or heads of household and \$400,000 for married couples. A taxpayer’s adjusted gross income (AGI) will determine the amount of the CDCTC. For taxpayers with AGI of \$15,000 or less, the applicable percentage is 35 percent.<sup>402</sup> The applicable percentage drops by one percentage point for every increase of \$2,000 (or fraction thereof) over \$15,000 in AGI, but never falls below 20 percent.<sup>403</sup> Thus, the percentage is 20 percent for those taxpayers who make over \$43,000.<sup>404</sup> These income numbers should be adjusted upwards to reflect the middle income categories of taxpayers. Thus, the 35 percent should be closer to 50 percent for lower income groups or those making up to \$75,000. Then, the percentage could decrease for the upper-income groups, but should never be eliminated, as even wealthy taxpayers incur childcare expenses to work.

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397. See *American Rescue Plan*, *supra* notes 365 & 369.

398. See *supra* notes 139–149 and accompanying text. Also see, Haspel, *supra* 13, at 4 (“Nationally, the average for one child across all types of paid care . . . falls somewhere around \$9,500 a year, with many states’ averages significantly higher. For infants . . . the costs jump to \$15,000 or more.”).

399. Shurtz, *supra* note 12 (Adult Day Care section “e” at 179–82) (stating that those who care for the elderly must work and thus may have to deal with both childcare and elder care issues.)

400. Haspel, *supra* note 14, at 4 (stating around \$9,500 per child and \$15,000 for infants in 2019).

401. See McCormack, *supra* note 392, at 62 (“Congress failed for nearly three decades to even adjust these benefits for inflation, no less the rising cost of childcare.”)

402. 26 U.S.C. § 21(a)(2).

403. *Id.*

404. See Conor F. Boyle, Margot K. Crandall-Hollick & Brendan McDermott, *Child and Dependent Care Tax Benefits: How They Work and Who Receives Them*, CONGRESSIONAL RSCH. SERV. (Feb. 1, 2021), <https://crsreports.congress.gov/product/pdf/R/R44993> [perma.cc/3X8Y-8U28].

Unlike the EITC and the CTC, the CDCTC is not refundable.<sup>405</sup> Thus, it will only benefit taxpayers who have tax liability. Often childcare expenses exceed the wages of the taxpayer or represent a sizable part of the taxpayer's income.<sup>406</sup> Thus, the credit should be modified to allow refunds for childcare expenses up to a certain amount—say \$10,000—when the worker is making low wages. This is needed to encourage taxpayers to engage in paid market labor, but to also support quality childcare. It is important during COVID or other emergencies that essential workers have the flexibility to fund the childcare that is needed to enable them to work. Even if that care is expensive, the taxpayer should be able to be reimbursed for part of this expense.

At a time of concern for population growth, one would think Congress would support children, especially to enable parents to work. Recent census data reveals that our national fertility rate is the lowest in 300 years.<sup>407</sup> Unlike many historical enforced lockdowns, COVID did not result in a baby boom.<sup>408</sup> In fact, it is estimated that there were 300,000 fewer newborns in 2021 as a result of the pandemic.<sup>409</sup> Similar low fertility rates were also reported in Europe and other Western countries.<sup>410</sup> This acute “baby bust” only highlights the longer-developing trend of low birth rates. This trend will strain health and retirement systems that rely on a growing supply of younger working taxpayers to fund public safety nets. Young workers are needed to drive the general economy and foster innovation and growth. Congress's response to this crisis has been inadequate. Weak subsidies for families who work are partly to blame here.

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405. *Id.*

406. See discussion, *infra* Part I(B).

407. *U.S. Fertility Rate Drops to Another Historic Low*, CDC: NAT'L CTR/ FOR HEALTH STAT. (Apr. 25, 2024), [https://www.cdc.gov/nchs/pressroom/nchs\\_press\\_releases/2024/20240525.htm](https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2024/20240525.htm) [perma.cc/YUK2-5RZW].

408. Martha J. Bailey, Janet Currie, & Hannes Schwandt, *The COVID-19 Baby Bump in the United States*, PNAS (Aug. 15, 2023), <https://www.pnas.org/doi/10.1073/pnas.2222075120> [perma.cc/QUF8-UGQL].

409. Melissa S. Kearney & Phillip B. Levine, *We Expect 300,000 Fewer Births Than Usual This Year*, N.Y. TIMES (May 4, 2021), <https://www.nytimes.com/2021/03/04/opinion/coronavirus-baby-bust.html>.

410. Léo Pomar et al., *Impact of the First Wave of the COVID-19 Pandemic on Birth Rates in Europe: A Time Series Analysis in 24 Countries*, 37 HUM. REPRODUCTION 2921 (2022) (showing “a -14.1% decline in live births in January 2021”).

## 2. The Employer-Provided Dependent Assistance Is Largely Unavailable

Like the CDCTC, employers can provide a Section 129 dependent care assistance program (DCAP) which is an exclusion of \$5,000 of earned income to the working parent.<sup>411</sup> First, employers must make this pre-tax salary deduction available to the employee, and in 2024 only 43 percent of employers did so.<sup>412</sup> Second, like the CDCTC, the exclusion amount is too low and is unrepresentative of the high costs of childcare. Third, the exclusion amount does not coincide with the CDCTC amounts, causing complicated and time consuming calculations in some cases. Under the 129 plan, a taxpayer can exclude up to \$5,000 of earned income from gross income.<sup>413</sup> This is a slightly higher amount than the \$3,000 credit for one dependent under the dependent care credit. However, when parents have two children, the credit is better than Section 129, as that allows \$6,000 for two or more children. In this circumstance the taxpayer may have to apply for both.<sup>414</sup> However, a taxpayer cannot claim the benefits of both provisions for the same dollar of expense.<sup>415</sup> What is needed is more consistency between these two provisions, at least applied to the amounts per child.

Unlike the CDCTC, the \$5,000 129 plan exclusion is not phased-down for higher income taxpayers. Thus, the tax benefit of this provision is much better for the wealthier taxpayer than the dependent care credit, at least in the situation of one child.<sup>416</sup> In addition, the wealthy taxpayer is more likely to have an employer

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411. 26 U.S.C. § 129(2)(a). See also *Publication 503 (2024), Child and Dependent Care Expenses*, *supra* note 390. Sections 129 and 21 share a common goal of providing a tax benefit for taxpayers who incur expenses for the care of dependent seniors so that the taxpayer can work. They also share some common definitions (depend care assistance) and limitations (earn income limitation). Both provide that the exclusion or credit is limited to the earned income of the lesser-earning spouse. 26 U.S.C. § 21(d)(1), 129(b)(1)(B); see also *Compliance Overview: Dependent Care Assistance Programs*, SULLIVAN BENEFITS (2017), <https://www.sullivan-benefits.com/wp-content/uploads/Dependent-Care-Assistance-Programs-06.30.17.pdf> [perma.cc/N393-WBYH].

412. Margot L. Crandall-Hollick & Conor F. Boyle, *Child and Dependent Care Tax Benefits: How They Work and Who Receives Them*, CONGRESSIONAL RSCH. SERV. (Feb. 1, 2021), <https://sgp.fas.org/crs/misc/R44993.pdf> [perma.cc/QQ5D-66DB] (43 percent of employees have access to these programs).

413. See 26 U.S.C. § 129(a)(1).

414. When that credit was increased to \$6,000, Congress failed to similarly increase the dependent assistance exclusion.

415. 26 U.S.C. § 129(e)(7).

416. Remember that deductions, exemptions and exclusions are upside-down subsidies for the higher income groups. See Kaplan, *supra* note 377.

that has such a plan.<sup>417</sup> Such an upside-down subsidy makes little sense from both a horizontal and vertical equity point of view.<sup>418</sup> However, it does provide a benefit for childcare. Thus, more employers should be encouraged to establish this plan and the exclusion should be increased in amount and coordinated with the CDCTC.

### 3. The Employer Family Leave Credit Will Soon Expire

The TCJA of 2017 enacted a new provision<sup>419</sup> that allows eligible employers to claim a general business credit on a portion of qualified wages paid to qualifying employees during any period in which the employee took family or medical leave to care for a loved one.<sup>420</sup> This was extended through 2025 by the American Rescue Plan Act.<sup>421</sup> The credit for employers for family and medical leave (FML credit) could be a potentially transformative provision as it looks unlikely that the U.S. will adopt paid family leave any time soon.<sup>422</sup> However, this provision needs to be expanded as it is due to expire with the TCJA at the end of December 2025.<sup>423</sup>

For employers to be eligible for this credit, they do not have to be subject to the FMLA, but they must have a written policy in place that allows all full-time employees no less than two weeks of paid family and medical leave annually, and must allow all less-than-full-time qualifying employees a commensurate amount of leave on a pro rata basis.<sup>424</sup> To be an eligible employer, the employer must provide certain protections regardless of whether they would apply to the employer, specifically those relating to nondiscrimination and

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417. See Crandall-Hollick & Boyle, *supra* note 411.

418. Horizontal equity is not served because of the differential benefit to similarly situated taxpayers: vertical equity suffers because it confers greater benefits to wealthy taxpayers.

419. 26 U.S.C. § 45S.

420. “Family and medical leave” is defined as leave described under section 102(a)(1)(a)-(e) or 102(a)(3) of the Family and Medical Leave Act of 1993. See *id.* § 45S(e).

421. Lizet Ramirez, *IRC Section 45S Paid Leave Tax Credit Extended through 2025*, FOREWORD (Apr. 9, 2021), <https://www.sequoia.com/2021/04/irc-section-45s-paid-leave-tax-credit-extended-through-2025> [perma.cc/CZW8-TJGJ].

422. The FML credit adopts many of the standards of the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 et. seq., such as the requirements for the leave is caring for a child. This is in contrast to countries in the OECD. See *supra* note 7, at 13–15.

423. 26 U.S.C. § 45S(i). See *Section 45S Employer Credit for Paid Family and Medical Leave*, FAQs, IRS (Dec. 5, 2024), <https://www.irs.gov/newsroom/section-45s-employer-credit-for-paid-family-and-medical-leave-faqs> [perma.cc/9BRT-BH3Y].

424. 26 U.S.C. § 45S(c)(1).

discharge of employees asserting their rights under the law.<sup>425</sup> To be an eligible employee, the employee must have been paid (per the Fair Labor Standards Act), employed by the employer for at least one year, and had compensation totaling less than 60 percent of the compensation threshold for highly compensated employees (HCE) in the preceding year.<sup>426</sup> For 2024, the HCE threshold amount is \$150,000.<sup>427</sup> Thus, employers cannot receive credits for leave granted to employees earning more than \$93,000 (60% x \$150,000), although they can still grant these employees paid leave.

The FML credit allows a maximum of 12 weeks per year of family and medical leave.<sup>428</sup> The amount of the credit can vary from 12.5 percent to 25 percent of the amount of wages paid to the qualifying employee.<sup>429</sup> For wages to qualify, they must be 50 percent of the wages normally paid to the employee. The credit increases from the basic 12.5 percent amount by .25 percent (but not above the 25%) for each percentage point by which the rate of payment exceeds 50 percent of those wages. For example, suppose an employee earns \$52,000 annually (or \$1,000 per week) and receives only half of the normal salary (\$6,000) during their qualified leave period of 12 weeks, or half of their salary of \$12,000. The employer will receive a credit of \$750 or 12.5 percent under the new provision.

Prior to the pandemic, the U.S. “stood out as a laggard among comparable nations for its lack of paid leave.”<sup>430</sup> In the absence of such a national policy, many private employers stepped in with their own family leave policies, but in 2024 only 43 percent of them had them.<sup>431</sup> At the state level, thirteen states and the District of Columbia have enacted mandatory policies, while an additional eight states have voluntary systems that provide paid family leave through insurance.<sup>432</sup> However, in the absence of comprehensive

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425. *Id.* These are from the FMLA.

426. *Id.* § 45S(d)(2).

427. Kelley Wolf, *Employer Credit for Paid Family and Medical Leave*, CCH ANSWER CONNECT, <https://answerconnect.cch.com/topic/8ded94127d471000b6b90050568873fd02/employer-credit-for-paid-family-and-medical-leave> [perma.cc/5HE2-VEPJ] (last visited Apr. 16, 2025) (for 2025, the salary will be \$155,000).

428. 26 U.S.C. § 45S(b)(3).

429. *Id.* § 45S(a)(2).

430. Cahn & McClain, *supra* note 48, at 14.

431. Molly Weston Williamson, *The State of Paid Family and Medical Leave in the U.S. in 2024*, CTR. FOR AM. PROGRESS (Jan. 17, 2024), <https://www.americanprogress.org/article/the-state-of-paid-family-and-medical-leave-in-the-u-s-in-2024> [perma.cc/P3X8-2SQB] (According to the U.S. Bureau of Labor Statistics, 43 percent of the private sector workforce has access to short-term disability coverage through their employer.).

432. *State Paid Family Leave Laws Across the U.S.*, BIPARTISAN POL’Y CTR.

federal legislation, which is needed, this tax provision should be expanded to cover more employees and for longer lengths of time.<sup>433</sup> Such a modification might encourage employers (or even the government) to establish family leave policies.<sup>434</sup> Such expansions are necessary to protect parents' participation in the labor force, as well as to encourage quality care of children.

#### 4. The Head of Household Filing Status Offers Mixed Results

The head of household status provides a way to split income between working parents and children but has many flaws.<sup>435</sup> First,

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(Jan. 16, 2024), <https://bipartisanpolicy.org/explainer/state-paid-family-leave-laws-across-the-u-s> [perma.cc/BSN4-ENQC] (Those states include California, Colorado, Connecticut, Delaware, Maine, Maryland, Minnesota, Massachusetts, New Jersey, New York, Oregon, Rhode Island and Washington.)

433. See Diego Area Munhoz, *Congress Eyes Tax Code for Workplace Family-Friendly Benefits*, BLOOMBERG (Oct. 15, 2024), <https://news.bloomberglaw.com/daily-labor-report/congress-eyes-tax-code-for-workplace-family-friendly-benefits>.

434. Cahn & McClain, *supra* note 48 (The “business case” for paid leave is also strong: such leave increases employee “loyalty and morale, thus reducing employee turnover,” “allows smaller businesses to compete better with larger businesses,” and “heightens American businesses’ competitiveness in the global economy.”).

435. The head of household status is eliminated under the alternative minimum tax (AMT) as there are just two status categories: individual and joint. Under that provision, head of household taxpayers are considered single taxpayers, thus ignoring their role as care providers. Before the TCJA, all dependent exemptions were eliminated in the AMT calculation. Thus, the fact that the taxpayer supported multiple dependents did not reduce his or her AMT, as it did under the regular tax calculation. Under the TCJA, this status discrimination remains—head of households will continue to be treated as single taxpayers—but now the dependency exemption is eliminated and is replaced by a credit. The dependent tax credit can now offset AMT liability, just as all similar credits could do before the TCJA. 26 U.S.C. § 55(d). Thus, after the TCJA, the discrimination against higher-income taxpayer with dependents has lessened. In addition, the TCJA expands the threshold and phase-out limits, thus reducing the number of middle-income taxpayers likely to be subject to this tax. See Paul Neiffer, *Good News: Certain Credits Offset AMT*, AGRIBUSINESS BLOG (Jan. 13, 2013), <http://blogs.claconnect.com/agribusiness/good-news-certain-credits-offset-amt> [perma.cc/TM39-MRLE]. The TCJA temporarily increases both the exemption amount and the exemption amount phase-out thresholds for the individual AMT. The AMT exemption amount is increased to \$109,400 for married taxpayers filing jointly and \$70,300 for all other taxpayers, including heads of households. The phase-out thresholds are increased to \$1,000,000 for married taxpayers filing jointly and \$500,000 for all other taxpayers. 26 U.S.C. § 55(d)(4)(A)(i). A tax rate of 26 percent is applied on the first \$175,000 (adjusted for inflation in 2018 to \$191,100) and then at a rate of 28 percent for amounts over that amount. *Id.* § 55(b)(1)(A)(i), (c)(3)(B)(i).

the status only applies to single taxpayers, as married couples are ineligible.<sup>436</sup> Second, the status applies whether the taxpayer has one child or forty.<sup>437</sup> Third, the status does not provide the same income splitting benefit as joint returns in one-earner couple situations.<sup>438</sup>

Heads of households receive a larger federal standard deduction than either of the other filing status categories. Thus, for example in 2024, a head of household receives a \$21,900 deduction, compared to a \$14,600 for singles, and double that amount, or \$29,200 for married couples filing jointly.<sup>439</sup> This standard deduction provides an “upside-down” benefit to higher income taxpayers.<sup>440</sup> Qualifying for head of household status can lead to lower federal tax rates than single taxpayers or married couples filing separately.<sup>441</sup> However, the TCJA “rolled back the beneficial head of household rates,” so that the splitting benefit only arises for lower income taxpayers.<sup>442</sup>

To qualify as head of household, a taxpayer must pay more than half of the “maintenance costs of the home” for a “qualifying

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436. A taxpayer is unmarried if single at the end of the year, a widow or widower and the taxpayer’s spouse has died, is legally separated or divorced under a final court decree as of the end of the year, and married to an individual who was a nonresident alien during part of the year and the taxpayer did not elect to file jointly. 26 U.S.C. § 2(b).

437. Jacob Goldin & Zachary Liscow, *Beyond Head of Household: Rethinking the Taxation of Single Parents*, 71 TAX L. REV. 367 (2018).

438. In addition, to obtain the credit the taxpayer must fill out Form 14824 (Supporting Documents to Prove Filing Status) to prove filing status. This includes divorce decree or separation papers if the taxpayer is divorced. If taxpayer were married but living with spouse then extra paper work is required. See Form 14824, IRS (Oct. 2022), <https://www.irs.gov/pub/irs-pdf/f14824.pdf> [perma.cc/ZL8J-WXPX].

439. *IRS Provides Tax Inflation Adjustments for Tax Year 2024*, IRS (Nov. 9, 2023), <https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2024> [perma.cc/JLF2-7WF3].

440. A deduction is a subtraction and is worth more the higher one’s tax bracket. See McCormack, *supra* note 391, at 64, n.62. Under the TCJA, 26 U.S.C. § 63(c)(7) provides for a basic standard deduction of \$18,000 for a head of household (\$21,900 for 2024) versus a \$12,000 standard deduction for a single individual (\$14,000 for 2024) and a \$24,000 standard deduction for married filing jointly (\$29,200 for 2024). Both of these amounts are adjusted for inflation. *Id.* § 63(c)(7). See *Publication 505 (2025), Tax Withholding and Estimated Tax*, IRS (Mar. 18, 2025), <https://www.irs.gov/publications/p505> [perma.cc/SH55-5YTH].

441. See 26 U.S.C. § 1(j)(2)(B).

442. McCormack, *supra* note 392, at 56 & 63. (“The HH rates “broke” at points sandwiched between the UM and MFJ breaks . . . As a result, heads of household enjoyed some—though not all—of the income splitting benefits MFJ couples enjoyed.”“

person.”<sup>443</sup> A qualifying person can be a child under 19 years old (24 if a student) or a relative as no age limits apply, but a gross income test must be met.<sup>444</sup> This income limit, however, does not pose any problem in the case of a child.<sup>445</sup> Home maintenance expenses include rent, repairs, utilities, property insurance, mortgage interest and property taxes, as well as household expenditures on yard upkeep, housework, and food “consumed on the premises.”<sup>446</sup> However, maintenance costs do not include the cost of childcare, medical expenses, transportation, or clothing. The value of any childcare, whether practical, personal, or custodial, performed by the taxpayer is also not valued and counted.<sup>447</sup>

The head of household status is an important way of supporting childcare and should be retained. However, it should be modified to increase the splitting benefits for single parents. In some states, such as Oregon, the head of household can file jointly as if married.<sup>448</sup> In addition, those who are heads of household should not be treated as single for other provisions of the tax code, such as the per child credit, the earned income tax credit, or Alternative Minimum Tax (AMT).<sup>449</sup> All of those hurt upper-income single parents .

##### 5. A New “Essential Worker Credit” Should Be Instituted

Congress passed an “earned income deduction” in 1981<sup>450</sup> and many recent commentators have argued for a reinstatement of that deduction, a so-called “secondary-earner tax deduction.”<sup>451</sup> Such a deduction would alleviate the tax burden on married families with

443. 26 U.S.C. § 2(b)(1)(B).

444. *Id.*; see Lawrence Zelenak, *Children and Income Tax*, 49 TAX L. REV. 349 (1993); Goldin & Liscow, *supra* note 436.

445. See earlier discussion, *supra* note 379, regarding gross income limits. In 2024, that amount is \$5,050, an increase of \$4,700 from 2023.

446. *Id.*

447. See discussion of *Markarian* in *supra*, note 389. J.K. Lasser, *YOUR INCOME TAX GUIDE* (2024 Ed) at pp. 25–26.

448. See *2023 Oregon Income Tax: Form: OR-40 Instructions* 16, OREGON DEPT. OF REVENUE, [https://www.oregon.gov/dor/forms/FormsPubs/form-or-40-inst\\_101-040-1\\_2023.pdf](https://www.oregon.gov/dor/forms/FormsPubs/form-or-40-inst_101-040-1_2023.pdf) [perma.cc/LQT9-KYSK] (“Use Chart J if your filing status is married filing jointly, head of household or qualifying surviving spouse.”).

449. 26 U.S.C. § 55(d) (showing exemptions are for married and for singles, but no exemption for head of household).

450. Pamela B. Gann, *Earned Income Deduction: Congress’s 1981 Response to the Marriage Penalty*, 68 CORNELL L. REV. 468 (1983).

451. Melissa S. Kearney & Lesley J. Turner, *Giving Secondary Earners a Tax Break: A Proposal to Help Low- and Middle-Income Families*, HAMILTON PROJECT (Dec. 2013), [https://www.hamiltonproject.org/assets/legacy/files/downloads\\_and\\_links/THP\\_Kearney\\_DiscPaper\\_Final.pdf](https://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/THP_Kearney_DiscPaper_Final.pdf) [perma.cc/8NUE-7GED].

children where both parents work. Because of progressive rates, secondary earners are taxed at the top marginal rate of primary earners, thus making married filing status less beneficial than two singles (or two heads of household).<sup>452</sup> However, such a deduction would favor higher income taxpayers, as a deduction is an “upside-down” tax benefit.<sup>453</sup> In addition, such a provision would only apply to married couples.

This article suggests instead a credit for essential workers. Such a provision would benefit low-income workers who must physically go into work. Those who go to work incur extra commuting, parking, clothing, meal and other expenses as a result of not working from home. The pandemic has resulted in a lot of “workplace flexibility” for higher income and well educated taxpayers,<sup>454</sup> but many essential workers must still go into work.<sup>455</sup> Often these essential workers are paid inadequately and are not reimbursed for these extra employment-related expenses, none of which are deductible.<sup>456</sup> These workers also tend to be women,<sup>457</sup> and a large percentage are of color.<sup>458</sup> Currently, the code allows K-12 teachers to take an above-the-line deduction in the amount of \$300 for supplies provided out of their own pockets.<sup>459</sup> The same concept would apply here but a credit is fairer to low-income groups than a deduction.

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452. An unmarried couple with one child can have one partner file as single and the other as head of household. Similarly, an unmarried couple with two children could each file as head of household.

453. McCormack, *supra* note 392.

454. See Goldin, *supra* note 34.

455. *Id.* (“The more educated could work from home” during the pandemic and after the pandemic had more work flexibility.)

456. Generally these expenses are not reimbursed by the employer as they would constitute taxable compensation to the worker. Unreimbursed business expenses were denied under the TCJA under Section 167 which will sunset and return to 2 percent of adjusted gross income but only if the taxpayer itemizes. Only 10 percent of taxpayers itemized in 2024.

457. Goldin, *supra* note 34, at 5 (“Prior to the pandemic, and relative to men, women were disproportionately employed in establishments, such as restaurants, beauty salons, child daycare service, and home health care services, that shuttered in many states at the start of the pandemic.”). Of course, many essential workers, such as fireman, police officers, etc. are men.

458. *Id.* (During the pandemic “race and ethnicity mattered to women’s employment and labor force status independent of the age of their youngest child, occupation, and education.”).

459. 26 U.S.C. § 62(a)(2)(D) (the \$250 adjusted upward to \$300 in 2024). But studies show that teachers on average spend more than \$700 for these supplies. See Elizabeth Heubeck, *Most Teachers Spend Their Own Money for School Supplies. Should They?*, EDUC. WEEK (Aug. 25, 2023), <https://www.edweek.org/teaching-learning/most-teachers-spend-their-own-money-on-school-supplies-should-they/2023/08> [perma.cc/C6ZL-KMAL].

However, the amount of the credit should be commensurate with the work-related expenses of “essential” workers, such as \$5 per day of essential work. COVID is still prevalent, and a new pandemic could occur. Those who expose themselves to sickness in the pursuit of essential work should receive a tax subsidy.

E. *The Tax System Provides Inadequate Benefits to Low-Paid Caregivers*

In general, the tax benefits for paid caregivers are quite limited. Paid caregivers may receive an exclusion from their income for the value of any meals or lodging (in the case of a nanny or au pair) provided to them on the home premises of their employer. An earned income credit may be available for low-paid care providers, but the credit is inadequate if a taxpayer has no children, which is the case for most low-paid care workers. The tax system provides health tax credits for those not covered by employer-provided health plans, but provides inadequate benefits for those with large medical debt. Also, the code does not significantly help middle- and low-income taxpayers to afford rent or purchase a home. More needs to be done through the tax code to enable low-income taxpayers to fulfill their American Dream.<sup>460</sup>

1. The Exclusion for Meals and Lodging Offers Minimal Value

A generous tax benefit, when it applies, is the exclusion from gross income of the value of all meals and lodging provided on the business premises for the convenience of an employer.<sup>461</sup> Since the largest portion of an average person’s personal budget goes toward rent and food, excluding these amounts from income can provide a substantial financial benefit to the recipient. For example, if the employer provides meals and lodging worth \$3,000 a month to a live-in nanny, that would total \$36,000 a year. However, only a small percentage (around 12 percent of parents with children under age three and 9 percent of parents with children age three to five) hire nannies, the highest of paid caregivers.<sup>462</sup> The exclusion does incentivize live-in care, which studies have shown are preferred by

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460. William G. Gale, Jonathan Gruber & Seth Stephens-Davidowitz, *Encouraging Homeownership Through the Tax Code*, TAX NOTES (June 18, 2007), <https://www.brookings.edu/wp-content/uploads/2016/07/20070618.pdf> [perma.cc/EGM6-FGJW].

461. For lodging there is also a condition of employment test, which is very similar to the convenience of the employer test. 26 U.S.C. § 119(a) (2012). See also Hatt v. Comm’r, T.C.M. (CCH) 1969-229 (1969).

462. Anna Powell et al., *supra* note 123.

children and parents alike. However, most taxpayers are not wealthy enough to afford such care or have a large enough living space to accommodate such care. Typically, however, parents will not provide lodging, but just pay for a care provider's meals, and often not pay minimum wage or overtime.<sup>463</sup> Thus, the lowest paid caregivers, babysitters, will only minimally benefit from the exclusion of the value of meals provided on the employer's premises.

## 2. The Earned Income Credit Should be Expanded

Both the unpaid caregiver who works in the marketplace and the in-home paid worker may be able to receive benefits from the earned income tax credit (EITC).<sup>464</sup> The EITC is a refundable credit to those who work, are poorly paid, or those who bear a disproportionate tax burden for paying Social Security taxes at a flat rate with no exemption.<sup>465</sup> The EITC credit aids low- to moderate-income people who make under \$25,511 (2024) if married, or \$18,591 if single.<sup>466</sup> The amount of credit the taxpayer receives will depend on the taxpayer's marital status and number of children that live with the taxpayer.<sup>467</sup> As the provisions of the credit currently stand, taxpayers who are single and have two "qualifying children" garner the largest refundable earned income credit amount (\$7,830 in 2024).<sup>468</sup> The lowest benefit goes to the single taxpayer with no children (\$632 in 2024).<sup>469</sup>

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463. For FLSA requirements, *see* discussion *supra* notes 14, 110–11.

464. Qualification for and the amount of the credit available depends on earned income, marital status, and dependents claimed. *See* 26 U.S.C. § 32.

465. *Policy Basics: The Earned Income Tax Credit*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 28, 2023), <https://www.cbpp.org/research/policy-basics-the-earned-income-tax-credit> [perma.cc/K5DB-B9W5].

466. *Who Qualifies for the Earned Income Tax Credit (EITC)*, IRS (Dec. 20, 2024), <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/who-qualifies-for-the-earned-income-tax-credit-eitc> [perma.cc/93HW-EC67] (One must also not file a foreign earned income tax form and meet certain rules if the taxpayer is divorced and not filing a joint tax return.).

467. *Id.* (The EITC does not incorporate a qualifying relative, only a child of 19 years old and younger. The Dependent Credit provides for qualifying relatives who are dependents.).

468. *Earned Income Tax Credit Guide*, FIDELITY (Mar. 12, 2025), <https://www.fidelity.com/learning-center/personal-finance/earned-income-tax-credit> [perma.cc/FU7E-95E2]; *see also Earned Income and Earned Income Tax Credit (EITC) Tables*, IRS (Jan. 27, 2025), <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/earned-income-and-earned-income-tax-credit-eitc-tables> [perma.cc/K3Y5-3EDK].

469. *The Earned Income Tax Credit (EITC): What It Is, How To Qualify, and 2024 Tax Year Credit Amounts*, HR BLOCK, <https://www.hrblock.com/tax-center/filing/credits/earned-income-credit> [perma.cc/HSE2-48WE] (last visited Sept. 20, 2025) (the lowest credit is on AGI of \$18,591).

Not only does the EITC reduce the amount of taxes low- to middle-income individuals owe, but it also can lead to a refund.<sup>470</sup> The refundable credit is designed to alleviate the tax burden for those with limited income.<sup>471</sup> Thus in 2024 the single taxpayer with 3 children earning \$59,899 (or filing jointly with \$66,819), could receive \$7,830.<sup>472</sup> However, the EITC has a “phase-out” at a lower income threshold for unmarried taxpayers compared to married filing jointly taxpayers.<sup>473</sup> This difference negatively affects single parents compared to married parents filing jointly.<sup>474</sup>

The ARP made two important changes to the EITC—one permanent and the other not. The permanent change was that the taxpayer age required to qualify for the credit was reduced from 25 to 18.<sup>475</sup> The lower age requirement subsidizes babysitters that have recently graduated from high school or are currently in college. However, the EITC amount was also temporarily expanded for childless low-income individuals.<sup>476</sup> The credit nearly tripled from roughly \$540 to \$1,500, and the income cap for these adults to qualify increased from about \$16,000 to at least \$21,000.<sup>477</sup> This also helped subsidize low-paid babysitters. Unfortunately, this expansion made by ARP has expired.<sup>478</sup>

The chief problem with the EIC is that it is totally inadequate,<sup>479</sup> particularly for caregivers who do not have children.<sup>480</sup> Expansion of the EIC would make sense, as this is an instance in which the

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470. *Id.*

471. *Id.*

472. *Id.*

473. Goldin & Liscow, *supra* note 436, at 15.

474. *Id.*

475. *Expanded Earned Income Tax Credit For Workers Without Children (As of March 2021)*, U.S. CONGRESSWOMAN TERRI SEWELL, <https://sewell.house.gov/expanded-earned-income-tax-credit> [perma.cc/32NX-594B] (last visited Apr. 23, 2025).

476. *Id.*

477. *Id.*

478. *Id.*

479. See Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and A Proposal for Repair*, 88 N.Y.U. L. REV. 515 (2013) (arguing that credit should be refunded throughout the year); Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995); Lawrence Zelanak, *Redesigning the Earned Income Credit as a Family-Size Adjustment to the Minimum Wage*, 57 TAX L. REV. 301 (2004).

480. See Chuck Marr et al., *Strengthening the EITC for Childless Workers Would Promote Work and Reduce Poverty*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 11, 2016), <http://www.cbpp.org/research/federal-tax/strengthening-the-eitc-for-childless-workers-would-promote-work-and-reduce> [perma.cc/GT6J-2B2Q] (that amount for 2024 is \$632).

interests of parents intersect with those of caregivers.<sup>481</sup> Expansion of the EITC, similar to the ARP changes, could prove beneficial to the majority of low-wage care workers employed in the childcare trade.<sup>482</sup> If further expanded, the EIC could play a role in redressing a conspicuous inequity in taxation policy. Over the years, many have argued for a universal basic income or negative income tax as a means of building in a measure of broad-based income security for all of our citizens, whether they work or not.<sup>483</sup> However, a refundable credit, like the EIC, with some qualifying measures based on work, appears to be more efficient, fair, politically palatable, and less expensive. However, a larger credit size could serve to incentivize paid child caregivers to maintain their station in a field known for its high turnover and chronic shortages of available participants. Thus, such EIC revisions could act to jointly aid the interests of parents and caregivers alike.

### 3. Housing and Health Tax Credits Should Be Enacted to Help Advance the American Dream

The lower- and middle-income classes are struggling with childcare costs, but also housing, energy, and health care costs. Thus, Congress should consider providing a new renter's credit, a first home purchase credit for lower-income taxpayers, as well as a "medical debt" credit for lower income taxpayers. The premium health credits that were passed during the pandemic that will expire at the end of 2025 should be extended.

Now that the pandemic rent relief has ended, rents are escalating and housing assistance is diminishing.<sup>484</sup> Under most assistance

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481. *Id.* See suggestions for modification of this provision, *supra* IV(E). See also WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* 223 (1996) (advocating for the expansion of the credit to raise all full-time working-poor families out of poverty). See suggestion section *supra* Part IV(E).

482. The EIC is available based on earned income, marital status, and the number of dependents. 26 U.S.C. § 32. See also *Earned Income Tax Credit (EITC)*, IRS (Apr. 23, 2025), <https://www.irs.gov/Credits-&-Deductions/Individuals/Earned-Income-Tax-Credit> [perma.cc/7FLJ-QFR9].

483. Samuel Hammon, *Universal Basic Income Tax is Just Like a Negative Income Tax with a Leaky Bucket*, NISKANEN CTR. (June 6, 2016), <https://www.niskanencenter.org/universal-basic-income-is-just-a-negative-income-tax-with-a-leaky-bucket> [perma.cc/88DX-MBGV].

484. *The Federal Government's Support for Low-Income Housing Expanded During the Pandemic*, PETER G. PETERSON FOUND. (Apr. 23, 2024), <https://www.pgpf.org/blog/2024/04/how-does-the-federal-government-support-housing-for-low-income-households> [perma.cc/YU56-WDC5] (Federal Assistance takes three forms: (1) Tenant-based rental assistance (\$30 billion). Low-income households receive a voucher that allows them to choose housing in the private market while paying 30 percent of their income toward rent. The voucher, administered by

programs, a taxpayer would pay no more than 30 percent of their income on rent.<sup>485</sup> Thus, when a taxpayer is paying more than that amount, and their income is quite low, they should be eligible for a “renter’s credit.”<sup>486</sup> While the Low Income Housing Credit (LIHC) was intended to benefit those with acute housing issues, the credit’s tax benefit goes to the wealthy, and the housing provided is inadequate to serve the demands of poor tenant populations.<sup>487</sup> What is needed is a refundable credit for low-income households to help subsidize this basic necessity. This would greatly reduce homelessness, increase housing stability, and particularly help children.<sup>488</sup>

In addition to the renter’s credit those low- and middle-income taxpayers seeking a new home should receive a housing credit. House prices have been escalating over the last two decades and interest rates are still high.<sup>489</sup> Subsidizing the purchase of one’s

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local public housing authorities (PHAs), covers the remainder of the rent, (2) Project-based rental assistance (\$15 billion). The Department of Housing and Urban Development (HUD) enters into contracts with property owners who have agreed to rent their units to low-income households. The households pay 30 percent of their income toward the rent and HUD makes up the difference. HUD has allowed such contracts to expire gradually over time and has been switching households to tenant-based assistance, (3) Public housing (\$8 billion). In this arrangement, PHAs own and operate housing units and rent them directly to low-income households, who pay 30 percent of their income. HUD provides regulatory oversight and allocates funding to PHAs to support operating costs and capital improvements.”).

485. *Id.*

486. Will Fischer, Barbara Sard & Alicia Mazzara, *Renters’ Credit Would Help Low-Income Workers, Seniors, and People with Disabilities Afford Housing*, CTR. ON BUDGET & POL’Y PRIORITIES (Mar. 9, 2017), <https://www.cbpp.org/research/housing/renters-credit-would-help-low-wage-workers-seniors-and-people-with-disabilities> [perma.cc/A8C5-QQNZ] (see chart on “Federal Housing Expenditures Poorly Matched to Need.”). Although Title 8 is most well-known program, it has no waiting lists. If one were to add federal direct subsidies to tax subsidies, most assistance goes to the wealthy through the low-income housing tax credit (LIHC).

487. *Id.*

488. *Id.* (“In addition, housing vouchers provided to homeless families lower the chance that a child will be removed from its family and placed in foster care (which often occurs because parents cannot afford suitable housing), reduce the frequency with which children must move from one school to another, and lower rates of behavioral and sleep problems among children and psychological distress and domestic violence among the adults with whom children live.<sup>[7]</sup> Research has also found that children whose families receive rental assistance earn more and are less likely to be incarcerated as adults.”)

489. *Rent, House Prices, and Demographics*, US DEP’T. OF TREASURY (June 24, 2024), <https://home.treasury.gov/news/featured-stories/rent-house-prices-and-demographics> [perma.cc/Y9EN-ZD5K] (“since 2000, housing costs have been rising faster than median household income”).

first home might make sense as this is part of the American Dream. Precedent exists for such a credit. In the Housing and Economic Recovery Act of 2008,<sup>490</sup> Congress passed a refundable first-time owners credit of 10 percent of the purchase price up to a maximum of \$8,000 for low income taxpayers on the purchase of a new home.<sup>491</sup> This amount should be at least \$10,000, equal to the amount that a first-time home buyer can now withdraw from an IRA account to purchase a new home without a penalty.<sup>492</sup>

Lastly, Congress should extend the premium credits for marketplace health care plans under the Affordable Care Act (ACA). Before the ACA, 49 million or 16 percent of the population had no health care, whereas after the premium credits, in 2023, that number dropped in half, to 8 percent of the population.<sup>493</sup> If Congress fails to extend these premiums, four million people are expected to become uninsured and premium prices are expected to increase by \$705 per enrollee.<sup>494</sup> Congress should also consider giving a credit to low- and middle-income taxpayers who are struggling with medical debt. Currently, the tax code provides a meager deduction for extraordinary medical expenses. This amount is limited to the excess over 7.5 percent of a taxpayer's adjusted gross income.<sup>495</sup> Furthermore, this deduction is allowed only if the taxpayer itemizes their deductions. Since nearly 90 percent of taxpayers take the standard deduction and do not itemize, this medical deduction is of very limited benefit.<sup>496</sup> Thus, it would make sense to

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490. Maurie Backman, Andrew Pentis & Katie Lowery, *What to Know About the First-Time Homebuyer Tax Credit*, <https://www.cnn.com/cnn-underscored/money/first-time-home-buyer-tax-credit#:~:text=Homebuyer%20tax%20credits%2C%202008%20to,equal%20installments%20starting%20in%202010>.

491. *IRS Fact Sheet: Tax Credit for Home Buyers*, IRS (Jan. 6, 2010), <https://www.irs.gov/pub/irs-news/fs-10-06.pdf> [perma.cc/DJ8T-HNXE].

492. Emily Sherman, *Should You Buy a Home with Retirement Savings?* U.S. NEWS & WORLD REPORT (Apr. 14, 2025), <https://www.usnews.com/loans/mortgages/articles/should-you-buy-a-home-with-retirement-savings> [perma.cc/92DU-P6RM]; see also Jackson Walker, *VP Harris Touts Plan to Give \$25K to New Homebuyers*, CBS, (Sept. 17, 2024), <https://cbsaustin.com/news/nation-world/vp-harris-wants-to-give-25k-to-new-homebuyers-vice-president-biden-kamala-college-park-national-association-of-black-journalists-nabj-activism-money-funds-taxpayers-federal-proposal-giveaway-taxes-black-white-race> [perma.cc/P9GG-MMYF].

493. *The State of Health Insurance Coverage in the U.S.*, COMMONWEALTH FUND (Nov. 21, 2024), <https://www.commonwealthfund.org/publications/surveys/2024/nov/state-health-insurance-coverage-us-2024-biennial-survey> [perma.cc/5HK4-ZH65].

494. *Id.*

495. 26 U.S.C. § 213.

496. *What Are Itemized Deductions and Who Claims Them?*, TAX POL'Y

have a small credit, perhaps even refundable for those taxpayers unlucky enough to have large medical debt.

F. *The Tax System Fails to Value Caregiving as “Real Work”*

President Trump, in his Madison Square Garden campaign speech on October 30, 2024, proposed a tax credit for “family caregivers.”<sup>497</sup> Childcare is too often framed as an individual problem left up to the personal responsibility of the family to solve on their own, rather than as a public good. Parents, and sometimes extended families and friends, are required to figure out how to pay for childcare and generally must do so in the absence of any meaningful public subsidies to help defray the cost. This approach ignores the important role that childcare plays in the economy, particularly the caregiving economy. It devalues caregiving and masks the fact that the economy depends on the productive market work of the parents. This can only happen if someone—be it a parent, family member, or paid caregiver—is providing childcare.<sup>498</sup>

No policy reform regime in the childcare realm will prove fully effective without explicit acknowledgement of the varied contributions made by unpaid care providers. If a caregiver, other than a parent, provides childcare, then why not give them a credit for their effort? A credit would support childcare by unpaid relatives, friends, and neighbors and comport with the desire of many children to be cared for by loved ones, as well as parents’ desire to have a supportive person care for their child.<sup>499</sup> During the pandemic, in many groups, this was the only care available.<sup>500</sup> Such a proposal would cost much less than universal preschool for all, and provide flexibility in the case of another pandemic.

A mechanism for determining the remunerative value of unvalued labor may be approached in several ways.<sup>501</sup> Viewed from a minimum valuation perspective, the base calculation would equal the state or local minimum wage or federal prevailing wage

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CTR. (Jan. 2024), <https://taxpolicycenter.org/briefing-book/what-are-itemized-deductions-and-who-claims-them> [perma.cc/5EKG-D7DL].

497. Tami Luhby, *Trumps Latest Promise is Tax Break for Family Caregivers*, CNN (Oct. 28, 2024) <https://www.cnn.com/2024/10/28/politics/family-caregivers-trump-tax-credit/index.html> [perma.cc/Q4PJ-FTRJ] (Trump did not give details but suggested a tax credit for caregivers).

498. See Sarah Jane Glynn & Katie Hamm, *The Economics of Caregiving for Working Mothers*, CTR. FOR AM. PROGRESS (Dec. 10, 2019), <https://www.americanprogress.org/article/economics-caregiving-working-mothers> [perma.cc/44XE-TBJY].

499. See discussion, *supra* notes 94 & 124.

500. See Cahn & McClain, *supra* note 48.

501. Shurtz, *supra* note 12.

rate. Using the federal minimum wage as an example, if a taxpayer provides forty-hours of care per month, then at \$7.25 per hour, this yields a total monthly care value of \$348.<sup>502</sup> This would be an effective way to deliver tax benefits to those who care and are not paid. It could even be partly refundable.

### G. *The Tax System Favors Wealthy Families*

The wealth gap in this country is growing exponentially. The reason for this is the top 1 percent owns most of the investments and businesses, whereas the poor working class's wealth is based on labor. The top 1 percent own 62 percent of the wealth, while the bottom 90 percent own 7 percent of the wealth.<sup>503</sup> Moreover, 70 percent of realized capital gains inure to the benefit of the top 1 percent, with 50 percent going to the top 0.1 percent.<sup>504</sup> This wealth disparity is particularly acute for people of color.<sup>505</sup>

Wealthy families benefit from many provisions of the code. First, wealthy families benefit from the splitting of income on joint tax returns when one spouse stays home to take care of children. Second, wealthy families benefit from exclusions, deductions, and tax deferrals. Third, wealthy families receive a plethora of favorable tax advantages from their capital and wealth. Because of these tax benefits, wealthy families should pay higher taxes to finance needed childcare reform.

#### 1. The Wealthy Benefit from the Joint Return

The joint return status is available only to married couples. It provides a great tax benefit to one-earner couples as they can split their income. In contrast, studies show that this status penalizes two-earner couples as the secondary earner is taxed at the top

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502. Currently, K-12 teachers obtain an above-the-line deduction of \$300 for supplies they buy with their own funds when studies show they expend more than \$700 for those supplies.

503. Alexandra Thornton & Halen Hendricks, *Ending Special Tax Treatment for the Very Wealthy*, CTR. FOR AMERICAN PROGRESS (June 4, 2019), <https://www.americanprogress.org/issues/economy/reports/2019/06/04/470621/ending-special-tax-treatment-wealthy> [perma.cc/HUM9-73KW].

504. Ron Wyden, *Treat Wealth Like Wages*, SENATE FINANCE COMM. (2019), <https://www.finance.senate.gov/imo/media/doc/Treat%20Wealth%20Like%20Wages%20RM%20Wyden.pdf> [perma.cc/6R4M-N3XS] (The average family worth 100 million or more never paid a tax on over half of their wealth). Not only does the current system allow for this but in fact the current tax system actively facilitates the increasing wealth gap. It actively restricts the economic prosperity of labor while it enhances capital wealth, as ordinary income tax is tax between 10 percent to 37 percent, whereas long term capital gains are tax between 0 percent to 20 percent).

505. See, Moran, *supra* note 291.

marginal rate of the primary earner.<sup>506</sup> Many commentators have written on this topic, several advocating for simplifying the system with an individual unit in relation—in particular relation to those that are dependent.<sup>507</sup> Others have argued for a secondary-earner's deduction.<sup>508</sup> The joint return should be kept as it benefits children, but this status should be made available to single parents who must maintain a household for those children.<sup>509</sup> In addition, low-income taxpayers should have additional subsidies for childcare.

## 2. The Wealthy Benefit from Exclusions, Deductions, and Deferrals

Wealthy families benefit from a number of exclusions, deductions, and deferrals. Perhaps the greatest benefit to the wealthy are the exclusions for gifts and inheritances.<sup>510</sup> They also benefit from fringe benefit exclusions,<sup>511</sup> and in particular, the exclusion of employer-provided health benefits.<sup>512</sup> In addition, the wealthy benefit from a number of deferral provisions, including retirement

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506. See discussion, *infra* note 448.

507. Shurtz, *supra* note 324.

508. See Gann, *supra* note 448.

509. As the case is in Oregon. See earlier discussion, *supra* note 446.

510. 26 U.S.C. § 102. The original purpose of the estate tax was to act as a backstop for the tax code, capturing wealth transfer activity that would otherwise go untaxed because of the income tax exclusion. Because that purpose is not being fulfilled through the current \$13.61 exemption in the estate tax, Congress should consider limiting this Section 102 exclusion. After all, gifts and inheritances clearly fall within the *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), definition of “accession to wealth, clearly realized, over which the taxpayer has dominion and control.”

511. See 26 U.S.C. §§ 119, 132.

512. *Id.* §§ 105–06. Perhaps the largest fringe benefit exclusion under the federal income tax system is that of employer-provided health benefits under Sections 105 and 106 of the code. The loss of revenue for this item is almost \$300 billion, \$224.5 billion from income tax revenue loss and the rest attributed to payroll tax loss. Yet, this provision is both horizontally and vertically inequitable as it advantages high paying workers while others must purchase their own insurance, with limited credits or deductions.

savings,<sup>513</sup> like-kind exchanges,<sup>514</sup> and the American Opportunity Zone Credit, which was passed by the TCJA.<sup>515</sup>

Wealthier families may also take large itemized deductions for mortgage interest,<sup>516</sup> taxes, and charitable deductions.<sup>517</sup> They may even be able to deduct a contribution to a church, which indirectly benefits religiously affiliated childcare or preschool. Any transfer made to a qualified religious organization must be exclusively for the benefit of the charity with no strings attached.<sup>518</sup> Thus, any amounts transferred must not be for payment of preschool or childcare directly but to the church in general.<sup>519</sup> Under the TCJA, if the contribution is made in cash, this itemized deduction can be as much as 60 percent of the taxpayer's contribution base or adjusted gross income.<sup>520</sup> If the gift consists of property, the limit is 50 percent of the taxpayer's contribution base. In either case, this deduction can be substantial. When the TCJA expires, many more taxpayers

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513. Some of the retirement deferral provisions, amounting to over \$300 billion in lost revenue, are only available to high income taxpayers. Betsy Vereckey, *How Retirement Savings Incentives Amplify Wealth Gaps in the U.S.*, MIT MGMT. (Feb. 1, 2024), <https://mitsloan.mit.edu/ideas-made-to-matter/how-retirement-saving-incentives-amplify-wealth-gaps-u-s> [perma.cc/GA3S-PNMM] (stating that closing the \$300 billion annual incentives for these plans could close the racial gap by a third).

514. The like-kind exchange provision would garner \$3.8 billion and the American Opportunity deferral \$3.7 billion according to the tax expenditure budget.

515. See generally Michelle L. Sidle, *An "Opportunity" to Invest in a "Rate-Infested" City: The Effects of President Trump's Economic Development Plan in Baltimore*, 16 J. BUS. & TECH L. 143 (2021); Ofer Eldar & Chelsea Garber, *Opportunity Zones: A Program in Search of a Purpose*, 102 B.U. L. REV. 1397 (2022); Hale E. Sheppard, *Opportunity Zones: Tax Benefits, Criticisms and Early IRS Enforcement*, 137 J. TAX'N (2022); Hayley Roth, *Opportunity Zones: Whose Opportunity? Remediating Failed Federal Policy via State Pro Bono Policy Toolkits*, 34 GEO. J. LEGAL ETHICS 1285 (2021).

516. The home mortgage interest loses \$34 billion each year under Tax Expenditure Budget. See *Tax Expenditures, U.S. Dept of Treasury*, U.S. DEPT. OF TREASURY (Mar. 6, 2023), <https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2024-update.pdf> [perma.cc/8T7K-GBDF].

517. 26 U.S.C. §§ 163 (interest), 170 (charity).

518. See Lori A. Tobias, *Brinley v. Commissioner: A Modified Charitable Deduction Standard for Missionary Support Payments*, 40 SMU L. REV. 1267, 1269 (1987) (discussing the three prerequisites to the deductibility of direct charitable transfers: (1) the transfer must be gratuitous or a gift, (2) the transfer must benefit a qualified recipient, and (3) must be absolutely for the benefit of the recipient. Any quid pro quo for the transfer will disqualify it.).

519. 26 U.S.C. § 170. The IRS will be weary of such schemes if they fly in the face of the statute.

520. *Id.* § 170 (b)(1)(G)(i).

will itemize (as the standard deduction will expire) and the limitation rules will go back to 50 percent for cash contributions.

### 3. The Wealthy Benefit from Taxation on Capital and Wealth

Capital, unlike labor, is not subject to Social Security taxation and is also subject to favorable rates when property is sold. Income from labor is taxed at ordinary rates of up to 37 percent but capital gains are favorably taxed—at a maximum of 20 percent.<sup>521</sup> Furthermore, no realization occurs upon gifts or inheritances. Thus, heirs receive a stepped-up basis to the fair market value in all property transferred at death.<sup>522</sup> Currently, a wealthy married couple (in 2024) can give away (or die and transfer) \$27.22 or \$13.16 million dollars per individual and pay no estate or gift tax.<sup>523</sup> Even at that amount, most Americans would be exempt from tax. The average estate is between \$50,000 and \$250,000, with only 11 percent of estates being over \$1 million.<sup>524</sup> In 2022, the current estate and gift tax raised \$33 billion dollars in revenue and essentially applies only to billionaires.<sup>525</sup>

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521. *Id.* § 1(a), (h).

522. *Id.* § 1014. The § 1014(b)(6) preference for those living in community property states should be eliminated as why should married couples in those states receive a full step-up in the total property owned at death. The U.S. Treasury estimated that 2024 would see over \$55 billion in tax expenditures attributable to the step-up basis at death and the carry-over value of gifts. See Jane G. Gravelle, *Estate and Gift Tax: An Overview*, CONGRESSIONAL RSCH. SERV. (Sept. 16, 2024), <https://crsreports.congress.gov/product/pdf/R/R48183> [perma.cc/S63B-3BB2].

523. At the end of 2025, this exemption expires and goes back to slightly over \$5 million, although estimates vary here as to the exact amount. See *Use It or Lose It: Sunset of the Federal Estate Tax Exemption*. LPL FINANCIAL (Jan. 29, 2024), <https://www.lpl.com/i/private-wealth-management/sunset-of-federal-estate-tax-exemption-use-it-lose-it.html> [perma.cc/G8QM-BS9M] (lifetime exemption will go to \$5.6 million); *Prepare for Future Estate Tax Law Changes*, FIDELITY WEALTH MGMT. (Mar. 3, 2025), <https://www.fidelity.com/learning-center/wealth-management-insights/TCJA-sunset-strategies> [perma.cc/3C9F-W9HU] (might decline to \$7.5 million). See also Nina Daigle, *Tax Planning for the TCJA's Sunset*, TAX ADVISER (Dec. 1, 2023), <https://www.thetaxadviser.com/issues/2023/dec/tax-planning-for-the-tcja-sunset.html> [perma.cc/3C9F-W9HU] (advising that taxpayer “consult their tax advisers and estate attorneys”).

524. *Estate Settlement and Executor Statistics*, ESTATE EXEC., [https://www.estateexec.com/Docs/General\\_Statistics](https://www.estateexec.com/Docs/General_Statistics) [perma.cc/GC3H-HPXF] (last visited Apr. 20, 2025) (estimates put estates subject to tax at less than 0.1%).

525. Abigail Tierney, *Estate and Gift Tax Revenue and Forecast in the United States from 2000 to 2023*, STATISTA (Nov. 18, 2024), <https://www.statista.com/statistics/217518/revenues-from-estate-and-gift-tax-and-forecast-in-the-us> [perma.cc/Y54W-9Z4S].

Even corporate tax benefits can benefit the rich.<sup>526</sup> According to the Tax Policy Center, over a third of the benefit from the corporate rate reduction flowed to the top 1 percent of households.<sup>527</sup> A study at the University of California, Berkeley finds that none of these cuts trickled down to those in the lower 90 percent of income distribution.<sup>528</sup> Thus, the 21 percent corporate tax rate adopted in the TCJA should be adjusted upwards, or at least made progressive.<sup>529</sup>

#### 4. Taxes on the Wealthy Should Increase to Finance Childcare Subsidies

Achievement of the important reforms outlined above will require creation of fresh tax revenue sources, either through new funding regimes or increases in existing ones. These proposals require a public sector response by simple virtue of the perpetual failure of the existing market system to acknowledge or account for the vast economic values represented by childcare activities. Numerous proposals are out there advocating taxing companies and wealthy individuals more fairly.<sup>530</sup> These range from elimination of tax preferences for the wealthy to increased tax rates.

A first step to raising adequate revenue would be to eliminate many deductions, deferrals and rate preferences that favor

526. 26 U.S.C. § 2010(c)(3)(C).

527. *T17-0180 – Share of Change in Corporate Income Tax Burden: By Expanded Cash Income Percentile, 2017*, TAX POL'Y CTR. (June 6, 2017), <https://www.taxpolicycenter.org/model-estimates/distribution-change-corporate-tax-burden-june-2017/t17-0180-share-change-corporate> [perma.cc/9LAR-JXHD].

528. Patrick J. Kennedy et al., *The Efficiency-Equity Tradeoff of the Corporate Income Tax: Evidence from the Tax Cut and Jobs Act* (unpublished manuscript) (Oct. 31, 2022), <https://economics.yale.edu/sites/default/files/2023-01/The%20Efficiency-Equity%20Tradeoff%20of%20the%20Corporate%20Income%20Tax.pdf> [perma.cc/L4GX-BQYE].

529. See Calvin H. Johnson, *How to Raise \$3.5 Trillion, Without a Rate Increase*, 182 TAX NOTES FEDERAL 2155, 2160 (2004). If rich companies were to pay their fair share then considerable revenue could be raised for the above proposals. Apple, Amazon, Google, and Microsoft, for example, pay effective tax rates of between 0.65 percent and 2.9 percent. This is in large part because of the immediate expensing of intangible investments, such as intellectual property. By some estimates this is worth \$6 trillion each year.

530. Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952); Martin J. McMahon, Jr. & Alice G. Abreu, *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX REV. 1 (1998); Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. (2018); Irem Guceri & Joel Slemrod, *Taxing the Rich (More)*, 39 OXFORD REV. OF ECON. POL'Y 399 (2023); Edward J. McCaffery, *The Paradox of Taxing the Rich*, 26 FLA. TAX REV. 130 (2023); but see Reuven S. Avi-Yonah, *Corporations, Richy, and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193 (2004).

the wealthy. A second important step would be to reduce the unified credit exemption for gift and estate taxation. A third possible reform would be to increase the existing 3.8 percent Medicare tax on net investment income.<sup>531</sup> This tax is levied on wealthy taxpayers and is relatively easy to administer. A final proposal could be a new wealth tax or tax on billionaires, similar to that proposed by Senator Wyden.<sup>532</sup>

## V. CONCLUSION

Currently in America the wealth gap is growing with those in the lower and middle income groups struggling to pay for daily expenses, including escalating childcare costs. Subsidizing childcare choices through the tax system should be the beginning of providing opportunities for our children to reach their full potential. Childcare, and how to pay for it, is one of the central issues facing parents and society today. During the pandemic unmet childcare needs resulted in disproportionately adverse impacts on caregivers, both paid and unpaid. This article argues that tax laws should be augmented to elevate the value of care labor while offering greater support for both parents working in the market and those in the home. A mix of policy measures can begin to reverse the damage visited upon parents and mothers, particularly those who already dwell in poverty, doubly inflicted by markets and governments that have denied the true value of this essential care. A refundable dependent credit, the reinstatement of the per child credit for children under six years old, the expansion of the earned income credit for care providers, a more generous employer family leave credit, as well as provisions explicitly recognizing the value of unpaid care, represent practical initial steps. In addition, new initiatives should be passed, such as the essential worker credit, a rental subsidy, a first home purchase credit, a medical debt credit, and a generous “caregiver credit.” While wealthy parents have many choices, even they are subject to market failures when childcare is unavailable due to closed facilities.

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531. *Find Out if Net Investment Income Tax Applies to You*, IRS (Jan. 17, 2025), <https://www.irs.gov/individuals/net-investment-income-tax> [perma.cc/6TJC-K38F] (generally taxpayer must have \$200,000 of MAGI if single and \$250,000 of MAGI if married and have investment income to be subject to this tax).

532. The only wealth tax proposal out there that would pass constitutional scrutiny is Ron Wyden’s proposal. Bernie Sanders’, ex-President Biden’s, and Elizabeth Warren’s proposed wealth taxes would either violate the realization principle or would “establishes a property tax” that violates the apportionment requirement of the constitution. See Amandeep S. Grewal, *Billionaires Tax and the Constitution*, 58 GA. L. REV. 299 (2023).

The middle and low-income groups struggle with childcare costs and often must sacrifice their American Dream to obtain quality education. The poor often are required to work at low-paying jobs or be denied basic welfare payments. Tax revenues should be raised in commensurate measure to support this higher valuation of care activities. Attention to elevating the station of caregiving activities to reflect higher market and policy values is an investment in our children, and will help assure them equality of opportunity and the education necessary to make a valuable contribution to our nation. This attention will advance the common good as well as prepare us for the next pandemic.