A SPECIAL DELIVERY: LITIGATING PREGNANCY ACCOMMODATION CLAIMS AFTER THE SUPREME COURT'S DECISION IN *YOUNG v. UNITED PARCEL SERVICE, INC.*

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Abstract

For over twenty years, the federal courts of appeals have been divided over the extent to which the Pregnancy Discrimination Act requires employers to offer light-duty or other work accommodations to pregnant employees. The division between circuits centers on the interpretation of the language in the second clause of the Pregnancy Discrimination Act mandating that employers "shall" treat pregnant employees "the same . . . as other persons . . . similar in their ability or inability to work."[1] *Four circuits interpreted this clause to merely explain the first clause, thereby refusing to enforce any significant obligation on employers to accommodate pregnancy-related physical limitations, even when they offer accommodations to nonpregnant employees. In contrast, three circuits interpreted this clause to have independent meaning and to provide pregnant women with a right to comparative accommodation if their employer provides accommodations for nonpregnant employees with similar physical limitations. In March of 2015, the Supreme Court rejected both of these interpretations and instead attempted to fashion a compromise based on the creation of a novel framework that it confined to claims brought under the Pregnancy Discrimination Act. While the Court's decision may allow greater access to light-duty positions for some pregnant employees, its new framework creates significant uncertainty by imposing ambiguous and burdensome requirements on pregnant employees seeking accommodation under the statute. This Article concludes that the limitations of the Court's decision may outweigh its*

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1. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012).

benefits to pregnant employees. Given the inherent complexity of the Court's new approach, congressional reform is needed to provide pregnant employees with a clear entitlement to accommodation of pregnancy-related medical conditions.

INTRODUCTION

Congress enacted the Pregnancy Discrimination Act of 1978[2] ("PDA") in order "to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."[3] Less than sixteen years after the PDA's enactment, the Seventh Circuit issued a decision in *Troupe v. May Department Stores Co.*, narrowly interpreting the statute's provisions and generally declaring that "[t]he Pregnancy Discrimination Act does not, despite the urgings of feminist scholars require employers to offer maternity leave or take other steps to make it easier for pregnant women to work."[4]

For twenty years, the sentiment expressed in the *Troupe* decision epitomized a fundamental disagreement among the federal courts of appeals over the extent to which the language of the PDA imposes any requirement on employers to reasonably accommodate the temporary work restrictions of its pregnant employees.[5] The second clause of the PDA mandates in pertinent part that "women affected by pregnancy, childbirth, or related medical conditions *shall be treated the same for all employment-related purposes*, including receipt of benefits under fringe benefit programs, *as other persons not so affected but similar in their ability or inability to work*."[6] In interpreting the mandate of this language, the federal courts of appeals have struggled to identify which employees qualify "as other persons not so affected but similar in their ability or inability to work."[7]

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2. *Id.*

3. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987) (quoting 123 CONG. REC. 29,658 (1977) (statement of Sen. Williams)).

4. 20 F.3d 734, 738 (7th Cir. 1994) (citation omitted).

5. *Compare* Young v. United Parcel Serv., Inc., 707 F.3d 437, 446–47 (4th Cir. 2013), *vacated*, 135 S. Ct. 1338 (2015), Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 547 (7th Cir. 2011), *abrogated by Young*, 135 S. Ct. 1338, Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1312 (11th Cir. 1999), *abrogated by Young*, 135 S. Ct. 1338, Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 207–08 (5th Cir. 1998), *abrogated by Young*, 135 S. Ct. 1338, Deneen v. Nw. Airlines, Inc., 132 F.3d 431, 435–36 (8th Cir. 1998), *and Troupe*, 20 F.3d at 738, *with* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1197 (10th Cir. 2000), *and* Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996).

6. § 2000e(k) (emphasis added).

7. *Id.*

Three other federal circuits subsequently followed the Seventh Circuit's reasoning, narrowly interpreting the second clause and concluding that it does not require employers to give pregnant employees "preferential treatment,"[8] but instead "merely requires employers to 'ignore' [their] employee[s'] pregnancies."[9] Under the approach adopted by the Fourth, Fifth, Seventh, and Eleventh Circuits, if an employer only offers light-duty assignments to employees with occupational injuries, it need not offer that benefit to pregnant employees.[10] In other words, these courts excluded employees with occupational injuries as potential comparators for pregnant workers by distinguishing the source of the employees' injury and, thus, differentiated between injuries that occurred at work and those that did not.

In comparison, the Sixth, Eighth, and Tenth Circuits interpreted the comparator clause of the PDA more broadly.[11] The analysis from these circuits compared the relative abilities to work of the pregnant and nonpregnant employees, rather than the source of the injury.[12] Thus, they concluded that if an employer offered light-duty accommodations to any worker with a similar medical condition, whether or not the condition

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8. *Urbano*, 138 F.3d at 207; *accord Spivey*, 196 F.3d at 1312.

9. Reeves v. Swift Transp. Co., 446 F.3d 637, 641 (6th Cir. 2006), *abrogated by Young*, 135 S. Ct. 1338.

10. *E.g.*, *Young*, 707 F.3d at 446 (stating that "[b]y limiting accommodations to those employees injured on the job, disabled as defined under the ADA, and stripped of their DOT certification, UPS has crafted a pregnancy-blind policy" that does not violate the PDA); *Serednyj*, 656 F.3d at 548–49 (deciding that the employer's modified work policy does not violate the PDA because it "denie[s] an accommodation of light duty work for non-work-related injuries" and, thus, "is 'pregnancy-blind'"); *Spivey*, 196 F.3d at 1313 (holding that "[t]he correct comparison is between Appellant and other employees who suffer non-occupational disabilities, not between Appellant and employees who are injured on the job"); *Urbano*, 138 F.3d at 208 (declaring that "the PDA does not entitle pregnant employees with non-work related infirmities to be treated the same under Continental's light-duty policy as employees with occupational injuries").

11. *See* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1196–97 (10th Cir. 2000); Deneen v. Nw. Airlines, Inc., 132 F.3d 431, 437–38 (8th Cir. 1998); Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996).

12. *See Horizon/CMS Healthcare Corp.*, 220 F.3d at 1195 n.7 (stating that the proper comparison is between the plaintiff and "other temporarily-disabled employees"); *Deneen*, 132 F.3d at 437–38 (concluding that "the relevant question in a pregnancy discrimination case is whether the employer treated the pregnant plaintiff 'differently than nonpregnant employees'" and, in making this determination, "[e]mployers must look to the employee's actual abilities" (quoting Lang v. Star Herald, 107 F.3d 1308, 1313 (8th Cir. 1997))); *Ensley-Gaines*, 100 F.3d at 1226 (holding that the comparator clause of "the PDA explicitly alters the analysis to be applied in pregnancy discrimination cases" because "[w]hile Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated 'in all respects,' the PDA requires only that the employee be similar in his or her 'ability or inability to work'" (first quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992); and then quoting § 2000e(k)).

arose from an occupational injury, then the employer also must offer that accommodation to qualifying pregnant employees under the PDA.[13]

Over the years, numerous scholars have objected vigorously to the narrow approach adopted by the Fourth, Fifth, Seventh, and Eleventh Circuits, arguing that it was contrary to the language of the PDA, its purpose, and its legislative history.[14] They further argued that this approach stripped the comparative clause of any realistic attainment for most plaintiffs, thereby gutting the PDA of its effectiveness in eradicating pregnancy discrimination.[15] These scholars predicted that the approach would both "exponentially widen the gulf in employment opportunities [for] pregnant women" and "create profound economic instability" for "women in low-wage jobs and traditionally male-dominated occupations."[16]

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13. *See Horizon/CMS Healthcare Corp.*, 220 F.3d at 1196–97; *Deneen*, 132 F.3d at 438; *Ensley-Gaines*, 100 F.3d at 1226.

14. *See, e.g.*, Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67, 67 (2013) (observing that the PDA, "as interpreted by the lower courts, . . . has withered in scope" because "the courts have misread the statute" by "tak[ing] a stilted view of the definition of pregnancy and the meaning of discrimination, to the detriment of women generally, but especially working class and lower-income women"); Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 454 (2012) (exploring the judicial interpretations of the PDA and agreeing that there are "gaps in the law for pregnant women"); Terry Morehead Dworkin et al., *The Role of Networks, Mentors, and the Law in Overcoming Barriers to Organizational Leadership for Women with Children*, 20 MICH. J. GENDER & L. 83, 98 (2013) (concluding that legislative action would be necessary to restore the PDA unless judges would "interpret the language of the PDA in the manner intended by Congress when it passed the law"); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 615 (2010) (stating that these decisions, "in my view, are wrongly decided, in part because they ignore the PDA's mandate that pregnant women be treated as well as others 'similar in their ability or inability to work'"); Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 965 (2013) (providing her opinion that the "body of PDA case law misinterprets the statute's same treatment language").

15. *See, e.g.*, Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 423 (2011) ("Courts' current interpretations of the PDA . . . limit [the] statute['s] transformative potential. Courts' discomfort with the redistributive potential of the PDA, in both disparate-treatment and disparate-impact cases, leads them to interpret the statute narrowly. Cabined interpretations of the PDA dampen the statute's ability to realize equal employment opportunity for women."); Widiss, *supra* note 14, at 963–64 (declaring that the "problem" with the PDA "stems from determining who 'counts' as a comparator," and observing that "[t]his has long been a simmering problem").

16. *See* Brief of Law Professors and Women's Rights Organizations as Amici Curiae in Support of Petitioner at 2–3, Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015) (No. 12-1226), 2013 WL 2103656.

When the Supreme Court granted the petition for certiorari in July of 2014 in *Young v. United Parcel Service, Inc.*,[17] advocacy groups on both sides anticipated that it would resolve the longstanding division between the federal circuits and would identify which employees were proper comparators for pregnant employees under the PDA.[18] Instead, the Court rejected both interpretations of the federal courts of appeals,[19] creating a novel framework for analyzing pregnancy accommodation claims fashioned loosely upon the approach established in *McDonnell Douglas Corp. v. Green*.[20] Unfortunately, this framework further complicates pregnancy accommodation decisions, leaving many unanswered questions for the lower federal courts to resolve in future cases.

This Article examines the Court's complex decision in *Young*, identifies its ambiguities, and analyzes its impact in litigating pregnancy discrimination claims. The Article is divided into three parts. Part I briefly describes the enactment of the PDA and examines a few early Supreme Court decisions interpreting its provisions. It then explores the development of the divergent approaches in the federal circuits to defining the proper comparator in pregnancy discrimination cases and reviews their justifications.

Part II closely examines the Supreme Court's decision in *Young*. In its decision, the Court rejected both parties' proposed interpretations of the statute, opting instead to adopt a middle ground by creating a novel framework wherein some but not all refusals to accommodate pregnant employees may violate the PDA. The dissent characterized this delivery of a special framework as an act of "craft[ing] . . . a new law that is splendidly unconnected with the text and even the legislative history of the Act."[21] Although a majority of the Justices technically sided with the pregnant plaintiff and remanded the specific facts of this case, any victory achieved by the Court's remand is greatly diminished by the many novel concepts and ambiguities included in this novel framework.

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17. 134 S. Ct. 2898 (2014).

18. *Compare* Brief of Amici Curiae 23 Pro-Life Organizations and the Judicial Education Project in Support of Petitioner Peggy Young at 15, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 4536934 (interpreting the PDA to mean that "an employer may not accommodate an employee whose need for light duty stems from an 'on the job' injury, but then deny accommodation to an employee whose similar need for light duty stems from pregnancy"), *with* Brief of U.S. Chamber of Commerce as Amicus Curiae in Support of Respondent at 3, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 5659409 (interpreting the PDA in such a way that it does not "create[] a freestanding cause of action for failure to accommodate pregnancy").

19. *Young*, 135 S. Ct. at 1349–53.

20. 411 U.S. 792, 802 (1973).

21. *Young*, 135 S. Ct. at 1361 (Scalia, J., dissenting).

Part II explores this framework, its ambiguities, and the dissent's rather spirited criticisms of the majority's special delivery.

This Article concludes in Part III by exploring the likely adverse impact of the framework created by the Court in *Young* and recommends action to minimize this impact. This unique framework, to be applied solely in adjudicating claims brought under the second clause of the PDA, is mostly a hollow victory as it adds complexity and uncertainty to the litigation of pregnancy discrimination claims. These ambiguities are likely to deter pregnant employees from pursuing claims under the PDA and to encourage them instead to pursue accommodations under the Americans with Disability Act Amendments Act of 2008 ("ADAAA").[22] However, this alternate remedy under the ADAAA does not provide a global solution for all pregnant workers. Congressional action is needed to provide all pregnant employees with an absolute right to accommodation.[23]

I. THE CIRCUMSTANCES THAT CREATED A SPECIAL DELIVERY: A HISTORICAL PERSPECTIVE OF THE PREGNANCY DISCRIMINATION ACT

Congress enacted the Pregnancy Discrimination Act to override the Supreme Court's decision in *General Electric Co. v. Gilbert*.[24] In *Gilbert*, the Supreme Court declared that the prohibition against sex discrimination contained in Title VII of the Civil Rights of 1964[25] did not likewise prohibit discrimination on the basis of pregnancy.[26]

The legal dispute in *Gilbert* challenged an employer's disability plan that provided income replacement benefits for various nonoccupational diseases and accidents, but, at the same time, excluded all pregnancy-related conditions from coverage.[27] After acknowledging that pregnancy is a condition "confined to women," a majority of the Court upheld the disability plan, concluding that pregnancy discrimination was not a form

22. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

23. *See infra* text accompanying notes 221–37.

24. 429 U.S. 125 (1976), *superseded by statute*, 42 U.S.C. §2000e(k), *as recognized in* Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983); Diana Kasdan, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. REV. 309, 321–23 (2001).

25. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e *et seq.* (2012)). Title VII declares, in pertinent part, that an employer shall not "discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment[] because of such individual's . . . sex." § 2000e-2(a)(1).

26. *Gilbert*, 429 U.S. at 145–46.

27. *Id.* at 128–29.

of sex discrimination protected by Title VII.[28] In part, these Justices distinguished pregnancy from other nonoccupational conditions covered by the plan on the ground that pregnancy usually was a voluntary condition and did not qualify as a disease or accident.[29]

In contrast, three Justices vigorously dissented, arguing that the exclusion of pregnancy benefits from the plan constituted sex discrimination in violation of Title VII.[30] Among other things, Justice Brennan, with whom Justice Marshall joined, disputed the majority's reliance on the voluntary nature of pregnancy as a basis for its exclusion from coverage.[31] Noting that the plan covers "prostatectomies, vasectomies, and circumcisions that are specific to the reproductive system of men and for which there exist no female counterparts covered by the plan" and likewise are voluntary, Justice Brennan concluded that the voluntariness of the condition "is not a persuasive factor."[32] Similarly, Justice Stevens concluded that the exclusion of pregnancy benefits from the plan discriminated on the basis of sex because "it is the capacity to become pregnant which primarily differentiates the female from the male."[33]

Two years after the *Gilbert* decision, and with strong bipartisan support in both houses, Congress enacted the PDA.[34] The PDA added the following language to Title VII's definitional section:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to

28. *Id.* at 136, 145–46.
29. *Id.* at 136.
30. *Id.* at 146–47 (Brennan, J., dissenting); *id.* at 161 (Stevens, J., dissenting).
31. *Id.* at 151 (Brennan, J., dissenting).
32. *Id.* at 151–52.
33. *Id.* at 162 (Stevens, J., dissenting).
34. 123 CONG. REC. S15035–60 (daily ed. Sept. 16, 1977) (Rollcall Vote No. 385) (approving S. 995 by a vote of 75 to 11); 124 CONG. REC. H6880 (daily ed. July 18, 1978) (Rollcall Vote No. 563) (approving H.R. 6075 by a vote of 376 to 43); 124 CONG. REC. S18977–79 (daily ed. Oct. 13, 1978) (agreeing to the conference report adopting S. 995 with amendments); 124 CONG. REC. H13494–96 (daily ed. Oct. 14, 1978) (agreeing to the conference report adopting S. 995 in lieu of H.R. 6075).

> work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.[35]

Within the first ten years after the passage of the PDA, the Supreme Court issued several decisions broadly interpreting its provisions. First, the Court observed that the PDA has two distinct clauses.[36] The Court acknowledged that the first clause legislatively rejected its prior decision in *Gilbert*, by broadening the definition of sex discrimination to expressly include discrimination "on the basis of pregnancy, childbirth, or related medical conditions."[37]

These initial decisions also expansively interpreted the meaning of the second clause in several respects. First, the Court declared that the second clause has a separate function from the first clause and that is "to illustrate how discrimination against pregnancy is to be remedied."[38] Additionally, the Court interpreted the second clause to create its own internal comparison group for pregnant women—nonpregnant employees that are "similar in their ability or inability to work."[39] Referring to this language as "a [bona fide occupational qualification] standard of its own," the Court explained that "[u]nless pregnant employees differ from others 'in their ability or inability to work,'" this standard requires employers to treat the two groups the same "for all employment-related purposes."[40] Under the second clause, Congress declared, "that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions."[41] Indeed, the Court previously described the PDA as "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[42]

In past cases interpreting the second clause of the PDA, the Court did not indicate that the language was ambiguous. To the contrary, the Court pronounced that Congress's mandate "could not be clearer" and that "the

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35. 42 U.S.C. § 2000e(k) (2012).

36. *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 284–85 (1987) (discussing both the first and second clauses of the PDA); *see also* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 204–06 (1991).

37. § 2000e(k); *see also* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983) (analyzing section 2000e(k) of the PDA and concluding that "[w]hen Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision").

38. *Guerra*, 479 U.S. at 285.

39. *Johnson Controls, Inc.*, 499 U.S. at 204 (quoting § 2000e(k)).

40. *Id.* (quoting § 2000e(k)).

41. *Id.* at 219 (White, J., concurring) (quoting *Newport News*, 462 U.S. at 684).

42. *Guerra*, 479 U.S. at 280, 285 (quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985), *aff'd*, 479 U.S. 272).

PDA means what it says."[43] As the Court previously explained, "[t]he PDA thus 'makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.'"[44]

Despite the Supreme Court's consistently broad interpretation of the PDA,[45] four of the lower federal courts chose to take a very "stilted view" when interpreting the second clause.[46] As we will see by examining some of the key cases, this narrow approach substantially limited the scope of the PDA and thus, for more than twenty years, reduced its effectiveness in combating pregnancy discrimination.[47]

The first notable federal decision to interpret the second clause of the PDA was written by Judge Richard Posner in *Troupe*.[48] As an initial matter, it is important to recognize that the *Troupe* case involves neither a failure to accommodate pregnancy-related medical limitations nor a challenge to an employer's light-duty policy.[49] Instead, the plaintiff in *Troupe* challenged her employer's decision to terminate her job as a sales clerk at a department store and argued that the termination was motivated by animus due to her pregnancy.[50] The plaintiff acknowledged that she was tardy to work on numerous occasions as a result of severe morning sickness arising from her pregnancy.[51] Despite her tardiness, the plaintiff relied on two pieces of circumstantial evidence to establish that her termination was due to her pregnancy and not her tardiness, "the timing of her discharge"[52] and a discriminatory statement by her immediate supervisor just minutes before her termination.[53] The district court granted summary judgment for the employer, thereby dismissing the plaintiff's pregnancy discrimination claim.[54]

In affirming the dismissal of the plaintiff's claim, the Seventh Circuit

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43. *Johnson Controls, Inc.*, 499 U.S. at 204, 211.

44. *Id.* at 219 (White, J., concurring) (quoting *Newport News*, 462 U.S. at 684).

45. *See* Brake & Grossman, *supra* note 14, at 77; Kasdan, *supra* note 24, at 323.

46. *See* Brake & Grossman, *supra* note 14, at 67–68; *accord* Dworkin et al., *supra* note 14, at 96.

47. *See, e.g.*, Grossman, *supra* note 14, at 571 (declaring that the PDA "has failed to deliver" and "[t]his failure, in a nutshell, flows from the PDA's structure, which grants rights based primarily on a pregnant woman's capacity").

48. Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994).

49. *See id.* at 735–36. In fact, the Seventh Circuit specifically states that the plaintiff requested to "return to part-time status" based on her severe morning sickness, and the employer granted her request. *Id.* at 735.

50. *Id.* at 735–36.

51. *Id.* at 737.

52. *Id.* (explaining that the plaintiff was terminated just one day before she was scheduled to begin her maternity leave).

53. *Id.* at 735–36 (describing that her supervisor stated the plaintiff was being terminated because she did not expect her to return to work after having a baby).

54. *Id.* at 736.

concluded that the plaintiff failed to produce sufficient direct or circumstantial evidence of pregnancy discrimination.[55] The court acknowledged that the plaintiff had relied on two pieces of circumstantial evidence, but it rejected the sufficiency of this evidence and concluded that the plaintiff needed evidence of a comparator to survive summary judgment.[56] The court also explained who constituted a comparator for purposes of the PDA and described a male employee with medical disabilities with a similar loss in productivity:

> We must imagine a hypothetical Mr. Troupe, who is as tardy as Ms. Troupe was, also because of health problems, and who is about to take a protracted sick leave growing out of those problems at an expense to Lord & Taylor equal to that of Ms. Troupe's maternity leave. If Lord & Taylor would have fired our hypothetical Mr. Troupe, this implies that it fired Ms. Troupe not because she was pregnant but because she cost the company more than she was worth to it.[57]

Thus, the Seventh Circuit endorsed the use of a comparator for purposes of establishing claims of pregnancy discrimination under the PDA.[58] In creating the "hypothetical Mr. Troupe" as the proper comparator, the court emphasized that this burden was not substantial, stating that the plaintiff "would be halfway home if she could find one nonpregnant employee of Lord & Taylor who had *not* been fired when about to begin a leave similar in length to hers" and that the proper inquiry was how the employer "treat[ed] an employee who was equally tardy for some other health reason."[59] Given that the plaintiff did not present any evidence that even one nonpregnant employee was treated more favorably, the court concluded that "there is no comparison group" and that summary judgment was appropriate.[60]

The Seventh Circuit's decision in *Troupe* not only made it more difficult for pregnant women to establish a claim under the PDA by requiring a comparator,[61] but it also made several other sweeping generalizations about the legal requirements of the PDA[62] that have

55. *Id.* at 736–38.
56. *Id.* at 739 (observing that "her failure to present any comparison evidence doomed her case").
57. *Id.* at 738.
58. *Id.* at 738–39.
59. *Id.* at 737, 739.
60. *Id.* at 737–39.
61. *See* Grossman, *supra* note 14, at 614–15.
62. *See Troupe*, 20 F.3d at 738.

limited the law's effectiveness. In making these declarations, the Seventh Circuit did not cite any persuasive authority, or analyze the statute's text, its purpose, legislative history, or administrative regulations. Despite this lack of authority, the court declared that "[t]he [PDA] does not, despite the urgings of feminist scholars, require employers to offer maternity leave or take other steps to make it easier for pregnant women to work."[63] Indeed, according to the Seventh Circuit, the PDA allows an employer to "treat pregnant women as badly as they treat similarly affected but nonpregnant employees."[64] In sum, the Seventh Circuit characterized the plaintiff's claim as one for preferential treatment, and the court concluded that the PDA did not mandate preferential treatment for pregnant women.[65]

Despite strong criticism of *Troupe*,[66] both the Eleventh and Fifth Circuits subsequently relied on its generalizations to further increase the burden on pregnant plaintiffs seeking to establish a claim under the PDA.[67] Unlike the facts in *Troupe*, which did not involve a light-duty challenge, the plaintiffs' primary complaints against their employers in both *Urbano v. Continental Airlines, Inc.* and *Spivey v. Beverly Enterprises, Inc.* were based on their failure to allow temporary lifting restrictions for conditions related to pregnancy.[68] Both cases were brought by plaintiffs whose job duties required regular lifting.[69] Likewise, both employers had policies that allowed employees to request a light-

63. *Id.* (citation omitted).

64. *Id.*

65. *See id.* (holding that "[t]he [PDA] requires the employer to ignore an employee's pregnancy but" does not require an employer to ignore an employee's "absence from work, unless the employer overlooks the comparable absences of nonpregnant employees").

66. *See, e.g.*, Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 735, 753 (2011) (observing generally that "the demand for similarly situated, better-treated others underinclusively misses important forms of discrimination and forecloses many individuals from having even an opportunity to be heard because sufficiently close comparators so rarely exist" and specifically noting that finding comparators in pregnancy claims is especially challenging because that trail is "inherently not comparable to others outside the trait-bearing group"); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 193, 223 (2009) (criticizing the circuit court's insistence on finding the "perfect comparator" and stating "that the circuits seem hopelessly lost" when determining "when the putative comparator is similar enough").

67. *See* Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1312–13 (11th Cir. 1999), *abrogated by* Young v. United Parcel Serv., 135 S. Ct. 1338 (2015); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998), *abrogated by Young*, 135 S. Ct. 1338.

68. *See Spivey*, 196 F.3d at 1311–12; *Urbano*, 138 F.3d at 205.

69. For instance, the plaintiff in *Urbano* was employed as a ticketing sales agent with Continental Airlines, and, in the process of assisting passengers with their baggage, she often lifted more than twenty pounds. 138 F.3d at 205. Similarly, the plaintiff in *Spivey* was employed as a certified nurse's assistant at a rehabilitation center and regularly lifted patients in the process of providing patient care. 196 F.3d at 1311.

duty assignment in the event the employee sustained a workplace injury.[70] When both plaintiffs requested a light-duty assignment under their employer's policy, however, their requests were denied because their limitations did not arise out of occupational injuries.[71] Relying on the unsupported language in *Troupe* that the PDA does not require "preferential" treatment for pregnant women, the Fifth and Eleventh Circuits concluded as a matter of law that the policies were permissible, declaring them to be pregnancy-blind.[72]

In further contrast to *Troupe,* where the Seventh Circuit counseled the plaintiff that she "would be halfway home if she could find one nonpregnant employee" to offer as comparator evidence of pretext,[73] the Eleventh and Fifth Circuits dismissed the plaintiffs' claims without conducting an extensive pretext analysis.[74] Rather, these courts dismissed the plaintiffs' claims at an earlier stage of the process—for failure to establish a prima facie case of pregnancy discrimination—by imposing a requirement that plaintiffs demonstrate they were similarly situated to nonpregnant workers who received more favorable treatment than they did.[75] Although the plaintiff in *Urbano* identified forty-eight other employees that her employer approved for similar light-duty assignments within just one year's time, the Fifth Circuit disregarded this comparator evidence, declaring that the comparators were not similarly situated because they had sustained work-related injuries.[76] Even when faced with considerable comparator evidence, both courts concluded it was insufficient by focusing on the *source* of the employees' injuries rather than their relative abilities to work.[77]

By focusing on the source of the employees' injuries, these courts further narrowed the acceptable comparators for pregnant employees under the PDA, making it even more difficult for plaintiffs to obtain accommodation. In *Urbano*, the Fifth Circuit declared that the proper comparators under the PDA are "other employees injured off duty."[78] The Fifth Circuit also generally declared that "the PDA does not entitle pregnant employees with non-work related infirmities to be treated the

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70. *Spivey*, 196 F.3d at 1311; *Urbano*, 138 F.3d at 205.
71. *Spivey*, 196 F.3d at 1311–12; *Urbano*, 138 F.3d at 205.
72. *See Spivey*, 196 F.3d at 1312–13 (citing Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994)); *Urbano*, 138 F.3d at 207–08 (citing *Troupe*, 20 F.3d at 738).
73. *Troupe*, 20 F.3d at 739.
74. *See Spivey*, 196 F.3d at 1313; *Urbano*, 138 F.3d at 206.
75. *See Spivey*, 196 F.3d at 1312–13; *Urbano*, 138 F.3d at 206.
76. *Urbano*, 138 F.3d at 206.
77. *See Spivey*, 196 F.3d at 1313; *Urbano*, 138 F.3d at 206–07.
78. *Urbano*, 138 F.3d at 208.

same . . . as employees with occupational injuries."[79] Similarly, the Eleventh Circuit concluded that "[t]he correct comparison is between Appellant and other employees who suffer non-occupational disabilities, not between Appellant and employees who are injured on the job."[80] Thus, although the Eleventh and Fifth Circuits relied on *Troupe* for their generalizations about "preferential treatment," these courts deviated substantially from *Troupe* by imposing this similarly situated requirement and defining it so narrowly as to exclude most nonpregnant workers as potential comparators.

Three circuits disagreed with considering the source of the employees' injuries, adopting instead a broader analysis that compared the employees' relative abilities to work.[81] Under this alternative approach, a pregnant employee could compare her benefits with those of an employee with an occupational injury.[82] In reaching these decisions, courts emphasized the plain text of the comparator clause.[83] For instance, in *Ensley-Gaines v. Runyon*, the Sixth Circuit observed the existence of two clauses, rather than just a single antidiscrimination mandate.[84] Then, the court held that

> [w]hen Congress enacted the PDA, instead of merely recognizing that discrimination on the basis of pregnancy constitutes unlawful sex discrimination under Title VII, it provided additional protection to those "women affected by pregnancy . . . " by expressly requiring that employers provide the same treatment of such individuals as provided for "other persons not so affected but similar in their ability or inability to work."[85]

Likewise, the Tenth Circuit held that the proper inquiry in a pregnancy discrimination case is whether the plaintiff has established "that she was treated differently than a non-pregnant, temporarily-disabled employee."[86]

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79. *Id.*
80. *Spivey*, 196 F.3d at 1313.
81. *See* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1195 (10th Cir. 2000); Deneen v. Nw. Airlines, Inc., 132 F.3d 431, 437–38 (8th Cir. 1998); Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996).
82. *See Horizon/CMS Healthcare Corp.*, 220 F.3d at 1194–96; *Ensley-Gaines*, 100 F.3d at 1226.
83. *Deneen*, 132 F.3d at 435 (quoting 42 U.S.C. § 2000e(k) (2012)); *Ensley-Gaines*, 100 F.3d at 1226 (quoting § 2000e(k)).
84. 100 F.3d at 1226.
85. *Id.* (quoting § 2000e(k)).
86. *Horizon/CMS Healthcare Corp.*, 220 F.3d at 1195 n.7.

In reaching a more expansive interpretation of the comparator clause, the Sixth Circuit relied on the Supreme Court's previous admonition in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc.* that "[t]he second clause [of the PDA] could not be clearer."[87] Accordingly, the Sixth Circuit followed the Court's directive and concluded:

> [T]he PDA explicitly alters the analysis to be applied in pregnancy discrimination cases. While Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated "in all respects," the PDA requires only that the employee be similar in his or her "ability or inability to work."[88]

Moreover, when applying this standard, the Sixth Circuit explicitly rejected the approach taken by the Fifth and Eleventh Circuits and refused to exclude workers with occupational injuries that were given light-duty assignments as possible comparators for pregnant workers.[89]

In evaluating the divergent interpretations of the second clause of the PDA, scholars focused on why the majority approach had excluded workers with occupational injuries from the list of possible comparators for pregnant workers. Theories ranged from a belief that the judiciary was "increasingly hostile" to accommodation mandates,[90] to more practical observations of judicial preferences for predictability and "clearly defined and identifiable categories,"[91] to more systematic opinions that the lower federal courts were essentially continuing to follow the reasoning of *Gilbert*.[92] Equality advocates and business groups alike, however, agreed that clarification was needed not only to resolve the circuit split but also to clearly define the obligations of employers under the PDA to provide accommodations to pregnant women.[93]

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87. *Ensley-Gaines*, 100 F.3d at 1226 (alterations in original) (quoting Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187, 204–05 (1991)).

88. *Id.* (first quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992); and then quoting § 2000e(k)).

89. *Id.*

90. Brake & Grossman, *supra* note 14, at 70.

91. Goldberg, *supra* note 66, at 740.

92. Dinner, *supra* note 15, at 478 (declaring that "[t]he reasoning of *General Electric Co. v. Gilbert*, though not its specific holding, continues to exert a shadow over the jurisprudence of the lower federal courts").

93. *See, e.g.*, Brake & Grossman, *supra* note 14, at 68–69, 122 (stating that the cases interpreting the PDA "are an increasingly sorry lot," that due to these interpretations, the statute "is failing the women who need it most," and suggesting that the problems under

II. THE SPECIAL DELIVERY ITSELF: THE COURT'S CREATION OF A NOVEL APPROACH TO LITIGATING CLAIMS OF PREGNANCY DISCRIMINATION UNDER THE COMPARATOR CLAUSE

After more than two decades of litigation in the lower federal courts over the meaning of the second clause of the PDA, civil rights advocates identified a convincing case to take to the Supreme Court in order to resolve the circuit split. The facts of *Young v. United Parcel Service, Inc.*, were well suited to the comparator issue, as the plaintiff in this case had identified more comparators than any previously reported decision.[94] Specifically, the employer, United Parcel Service ("UPS"), accommodated numerous workers with lifting and other temporary work restrictions but categorically refused to accommodate similar, pregnancy-related limitations.[95] Despite the existence of plentiful comparators, both the district court and the Fourth Circuit agreed with the employer that the plaintiff failed to establish a prima facie case of sex discrimination and interpreted the PDA more narrowly than any previous federal decision.[96]

In *Young*, the plaintiff was employed as a delivery driver for UPS, a position that required her to lift and transport packages that sometimes weighed as much as seventy pounds.[97] After the plaintiff became pregnant in 2006, her physician advised her not to lift more than twenty pounds while working during the first twenty weeks of her pregnancy and thereafter not more than ten pounds.[98] UPS refused to allow her to work as a delivery driver due to these restrictions, even refusing to provide her with a light-duty assignment during her pregnancy.[99] Thus, the plaintiff took unpaid leave under the Family and Medical Leave Act ("the FMLA"); when that leave expired, she was placed on an extended

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the PDA "could be fixed as they have been created, through judicial interpretation" rather than shifting the entire focus to ADA accommodations); Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimating Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 227, 251 (1998) (proclaiming that "the elimination of pregnancy discrimination has proven to be an elusive goal," that "the PDA has often served to legitimate" discrimination based on pregnancy "instead of eradicating" it, and further advocating that "the PDA should be amended to require accommodation"); Grossman, *supra* note 14, at 571, 625–26 (declaring that "current law falls quite short" and "neglects the needs of many pregnant working women today" and thereafter outlining three different approaches to achieving reform in the area of pregnancy accommodation).

94. *See* Young v. United Parcel Serv., Inc., No. DKC 08-2586, 2011 WL 665321, at *13 (D. Md. Feb. 14, 2011), *aff'd*, 707 F.3d 437 (4th Cir. 2013), *vacated*, 135 S. Ct. 1338 (2015).

95. *See id.*

96. *Id.* at *14; *Young*, 707 F.3d at 451.

97. *Young*, 707 F.3d at 440.

98. *Id.*

99. *Id.* at 441.

leave of absence.[100] Given the forced leave of absence, the plaintiff exhausted her FMLA leave during her pregnancy, and she had no salary or medical coverage when her baby was born.[101]

UPS had adopted a written policy that provided light-duty accommodations to three separate categories of qualifying employees: employees injured on the job, employees with qualifying disabilities under the ADA, and drivers who had lost their certification issued by the Department of Transportation and, thus, were ineligible to drive.[102] Despite regularly accommodating other employees under this policy by providing temporary light-duty assignments, UPS denied the plaintiff's request for a temporary assignment to accommodate the lifting restriction imposed by her physician.[103] UPS argued that its accommodation policy was pregnancy-neutral and thus did not violate the PDA because it did not single out pregnancy as the only condition ineligible for accommodation.[104]

After acknowledging the significant number of nonpregnant workers receiving lifting accommodations, the district court nonetheless concluded that UPS had not violated the PDA and granted UPS's motion for summary judgment.[105] Thereafter, the Fourth Circuit affirmed, citing *Troupe*, *Urbano*, and *Spivey*, and held that the PDA did not require UPS to accommodate the plaintiff's lifting restriction, even though UPS had a policy that provided this benefit to other workers.[106] The Fourth Circuit's decision not only limited a pregnant employee's pool of potential comparators, but its legal analysis also essentially eliminated the second clause of the PDA from Title VII.[107] The Fourth Circuit acknowledged the existence of two separate clauses in the PDA but then declared that "[c]onfusion arises when trying to reconcile [the] language in the" two clauses.[108] Additionally, the Fourth Circuit observed that Congress placed both clauses "in the definitional section of Title VII."[109] Based on this placement, the court concluded that the second clause "does not create a

100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 446.
105. Young v. United Parcel Serv., Inc., No. DKC 08-2586, 2011 WL 665321, at *13, *22 (D. Md. Feb. 14, 2011), *aff'd*, 707 F.3d 437, *vacated*, 135 S. Ct. 1338 (2015).
106. *See Young*, 707 F.3d at 447–49, 451.
107. *See id.* at 447 (holding that the second clause of the PDA "does not create a distinct and independent cause of action").
108. *Id.*
109. *Id.*

distinct and independent cause of action" that "requires different—perhaps even preferential—treatment for pregnant workers."[110]

The ramifications of the *Young* decision were so universally harmful to the future effectiveness of the PDA that the plaintiff filed a petition for certiorari to the Supreme Court.[111] Additionally, multiple civil rights organizations filed a joint amici curiae brief in support of the plaintiff, urging the Court to reverse the Fourth Circuit and resolve the circuit split.[112] They persuasively argued that the Fourth Circuit's approach "strips pregnant women of most potential comparators, rendering the comparative right of accommodation an empty vessel."[113] If unchanged, these experts predicted that the approach would both "exponentially widen the gulf in employment opportunities [for] pregnant women" and "create profound economic instability" for "women in low-wage jobs and traditionally male-dominated occupations."[114]

In response to the petition, the Court invited the Solicitor General to submit an amicus curiae brief providing the position of the United States.[115] Significantly, it was the opinion of the Solicitor General that the Fourth Circuit "erred in holding that petitioner failed to establish a prima facie case of pregnancy-related sex discrimination," and, moreover, that "[a] majority of the courts of appeals . . . to have considered claims similar to petitioner's have erred in interpreting" the second clause of the PDA.[116] The Solicitor General explained that the Fourth Circuit's reasoning required the petitioner to establish that "she receive[d] less favorable treatment than *every* other employee" and "[n]othing in the PDA" supports such an interpretation.[117] According to the Solicitor General, the plaintiff's identification of the comparators, including the employees with occupational injuries and individuals protected by the ADA, was "sufficient to satisfy the fourth prong of the prima facie case."[118]

Ultimately, the Court voted 6-3 to vacate the judgment of the Fourth Circuit, explaining that it had failed to ask this crucial question: "[W]hy,

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110. *Id.*

111. Petition for a Writ of Certiorari, Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015) (No. 12-1226), 2013 WL 1462041.

112. Brief of Law Professors and Women's Rights Organizations as Amici Curiae in Support of Petitioner, *supra* note 16, at 4.

113. *Id.* at 2.

114. *Id.* at 2–3.

115. Young v. United Parcel Serv., Inc., 134 S. Ct. 374 (2013).

116. *See* Brief for the United States as Amicus Curiae at 8, 11, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 2089966.

117. *Id.* at 12.

118. *Id.* at 13.

when the employer accommodated so many, could it not accommodate pregnant women as well?"[119] The precise legal issue, according to the Court, was the meaning of the command in the second clause of the PDA to "treat" pregnant workers "the same . . . as other persons."[120] In addressing this question, the majority of the Justices began their analysis by rejecting the interpretations offered by both parties.[121]

The opinion of the Court, written by Justice Breyer, and joined by Chief Justice Roberts, Justices Ginsburg, Sotomayor, and Kagan, rejected the interpretation of the PDA adopted by the Fourth Circuit and advanced by UPS.[122] Specifically, the Court disagreed that the purpose of the second clause of the PDA is to "clarif[y]" or "simply define[] sex discrimination to include pregnancy discrimination."[123] Such an interpretation "cannot be so," according to the Court, because it would render the second clause "superfluous" by collapsing it into the first clause.[124] The Court explained that "the first clause . . . reflects Congress' disapproval of the reasoning in *Gilbert* by 'adding pregnancy to the definition of sex discrimination[,]' . . . [b]ut the second clause was intended to do more than that—it [also] 'was intended . . . to illustrate how discrimination against pregnancy is to be remedied.'"[125]

All nine Justices likewise rejected the interpretation of the PDA advanced by the plaintiff and the Solicitor General.[126] Under their interpretation, the second clause "requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work."[127] Characterizing this interpretation as granting pregnant workers "a most-favored-nation status," the Court unanimously discarded this reading of the statute as too broad.[128] In rejecting this interpretation, the majority emphasized the plain language of the statute, namely, that the second clause "uses the open-ended term

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119. *Young*, 135 S. Ct. at 1355.

120. *Id.* at 1343 (quoting 42 U.S.C. § 2000e(k) (2012)); *accord id.* at 1357 (Alito, J., concurring); *id.* at 1361 (Scalia, J., dissenting).

121. *Id.* at 1349 (majority opinion).

122. *Id.* at 1352–53.

123. *Id.* at 1353.

124. *Id.* at 1352.

125. *Id.* at 1353 (quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 179 U.S. 272, 284, 285 (1987)).

126. *See id.*; *see also id.* at 1356 (Alito, J., concurring); *id.* at 1361 (Scalia, J., dissenting).

127. *Id.* at 1349 (majority opinion) (quoting Petitioner's Brief at 23, *Young*, 135 S. Ct. 374 (No. 12-1226), 2014 WL 4441528).

128. *Id.* at 1352; *accord id.* at 1358 (Alito, J., concurring); *id.* at 1361–63 (Scalia, J., dissenting).

'other persons[]' [and that i]t does not say . . . '*any* other persons' . . . nor does it otherwise specify *which* other persons Congress had in mind."[129]

The majority thereafter offered the Court's interpretation, wherein it reasoned that its new approach "minimizes the problems we have discussed, responds directly to *Gilbert*, and is consistent with longstanding interpretations of Title VII."[130] The Court explained that its interpretation is based generally on the framework set forth by the Court in *McDonnell Douglas*, which allows a plaintiff to establish a disparate treatment claim through circumstantial evidence.[131] Adapting the *McDonnell Douglas* framework to the pregnancy discrimination context, the Court held that a plaintiff may establish a prima facie case of disparate treatment under the second clause of the PDA by showing: "[1] that she belongs to the protected class, [2] that she sought accommodation, [3] that the employer did not accommodate her, and [4] that the employer did accommodate others 'similar in their ability or inability to work.'"[132] Although the Court did not identify which nonpregnant employees could qualify as similar in their ability to work, the Court did admonish that this does not "require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways."[133]

Once a plaintiff establishes her prima facie case, the Court explained that the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for denying the plaintiff's accommodation.[134] Here again, the Court provided only general guidance as to what constituted a sufficiently legitimate reason for refusing to accommodate a pregnant worker.[135] Specifically, the Court excluded cost as a permissible basis for refusing to accommodate pregnant workers by explaining that "consistent with the Act's basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates."[136] The Court justified this exclusion by explaining that "the employer in *Gilbert* could . . . have made just such a claim."[137] The Court also hinted that permissible reasons for refusing accommodation could include factors

129. *Id.* at 1350 (majority opinion).
130. *Id.* at 1353.
131. *See id.* at 1353–54; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
132. *Young*, 135 S. Ct. at 1354.
133. *Id.*
134. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 802).
135. *See id.*
136. *Id.*
137. *Id.*

such as age, seniority, job classifications, or job requirements.[138] Thus, by designating some reasons articulated by an employer as legitimate, while at the same time denying cost, the Court left open the potential for employers to lawfully treat pregnant workers differently than nonpregnant workers under certain circumstances.

Once an employer satisfied its burden, the Court explained that the burden then returns to the plaintiff to establish pretext, meaning "that its reasons for failing to accommodate pregnant employees . . . give rise to an inference of intentional discrimination."[139] In the pretext phase of the analysis, the Court imposed two additional criteria that are unique to claims brought under the PDA. First, the Court announced that a plaintiff could survive summary judgment, thereby reaching the jury on her PDA claim, if she provides "sufficient evidence" of the following two elements: "that the employer's policies impose a significant burden on pregnant workers, *and* that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination."[140] Second, while the Court did not define what constitutes a significant burden, the Court provided an example of how this burden could be achieved in the context of the PDA by explaining that a "plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[141] In other words, the Court left open the possibility that blanket, exclusionary policies that "categorically fail[] to accommodate pregnant employees" may provide a sufficient inference of intentional discrimination.[142]

The Court remanded the case to the Fourth Circuit for further fact finding, declining to decide whether the plaintiff established her burden of proving pretext.[143] The Court acknowledged the possibility that the plaintiff could survive summary judgment on remand declaring that, "if the facts are as Young says they are," then "a jury could find" in favor of the plaintiff.[144]

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138. *See id.* at 1349–50.
139. *Id.* at 1354–55.
140. *Id.* at 1343 (emphasis added).
141. *Id.*
142. *See id.* at 1354.
143. *Id.* at 1356.
144. *Id.* at 1354–55.

Justice Alito joined in the Court's judgment vacating the decision of the Fourth Circuit,[145] but wrote separately to provide his interpretation of the second clause of the PDA, which is narrower than that of the majority. He agreed with the majority's conclusion that "the second clause does not merely explain the first" because such a conclusion would render it superfluous.[146] He also emphasized the language of the statutory text, observing that the second clause contains "an affirmative command" requiring "equal treatment."[147] While the Court's opinion did not identify the proper comparators for pregnant women under the PDA, Justice Alito provided guidance on this issue, advising "that pregnant employees must be compared with employees performing the same or very similar jobs."[148] Justice Alito justified this conclusion by explaining that a worker's "ability to work—despite illness, injury, or pregnancy—often depends on the tasks that the employee's job includes."[149]

Although the majority's opinion did not contain any discussion of the requisite intent required under the second clause of the PDA, Justice Alito emphasized the lack of discriminatory intent in that clause of the statute and asserted that its absence is significant.[150] He reasoned that if an employer articulated a "neutral business reason" other than cost, the lack of intent language in the second clause meant that the court could not "evaluate the justification for a truly neutral rule."[151] Applying this analysis to the facts of this case, Justice Alito concluded that UPS had articulated a sufficiently neutral reason for accommodating employees who were injured on the job and employees who were eligible for an accommodation based on their disability under the ADA.[152] In contrast, Justice Alito also concluded that UPS failed to offer "any plausible justification" for accommodating drivers who lost their DOT certifications and noted that these drivers lost their "certification for a variety of reasons, including medical conditions or injuries incurred off the job."[153] Accordingly, Justice Alito argued that the case should be remanded on the narrow issue of the employer's failure to articulate a neutral reason for accommodating workers who had lost their DOT certifications while simultaneously failing to accommodate pregnant workers.[154]

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145. *Id.* at 1356 (Alito, J., concurring).
146. *Id.* at 1357.
147. *Id.*
148. *Id.* at 1357–58.
149. *Id.* at 1358.
150. *Id.* at 1357.
151. *Id.* at 1359.
152. *Id.* at 1360.
153. *Id.*
154. *Id.* at 1361.

In dissent, Justice Scalia, joined by Justices Kennedy and Thomas, adopted the interpretation advanced by UPS, namely, that the second clause of the PDA adds "clarity" to the first clause, and "prohibits singling pregnancy out for disfavor."[155] Under this view, "[i]f a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she *has* been 'treated the same' as everyone else."[156] Justice Scalia boisterously criticized the majority's approach, characterizing it as "[i]nventiveness posing as scholarship—which gives us an interpretation that is as dubious in principle as it is senseless in practice."[157] Calling their disagreement with the majority a "fundamental" one, the dissent accused the Court of confusing its role with that of a congressional conference committee, by "craft[ing] a policy-driven compromise between the possible readings of the law."[158]

Among other things, the dissent chastised the majority for inserting ambiguous requirements into the *McDonnell Douglas* framework such as the "significant burden" and "sufficiently strong justification" that are "splendidly unconnected with the text and even the legislative history of the Act."[159] When addressing the majority's test for establishing pretext in a claim under the PDA, the dissent accused the majority of "bungl[ing] the dichotomy between claims of disparate treatment and claims of disparate impact."[160] The dissent concluded by declaring that the majority's approach "can thus serve only one purpose: allowing claims that belong under Title VII's disparate-impact provisions to be brought under its disparate-treatment provisions instead."[161]

Despite the Court's creation of this novel framework for litigating claims under the PDA, many observers immediately declared the decision a decisive win for "other women in the workplace."[162] While the Court's decision may be characterized as an individual win for Ms. Young, given

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155. *Id.* at 1363–64 (Scalia, J., dissenting).
156. *Id.* at 1362.
157. *Id.* at 1361.
158. *Id.* at 1366.
159. *Id.* at 1361.
160. *Id.* at 1365.
161. *Id.* at 1366.
162. Lawrence Hurley, *U.S. Supreme Court Revives Pregnant Worker's Case Against UPS*, THOMSON REUTERS (Mar. 25, 2015, 4:09 PM), http://www.reuters.com/article/2015/03/25/usa-court-pregnancy-idUSL2N0WR0Z620150325 (quoting Sam Bagenstos, who argued Young's case before the Supreme Court); *accord Statement of Chair Jenny R. Yang and General Counsel P. David Lopez on the Supreme Court's Ruling in* Young v UPS, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/litigation/statement_young_v_ups.cfm (last visited Jan. 31, 2016); Lenora M. Lapidus, *Supreme Court Delivers Fairness to Pregnant Workers in UPS Case*, ACLU (Mar. 25, 2015, 8:28 PM), https://www.aclu.org/blog/supreme-court-delivers-fairness-pregnant-workers-ups-case.

that it provides her with an opportunity to present her case to the jury, any more global declaration of victory for women should be tempered by the complications arising from the Court's creation of this vague, new framework for claims under the PDA.[163] As noted above and addressed in greater detail below, the Court imposed new, subjective requirements on pregnant workers seeking accommodation that previously had not been imposed in the general Title VII context. As we shall explore, these new requirements were not defined and will create considerable ambiguity in litigating pregnancy claims, leaving the lower courts to interpret these requirements through future litigation.

III. THE COMPLICATIONS OF A SPECIAL DELIVERY: THE RAMIFICATIONS OF THE COURT'S NEW FRAMEWORK IN SECURING FUTURE WORKPLACE ACCOMMODATIONS FOR PREGNANT WOMEN

While the Supreme Court's decision in *Young* overturned the narrow interpretation of the PDA applied by the Fourth Circuit, it fell far short of the interpretation sought by the Solicitor General. The Solicitor General's interpretation would have required employers to afford pregnant women a full right to accommodation, comparable to that provided to other employees with similar abilities or inabilities to work.[164] Instead, the *Young* decision leaves many unresolved questions and imposes novel and challenging burdens on pregnant women seeking an accommodation under the PDA. Faced with the possibility of protracted litigation and unpredictable rulings, pregnant workers may elect instead to pursue their claims under the ADAAA.[165] Unfortunately, the specific medical conditions arising from pregnancy that are covered under the ADAAA are unclear,[166] so some women may not be covered by its provisions. Given the maze of complexity and uncertainty surrounding accommodations for pregnant workers, Congress should intervene and amend the PDA to provide pregnant workers with a clear, affirmative right of accommodation.

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163. Joanna L. Grossman & Deborah L. Brake, *Afterbirth: The Supreme Court's Ruling in* Young v. UPS *Leaves Many Questions Unanswered*, JUSTIA (Apr. 20, 2015), https://verdict.justia.com/2015/04/20/afterbirth-the-supreme-courts-ruling-in-young-v-ups-leaves-many-questions-unanswered; Aaron J. Ver & Neal D. Mollen, *Mixed Messages on the Impact of* Young v. UPS, LAW360 (Mar. 27, 2015, 5:56 PM), http://www.law360.com/articles/636755/mixed-messages-on-the-impact-of-young-v-ups.

164. *Young*, 135 S. Ct. at 1351.

165. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

166. *See id.*

While the Court's decision in *Young* restored the potential for pregnant workers to establish a claim for accommodation under the PDA, it imposed a heavy, fact-intensive analysis that may be difficult to satisfy in all but extreme cases. In its decision, the Court did not define, for purposes of establishing the plaintiff's prima facie case, how an employee should determine which employees are "similar in their ability or inability to work" when compared to pregnant employees.[167] Justice Alito, in his concurring opinion, advised "that pregnant employees must be compared with employees performing the same or very similar jobs,"[168] but that guidance is not present in the majority's opinion. The majority only provided general instruction as to this element by indicating that pregnant and nonpregnant worker need not be "similar in all but the protected ways."[169]

Yet, the meaning of this fourth element of the prima facie case is the crux of the issue that has divided the federal courts of appeals for over twenty years. In its ruling in *Young*, the Fourth Circuit articulated the element with slightly different phrasing, requiring the pregnant plaintiff to show "that similarly-situated employees outside the protected class received more favorable treatment."[170] Although the Court used somewhat broader language in articulating this fourth element, the lower federal courts nonetheless are left with the task of defining which workers are "similar in their ability or inability to work."[171] In his concurring opinion, Justice Alito interpreted this phrase narrowly, concluding that "pregnant and non-pregnant employees are not similar in relation to the ability or inability to work if they are unable to work for different reasons."[172] Additionally, under Justice Alito's view, pregnant and nonpregnant "employees are not similar in the relevant sense if the employer has a neutral business reason for treating them differently."[173] If other federal courts adopt similar interpretations, employees may find it increasingly difficult to identify acceptable comparators. Given the absence of clear language in the Court's decision, the criteria for determining acceptable comparators remains open to interpretation.

Ambiguity is not only present in the prima facie stage, but it also is present in the plaintiff's burden of proving pretext. Here, the Court

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167. *See Young*, 135 S. Ct. at 1354.
168. *Id.* at 1357–58 (Alito, J., concurring).
169. *Id.* at 1354 (majority opinion).
170. Young v. United Parcel Serv., Inc., 707 F.3d 437, 449–50 (4th Cir. 2013) (quoting Gerner v. County of Chesterfield, 674 F.3d 264, 266 (4th Cir. 2012)), *vacated*, 135 S. Ct. 1338.
171. *Young*, 135 S. Ct. at 1351.
172. *Id.* at 1359 (Alito, J., concurring).
173. *Id.*

declared that the plaintiff has to establish that the employer's reasons for refusing to accommodate her are not "sufficiently strong to justify the [substantial] burden" that the employer's policy places on pregnant workers.[174] This is a new test, and yet, the Court neither identifies what constitutes a substantial burden nor explains how courts should achieve the proper balance between the employer's justifications and the burden on pregnant workers.

Moreover, when the Court applied its analysis to the facts of *Young*, the Court implied that significant comparator evidence of differential treatment is necessary at the pretext stage.[175] For instance, the Court declared that "if the facts are as Young says they are, . . . UPS accommodates *most* nonpregnant employees with lifting limitations while *categorically* failing to accommodate pregnant employees with lifting limitations."[176] Yet, UPS's policy seems like an extreme example, which begs the question of alternative ways to satisfy this test. The Court emphasized that the plaintiff must establish that the substantial burden is imposed by "the employer's *policies*," but its language also implies that the employer's refusal to accommodate a single pregnant worker must be more than an isolated event.[177] Justice Scalia criticized this portion of the majority's analysis, accusing the Court of "bungl[ing] the dichotomy between claims of disparate treatment and claims of disparate impact."[178] The Court's opinion, however, specifically notes that the plaintiff neither "alleged a disparate-impact claim," nor did she bring "a 'pattern-or-practice' claim."[179] Indeed, the Court disagreed with the dissent's characterization, specifically clarifying that the plaintiff's sole claim is one for disparate treatment and that "the continued focus [is] on whether the plaintiff has introduced sufficient evidence to give rise to an inference of *intentional* discrimination" based on "how a policy operates in practice."[180]

While the dissent's criticism of the combined disparate treatment-impact portion of the opinion seems a bit exaggerated, the Court's articulation of the "substantial burden" test at a minimum seems to require something more than isolated decisions of an employer refusing to accommodate pregnant workers. Specifically, UPS's policy

174. *Id.* at 1354 (majority opinion).
175. *See id.*
176. *Id.* (emphasis added).
177. *Id.* (emphasis added).
178. *Id.* at 1365 (Scalia, J., dissenting).
179. *Id.* at 1345 (majority opinion).
180. *Id.* 1345, 1355 (stating that the plaintiff's "case requires us to consider the application of the second clause to a 'disparate-treatment' claim").

accommodated three separate groups of nonpregnant workers,[181] and, thus, the quantum of comparator evidence is much greater than would exist in most individual disparate treatment claims. Indeed, if an employer denied an individual pregnant worker a lifting accommodation while granting a similar accommodation to only one or two nonpregnant workers, it seems difficult to imagine that this would satisfy the "substantial burden" test, thus rendering isolated acts of discrimination difficult to sustain past summary judgment.

The *Young* decision therefore seems to prohibit only patterns of refusal to accommodate pregnancy restrictions, while permitting an employer to refuse individual requests to accommodate based on pregnancy. If this characterization is accurate, it is indeed a heavy burden for an individual plaintiff to bear and it would preclude many individual claimants from challenging their employer's refusal to accommodate their medically-imposed, pregnancy-related restrictions under the PDA. Thus, the reality is that the comparator clause, as interpreted in the *Young* decision, only marginally improves working conditions for pregnant employees—namely, those workers whose employers systematically refuse to accommodate pregnant workers while simultaneously accommodating nonpregnant workers with similar limitations.

Even if the Court had adopted the broader reading of the second clause, the one advocated by the plaintiff and the Solicitor General, pregnant employees would not have been guaranteed the benefit of accommodation outright.[182] The PDA only secures pregnant employees a comparative right of accommodation in the event that the employer offered the benefit of accommodation to other workers.[183] In other words, if an employer did not provide accommodations for any other workers with a temporary disability, it would not be required by the PDA to provide any accommodation to pregnant workers.[184] Therefore, even under a broader interpretation of the PDA, this comparative right of

181. *Id.* at 1358 (Alito, J., concurring) ("[F]irst, nonpregnant employees who received favorable treatment; second, nonpregnant employees who do not receive favorable treatment; and third, pregnant employees who . . . did not receive favorable treatment.").

182. *See, e.g.*, Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 931–32 (1985) (discussing the "parity of treatment" standard mandated by the second clause of the PDA).

183. *See* Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 105 (2013); *see also* Grossman, *supra* note 14, at 570.

184. *See* Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 31–32 (2007); *see also* Greenberg, *supra* note 93, at 241; Grossman, *supra* note 14, at 613.

accommodation admittedly leaves some pregnant employees unprotected and without any right to accommodation.[185]

Indeed, a pregnant employee's access to accommodation under the PDA is much more limited than the affirmative rights of accommodation for individuals with disabilities under the ADA,[186] or for religious practices under Title VII. If a pregnant worker chose to pursue her request for accommodation under the ADA, rather than the PDA, she would eliminate both the requirement to identify comparators and to satisfy the *Young* decision's substantial burden test. Therefore, even before the Court's complex decision in *Young*, some scholars advocated "that disability law . . . provide[d] a feasible alternative to traditional litigation under [the PDA]."[187]

The trade off, of course, is that the ADA has its own unique statutory requirements and poses another set of challenges to pregnant workers. Historically, federal courts have held that pregnancy is not a disability qualifying for coverage under the ADA,[188] and in reaching this conclusion, have relied in part on regulations interpreting the ADA issued by the Equal Employment Opportunity Commission ("EEOC") in 1995 that specifically enumerated pregnancy as a condition that failed to qualify as an "impairment."[189] The justification often given for this pregnancy exclusion under the ADA was that pregnancy was a normal

185. *See* Grossman, *supra* note 14, at 570; Williams et al., *supra* note 183, at 136.

186. *Compare* 42 U.S.C. § 2000e(k) (2012) (requiring that "women affected by pregnancy, childbirth, or related medical conditions . . . be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work"), *with* § 12112(b)(5)(A) (defining the term discrimination under the ADA specifically to include an employer's failure to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business").

187. Colette G. Matzzie, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193, 197 (1993); *accord* Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA's Pregnancy Exclusion*, 27 WIS. J.L. GENDER, & SOC'Y 1, 2 (2012) (concluding "that the time has come to allow pregnant workers to make reasonable accommodation claims under the ADA"); Cox, *supra* note 14, at 467–72 (discussing how the 2008 amendments to the ADA drastically expanded its scope, making it much easier for pregnancy-related medical conditions to qualify under its provisions).

188. *See, e.g.*, Cox, *supra* note 14, at 445–48 (discussing court decisions and the historic reasons for denying coverage under the ADA to pregnant women); Matzzie, *supra* note 187, at 194 (explaining the historical distinction made by courts that "pregnancy is presumed to be natural and good, whereas disabilities are presumed to be unnatural and bad").

189. 29 C.F.R. app. § 1630.2(h) (2015).

medical condition and thus, should not qualify as a disability.[190] When denying ADA coverage to pregnant women, courts further rationalized that impairments due to pregnancy often were temporary conditions, whereas the ADA required the impairment to be "permanent or long-term"[191] in order for it to be covered under the ADA.[192]

In 2008, Congress enacted the Americans with Disabilities Act Amendments Act in order to broaden coverage to individuals with disabilities and reverse a series of Supreme Court decisions narrowly interpreting its provisions.[193] Among other things, the ADAAA modified the definitional section of the ADA and indicated that the term disability "shall be construed in favor of broad coverage of individuals under this chapter."[194] Congress also modified the durational requirement and specified that "[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."[195]

Yet, the pregnancy exclusion remains in the EEOC regulations, and thus, in order to interpret these provisions consistently, some scholars have concluded that while a woman's pregnancy itself is not a disability, some of the physical limitations that arise from the pregnancy may now qualify as impairments under the ADAAA.[196] Moreover, the Supreme Court acknowledged the new ADAAA statutory modifications in the *Young* decision, but it expressly declined to comment on their

190. Equal Employment Opportunities for Individuals with Disabilities, 56 Fed. Reg. 35,726-01, 35,727 (July 26, 1991) ("Pregnancy, by itself, is not an impairment and is therefore not a disability.").

191. § 1630.2(j)(4) (instructing that the following factors should be considered in determining whether an individual has a qualifying disability: "the nature and severity of the impairment, [the] duration or expected duration of the impairment, and [the] actual or expected permanent or long-term impact of or resulting from the impairment"); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002) (citing 29 C.F.R. § 1630.2(j)(2)(ii)–(iii) (2001)) (holding that in order for a plaintiff to establish that she is substantially limited in performing manual tasks, the impact of the impairment must be "permanent or long term").

192. *See* Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 554 (7th Cir. 2011) (acknowledging that the duration requirement created "a tough hurdle" for pregnant women seeking workplace accommodations for pregnancy-related impairments), *abrogated by* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015); Jackson v. City of Chicago, 414 F.3d 806, 810 (7th Cir. 2005) (stating that the first prong of a disability discrimination claim is showing of disability under the ADA); Villarreal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D. Tex. 1995) (granting employer's motion to dismiss because temporary pregnancy-related impairments "do not, absent unusual circumstances, constitute a 'physical impairment' under the ADA.").

193. 154 CONG. REC. S8840.01 (daily ed. Sept. 16, 2008).

194. 42 U.S.C. § 12102(4)(A) (2012).

195. 29 C.F.R. § 1630.2(j)(1)(ix) (2015).

196. *See* Cox, *supra* note 14, at 486; Williams et al., *supra* note 183, at 112–13.

effectiveness given that these changes were effective after the complaint in *Young* was filed.[197] Therefore, while the ADAAA appears to be an alternative avenue for some pregnant women to obtain a workplace accommodation, the statutory revisions only became effective January 1, 2009,[198] and much uncertainty remains over the scope and application of its provisions.[199]

Even with a broad interpretation, the ADAAA only provides accommodations for some complications related to pregnancy; its coverage is not universal.[200] Only a few years have passed since the effective date of the ADAAA, but there already are a few cases denying coverage to pregnant women for complications related to pregnancy.[201] For example, in *Abbott v. Elwood Staffing Services, Inc.*, a pregnant worker employed on a car manufacturing assembly line requested light duty work due to a lifting restriction imposed by her physician after she experienced irregular vaginal bleeding when installing a heavy car door.[202] Her employer denied her request for light duty and placed her on FMLA leave.[203] Despite her symptoms and the twenty-five pound lifting restriction, the court held that she did not qualify as "disabled" under the ADAAA because her pregnancy was otherwise "healthy" and she failed to

197. *See Young*, 135 S. Ct. at 1348.

198. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 8, 122 Stat 3553, 3559 (codified as amended at 42 U.S.C. § 12101 (2012)) ("This Act and the amendments made by this Act shall become effective on January 1, 2009.").

199. *See Young*, 135 S. Ct. at 1352 (refusing to afford any deference under Skidmore v. Swift & Co., 323 U.S. 134 (1944), to the EEOC's 2014 guidelines interpreting the PDA and explaining that the new guidelines were "inconsistent with positions for which the Government has long advocated" and that the EEOC failed to offer an explanation for its contrary approach).

200. *See, e.g.*, Cox, *supra* note 14, at 484–86 (anticipating arguments against accommodating pregnancy as a disability and advocating that limitations arising from pregnancy should qualify under the ADAAA); Widiss, *supra* note 14, at 1007–09 (explaining that "[n]either the original ADA nor the ADA Amendments Act speaks directly to whether pregnancy may be a qualifying disability" and noting that the EEOC regulations and its "Questions and Answers" state "that pregnancy is not an impairment but that complications of pregnancy may be"); Williams et al., *supra* note 183, at 124–37 (analyzing pregnancy accommodation cases filed under the ADAAA, and observing that, "[w]hile the [ADA]'s scope of coverage is broad, it does not require accommodations for all situations in which pregnant women might want an accommodation" (for instance, the ADA would not cover "prospective injury to the fetus . . . because no impairment exists")).

201. *See* Abbott v. Elwood Staffing Servs., Inc., 44 F. Supp. 3d 1125, 1165–66 (N.D. Ala. 2014); Turner v. Eastconn Reg'l Educ. Serv. Ctr., No. 3:12-CV-00788 (VLB), 2013 WL 6230092, at *7–9 (D. Conn. Dec. 2, 2013); Nayak v. St. Vincent Hosp. & Health Care Ctr., Inc., No. 1:12-cv-0817-RLY-MJD, 2013 WL 121838, at *4 (S.D. Ind. Jan. 9, 2013).

202. 44 F. Supp. 3d at 1146–47.

203. *Id.* at 1150.

establish that her condition substantially limited a major life activity.[204] Similarly, another federal court recently dismissed a pregnant plaintiff's "regarded as" claim despite the fact that her contract was not renewed admittedly "[d]ue to [her] medically complicated pregnancy."[205] This plaintiff's physician placed her on complete bed rest after she experienced complications related to carrying twins, and, despite these precautions, she lost one of the twins during the pregnancy.[206] Thus, even under the more lenient standards of the ADAAA, pregnant workers experiencing common complications, such as morning sickness, swelling, fatigue, back pain, and others, still face a significant burden of proving they are disabled and entitled to reasonable workplace accommodations.

Additionally, pregnancy discrimination charges largely increased during the past fifteen years[207] and indeed are among the fastest growing categories of charges filed with the EEOC "despite a decline in the birth rate."[208] We must acknowledge that our statutory regime has provided inadequate employee protection and employer incentives to eliminate the problem. Statistics from the Department of Labor show that, as of 2010, women comprise forty-seven percent of the total workforce.[209] Given that percentage, and the fact that approximately seventy-five percent of these women will become pregnant while they are working,[210] Congress should legislate affirmative and predictable access to accommodations for all pregnant working women.

It is crucial that pregnant women be afforded the affirmative right to request a reasonable accommodation for pregnancy-related medical conditions. This is particularly true for "millions of women"[211] who are employed in positions with inflexible work schedules, or physically

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204. *Id.* at 1149, 1165–66.

205. *Nayak*, 2013 WL 121838, at *1, *4 (alteration in original).

206. *Id.* at *1.

207. In fiscal year 1997, the EEOC reported that approximately 3977 pregnancy discrimination charges were filed. *See Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1997—FY 2011*, EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm (last visited Jan. 31, 2016). By fiscal year 2002, the EEOC reported that this number increased to 4714. *Id.* By fiscal year 2007, the EEOC reported that this number increased again to 5587. *Id.* Likewise, in 2010, the EEOC reported that it received 6119 charges of pregnancy discrimination. *Id.*

208. Grossman, *supra* note 14, at 575 & n.37.

209. *Women in the Labor Force in 2010*, U.S. DEP'T OF LAB., www.dol.gov/wb/factsheets/Qf-laborforce-10.htm (last visited Jan. 31, 2016).

210. *See* Michelle R. Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards that Maintain Traditional Roles*, 92 J. APPLIED PSYCHOL. 1499, 1500 (2007).

211. Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 30 (2009).

demanding occupations, such as police officers, firefighters, construction workers, nurse's aides, and other jobs that require regular lifting.[212] Additionally, it is crucial that women in lower paying jobs continue to work and earn income throughout their pregnancies.[213] Furthermore, Justice Kennedy authored a separate dissent in *Young* acknowledging the "difficulties pregnant women face in the workplace" and emphasizing that these concerns "are and do remain an issue of national importance."[214]

For instance, if pregnant women are not eligible for an accommodation under the PDA or the ADAAA, then their only other alternative is to take their twelve weeks of unpaid leave prior to the birth of their child[215] under the FMLA.[216] For many women in low-paying jobs,

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212. *See, e.g.*, Brake & Grossman, *supra* note 14, at 69, 109–14 (providing examples of how women who work "in physically demanding jobs . . . will likely face conflicts with work at some point during pregnancy"); Cox, *supra* note 14, at 454 (noting that the lack of accommodations for pregnant women "fall most harshly on women in historically male professions" and "also frequently affect women in low-income work"); Grossman, *supra* note 14, at 619–20 (discussing the results of two studies that document the correlation between the physical labor required for the job and the likelihood that women in these positions would continue to work throughout pregnancy).

213. *See, e.g.*, Brake & Grossman, *supra* note 14, at 69, 109–10 (explaining that "the women most vulnerable to work-pregnancy conflicts are the least privileged workers" because the PDA does not "affirmatively guarantee any substantive protections for pregnant women"); Grossman, *supra* note 14, at 619 (describing "[t]he consequences of withholding light-duty or other workplace accommodations to pregnant employees" as "severe" because it "is tantamount to termination").

214. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1367 (2015) (Kennedy, J., dissenting).

215. *See* Cox, *supra* note 14, at 456–57 (stating that women who are unable to perform their job during pregnancy "frequently experience the FMLA as 'a means by which an employer can move a woman out of the workplace'"); Grossman & Thomas, *supra* note 211, at 30 (discussing the ramifications for women who are forced to take unpaid leave before the birth of their child and declaring that this often results in a worker "exhaust[ing] her total allotment, leaving nothing for childbirth, recovery, or infant care"); Grossman, *supra* note 14, at 619 (explaining that when an employer fails to accommodate a pregnant worker's medical condition, "the lack of accommodation will cause them to exhaust paid or unpaid leave, leaving none to use during recovery from childbirth or when caring for a new baby" and that sometimes the use of this unpaid leave results in the loss of "seniority, benefits, and opportunities for advancement"); Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 6 (2007) (tracing the historical development of labor protections for women and declaring that "[w]orking-class women disproportionately work in environments where they are not covered by maternity or family leave laws"); Widiss, *supra* note 14, at 1005 (describing how, "if employers refuse to make necessary accommodations that permit an employee to keep working during pregnancy, an employee . . . must take FMLA leave early in a pregnancy, and she may exhaust it long before the baby is even born").

216. *See* Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified in scattered sections of the U.S.C.).

unpaid leave is not a viable option because they cannot afford to lose their meager income.[217] Moreover, approximately forty percent of the private workforce is not eligible for benefits under the FMLA.[218] This exclusion includes part-time workers, or those employed for less than 1250 hours in the past year,[219] many of which are women earning low incomes.[220]

There have been numerous attempts to amend the PDA, but all have failed.[221] Beginning in 2012, a bill entitled the Pregnant Workers Fairness Act, which seeks to address the deficiencies in coverage under both the PDA and the ADA by strengthening accommodation rights for pregnant workers, has been proposed each congressional year in both the House and Senate.[222] The stated purpose of the bills is "[t]o eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy,

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217. *See* Dworkin et al., *supra* note 14, at 99 (explaining that, "[b]ecause leave is unpaid [under the FMLA], many workers cannot afford to take it"); Greenberg, *supra* note 93, at 247 (explaining why the FMLA "has serious limitations for pregnant women," and these include both that "many pregnant women cannot afford to take advantage of the FMLA because it mandates only unpaid leave" and also that it "only provides a leave of twelve weeks," which is not "long enough for women whose problems continue throughout [their] . . . pregnancy"); Grossman & Thomas, *supra* note 211, at 29 (declaring that many of the workers who are eligible for leave under the FMLA simply "cannot afford to take unpaid leave"); Widiss, *supra* note 14, at 1005 (declaring that, "[e]ven for covered employees, . . . the FMLA is often inadequate" because "[f]irst, and very importantly, it is unpaid").

218. *See* NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, A LOOK AT THE U.S. DEPARTMENT OF LABOR'S 2012 FAMILY AND MEDICAL LEAVE ACT EMPLOYEE AND WORKSITE SURVEYS 1 (2013), http://www.nationalpartnership.org/research-library/work-family/fmla/dol-fmla-survey-key-findings-2012.pdf.

219. 29 U.S.C. § 2611(2)(A)(ii) (2012) (specifying that an employee must work 1250 hours in the past year to be eligible for coverage under the FMLA).

220. Cox, *supra* note 14, at 457–58 (detailing how the "[w]orkers who are ineligible" for FMLA "are disproportionately low-income workers" and "also disproportionately female"); Dinner, *supra* note 15, at 442 (explaining that "the FMLA largely fails to provide protections for low-income women and men"); Dworkin et al., *supra* note 14, at 99 (estimating that "many employees are excluded" from coverage under the FMLA and estimating that "only 54% of employees were covered" and that this "coverage is skewed toward higher paid employees"); O'Leary, *supra* note 215, at 59 (discussing the "stark evidence of inadequate maternity and family leave coverage for low-wage workers"); Widiss, *supra* note 14, at 1005 (stating that the eligibility requirements of the FMLA "exclude almost half of the workforce, including disproportionately low-income workers").

221. *See* Pregnant Workers Fairness Act, S. 1512, 114th Cong. (2015); Pregnant Workers Fairness Act, H.R. 2654, 114th Cong. (2015); Pregnant Workers Fairness Act, S. 942, 113th Cong. (2013); Pregnant Workers Fairness Act, H.R. 1975, 113th Cong. (2013); Pregnant Workers Fairness Act, S. 3565, 112th Cong. (2012); Pregnant Workers Fairness Act, H.R. 5647, 112th Cong. (2012).

222. *See* S. 3565; H.R. 5647.

childbirth, or a related medical condition."[223] The bills require employers to provide reasonable accommodations to limitations arising out of a worker's pregnancy, childbirth, or related conditions unless the employer can establish that the requested accommodation "would impose an undue hardship on the operation of the business of such covered entity."[224]

The bills also forbid employers from forcing pregnant workers to take leave rather than providing them with a reasonable accommodation.[225] This latter portion of the bills' language attempts to avoid the harsh repercussions experienced by many pregnant employees, such as the plaintiff in *Young*. When an employee is denied accommodation during her pregnancy and forced to exhaust her FMLA leave before the birth of her child, she not only faces a loss of income but also may lose her health coverage, other benefits, and, worse yet, is eligible for discharge.[226]

Additionally, the Pregnant Workers Fairness Act does not require pregnant workers to overcome the constrained disability analysis and other statutory obstacles under the ADAAA.[227] The Act does not require a pregnant employee to establish that she has a qualifying disability. Instead, she must establish that her condition limits her ability to perform her job.[228] Moreover, the conditions qualifying for an accommodation under this legislation are broader than just complications related to the pregnancy itself.[229] These conditions may include complications arising from childbirth or even a more general "related medical condition[]."[230] Thus, if enacted, this legislation would provide accommodations to pregnant workers with conditions that fall outside the scope of the ADAAA.[231]

More significantly, this legislation eliminates the requirement that pregnant workers identify a comparator, and it provides these employees with an affirmative and unequivocal right to reasonable workplace accommodations.[232] Instead, the focus is on whether the requested accommodation is reasonable, thereby shifting the analysis to issues of

223. S. 3565, at 1; H.R. 5647, at 1.
224. S. 3565 § 2(1); H.R. 5647 § 2(1).
225. S. 3565 § 2(4); H.R. 5647 § 2(4).
226. *See* Grossman & Thomas, *supra* note 211, at 47.
227. *See* S. 3565 § 5(5); H.R. 5647 § 5(5).
228. *See* S. 3565 § 2; H.R. 5647 § 2.
229. *See* S. 3565 § 2(1); H.R. 5647 § 2(1).
230. S. 3565 § 2(1); H.R. 5647 § 2(1).
231. *See, e.g.*, Williams et al., *supra* note 183, at 136 (acknowledging that while the ADAAA has broadened the available coverage for pregnancy-related accommodations, "it does not require accommodations for all situations in which pregnant women might want an accommodation," including those situations in which an accommodation might avoid a "prospective injury to the fetus").
232. *See* S. 3565 § 2(1); H.R. 5647 § 2(1).

feasibility and cost.[233] Notably, the same legislation was proposed again approximately two months after the Supreme Court's decision in *Young*,[234] signaling a continued exigency for clarification and uniform accommodation of pregnant workers.[235] Therefore, not only does the Act eliminate the requirement that a pregnant employee identify a comparator, finally resolving both the longstanding division among the federal courts of appeals,[236] but the provisions of the Act will also mitigate many of the issues with the Court's novel approach in *Young*.

Thus, while the ADAAA and the Court's decision in *Young* increase the likelihood that pregnant workers will receive a workplace accommodation, this result is not guaranteed for all pregnant workers. Yet, this right to accommodation is vital and some scholars have even declared that "[a]ccommodation is the link between pregnant working women and equal social citizenship."[237] Therefore, Congress should intervene and pass the Pregnant Workers Fairness Act amending Title VII in order to affirmatively provide workplace accommodations for pregnant women.

CONCLUSION

Despite the passage of the PDA in 1978, pregnant women still lack a clear, affirmative right to the accommodation of pregnancy-related conditions in the workplace. Many litigants and civil rights groups have exerted considerable effort to achieve this right, but it remains elusive. As interpreted by the Supreme Court in *Young*, the PDA does not guarantee the right to accommodation to all pregnant women. Instead, women pursuing claims under this statute now face even greater uncertainty in identifying comparators and in interpreting the Court's novel framework.

Women seeking an accommodation for certain medical conditions related to their pregnancies may elect to request an accommodation under the ADAAA in order to achieve more predictable results. Yet, this remedy may apply only to certain medical complications, leaving women

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233. *See* S. 3565 § 2(1); H.R. 5647 § 2(1).

234. *See* Pregnant Workers Fairness Act, S. 1512, 114th Cong.; Pregnant Workers Fairness Act, H.R. 2654, 114th Cong.

235. *See* Alemzadeh, *supra* note 187, at 33–34 (discussing the significance of the Pregnant Workers Fairness Act and declaring that if such legislation is passed it "could dramatically improve the working conditions of pregnant women"); Dworkin et al., *supra* note 14, at 98 (explaining that the bill would "offer more protection to pregnant workers than does the PDA").

236. *See supra* notes 4–16 and accompanying text.

237. Grossman, *supra* note 14, at 621.

who remain uncovered by the PDA or ADAAA vulnerable to lost income, loss of health insurance and other employee benefits, and dismissal.

Given the pervasiveness of this issue in today's workplace, accommodations should be available to all pregnant employees. While some have touted the *Young* decision as progress, Congress must act to strengthen the protections afforded to pregnant employees and to provide them with a clear and affirmative right to accommodation through the passage of the Pregnant Workers Fairness Act.