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ABSTRACT

Pregnancy has become more than just a women's issue; it has become an employment law issue. As more and more women have joined the workforce in the last four decades, the law regarding pregnant employees' rights to reasonable workplace accommodations has yet to catch up. The Pregnancy Discrimination Act, enacted in 1978, was a step in the right direction to ensure pregnant women's rights in the workplace. However, the statute itself and the judicial interpretation resulted in empty promises to pregnant employees when litigation ensues. Employers and employees still lack clarity in their understandings of whether a pregnant employee is entitled to receive accommodations in the workplace. Although the Supreme Court attempted to clarify a pregnant employee's right to workplace accommodations in *Young vs. UPS, Inc.*, it left an important question unanswered. This unanswered question centers around claims brought under the Pregnancy Discrimination Act (PDA) and is based on the refusal of workplace accommodations to pregnant employees.

Although the Court in Young clarified how an employee can bring a claim of this type under the *McDonnell Douglas* framework, it left open the question of who is an appropriate comparator. Identifying a comparator is an important element in bringing a discrimination claim under the PDA, because it determines whether the employer denied the accommodations in a discriminatory manner. This comparator question had split the circuits before *Young*, and it will continue to do so because of the ambiguity in the Court's recent opinion. Although both the petitioner and the respondent introduced the two main competing circuit views on who an appropriate comparator is, the Court adopted neither. The narrow view is that the employer may adopt a pregnancy-blind policy that looks past the pregnancy and only grants accommodations based on whether a regular employee without the limitation is granted accommodations. The broad view instead

looks at whether an employee with a similar limitation is given accommodations that a pregnant employee should also receive.

Although the Court did not adopt either of these views, this Note proposes a better way to address the Court's interpretation of the comparator question left open in *Young*. In doing so, both employers and pregnant employees would have a better understanding of their rights and obligations, which would ultimately provide more protection for both parties. This Note proposes that the Court should consider a source-based or effect-based approach to answering this question. In these approaches, the source or effect would be the distinguishing factor in deciding whether the discrimination claim succeeds. In a source-based analysis, the employer would consider the source of the limitation or disability and accommodate based on that source. However, in an effect-based analysis, the employer would consider the limitation or disability itself, then whether it generally accommodates that limitation or disability, and the employer would provide accommodations on that basis. Although both approaches would answer the Court's question left open in *Young*, the better approach would be the effect-based approach. The effect-based approach better extends the opportunity for pregnant employees to receive workplace accommodations. It also allows employers to consider an employee's limitation or disability equally, focusing on the ability to work and not on the pregnancy. The effect-based approach is better aligned with Congress's intent to overrule *Gilbert* and achieve equality for pregnant employees in the workplace.

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NOTE

THE PREGNANCY PROBLEM: RETHINKING WORKPLACE ACCOMMODATION CLAIMS UNDER TITLE VII'S PREGNANCY DISCRIMINATION ACT

Victoria A. Belk Brooks[†]

I. INTRODUCTION

When pregnancy complications arise for an employee, both the employer and employee must have clarity in their rights and responsibilities regarding reasonable workplace accommodations. Congress created the Pregnancy Discrimination Act (PDA) to expand Title VII's sex discrimination protections to pregnant employees.[1] Under the PDA, pregnant employees can bring a claim against their employers if they are discriminated against on the basis of their pregnancies.[2] Discrimination against pregnant employees may occur in a number of ways; however, this Note examines the discriminatory manner in which employers deny workplace accommodations to pregnant employees. While the PDA protects pregnant employees from discrimination, courts have had difficulty providing a uniform interpretation of the PDA when a pregnant employee brings a disparate treatment claim.[3] Although disparate treatment claims for workplace discrimination have been brought under the *McDonnell Douglas* framework since 1973,[4] the Court finally answered the question of whether this framework applies to pregnancy discrimination in *Young v. UPS, Inc.*[5]

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[1] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), *amended by* Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

[2] *See* discussion *infra* Section II.B.2.

[3] *See* discussion *infra* Section II.C.

[4] *See infra* Section II.B.3 (explaining the application of the *McDonnell Douglas* framework to PDA claims). *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973) (holding a disparate treatment claim may be brought under Title VII using a burden-shifting framework in which the plaintiff must establish a prima facie case by an initial showing of discrimination, now known as the *McDonnell Douglas* framework).

[5] *See generally* Young v. UPS, Inc., 575 U.S. 206, 210–12 (2015).

However, the Court stopped there, creating a new issue. This issue arises when the court analyzes the employee's claim under the *McDonnell Douglas* framework, which requires the employee to identify and to compare her treatment to similarly situated employees to prove discrimination.[6] Because the PDA does not identify the appropriate employee comparison in its language,[7] the question of an appropriate comparator has been left to the courts.[8] In light of this, courts have failed to answer this question, and even the Supreme Court in *Young* declined to answer this question.[9]

Defining a comparator is foundational to understanding whether the denial of workplace accommodations to pregnant employees has occurred in a discriminatory manner. By leaving the comparator question unanswered, the Court left employers exposed to the risk of litigation, and pregnant employees without an understanding of their accommodation rights. This gap in understanding what accommodations are mandated has created a grey area in PDA compliance. Although inconclusive on the matter, the Court's most recent case on this issue, *Young*, considered different interpretations of whom the Act prescribes as a comparator.[10] In *Young*, both the respondent and the petitioner provided comprehensive interpretations of an appropriate comparator.[11] Additionally, various scholars and organizations provided solutions of an appropriate comparator in PDA cases.[12] These types of comparators range from nonpregnant peers to those with disabilities as defined in the Americans with Disabilities Act (ADA).[13] However, the Supreme Court's comparator analysis should range beyond specific classes of similar employees. A better solution is to look at the underlying basis of establishing a comparator, such as the distinguishing factor of whether the *source* of the limitation or the *effect* of the limitation is considered. If the source is considered, the employer should decide whether to accommodate the employee by looking at the source of the injury, but if the effect is

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[6] *See generally McDonnell Douglas*, 411 U.S. at 802, 804.

[7] *See infra* Section II.B.2.

[8] The term "comparator" is used throughout the Note to describe the individual(s) that the employee must use to identify and compare the approval or denial of reasonable accommodations. The comparison then provides a discriminatory presumption that the employer denied reasonable accommodations to the pregnant employee in a discriminatory manner.

[9] *See generally Young*, 575 U.S. at 210, 228.

[10] *Id.*

[11] *See* Brief for Respondent, Young v. UPS, Inc., 575 U.S. 206 (2015) (No. 12-1226); Petitioner's Brief, Young v. UPS, Inc., 575 U.S. 206 (2015) (No. 12-1226).

[12] *See* discussion *infra* Sections II.C, IV.A.1.

[13] *See* discussion *infra* Sections II.C, IV.A.1.

considered, the employer should look at the employee's disability and provide accommodations based on the limitations of the disability itself. This Note examines the different interpretations of whom an appropriate comparator is when disparate treatment claims arise out of the denial of reasonable workplace accommodations and provides a clearer solution for employers and employees by answering the comparator question with the source versus effects distinction.

II. BACKGROUND

A. *Pre-Pregnancy Discrimination Act*

After the 1950s, the number of women participating in the workforce grew exponentially.[14] By 1970, 43% of women were in the workforce, and by 1980, 51% of women were in the workforce.[15] With the growing number of women in the workforce, the battle for equality in the workplace was further complicated by pregnancy.[16] The lack of protection for pregnant women in the workforce dramatically affected women's career opportunities, impacting both their children and their families.[17] Many women were considering the balance between motherhood and working for the first time as the idea of the traditional family evoved alongside the advancement of modern medicine. The increasing proportion of working women with the potential to become working mothers prompted a critical need for each woman to "be fully protected against the harmful effects of unjust employment discrimination on the basis of pregnancy."[18]

Although there were no explicit legal protections for pregnancy until the PDA was enacted in 1978,[19] women attempted to bring claims under broad Title VII protections.[20] These claims were brought under Title VII's prohibition of discrimination on the basis of sex.[21] The argument that Title VII protected pregnancy stemmed from the idea that "pregnancy" is an inherently female activity that women, as a sex, are affected by, therefore,

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[14] U.S. Bureau of Lab. Stat., *Changes in Men's and Women's Labor Force Participation Rates*, U.S. DEP'T OF LAB. (Jan. 10, 2007), https://www.bls.gov/opub/ted/2007/jan/wk2/art03.htm.

[15] *Id.*

[16] STAFF OF S. COMM. ON LAB. AND HUM. RES., 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978 PUB. L. 95-555, at III (Comm. Print 1980).

[17] *Id.* at 12.

[18] *Id.* at III.

[19] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), *amended by* Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

[20] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 127–28 (1976).

[21] Civil Rights Act of 1964, 42 U.S.C. § 2000e(k).

resulting in the protection of pregnancy itself.[22] However, it was clear that claims under Title VII could not proceed under this notion when the Supreme Court, in *General Electric Co. v. Gilbert*, held that the exclusion of pregnancy-related disabilities from an employee's disability plan did not constitute sex discrimination under Title VII of the Civil Rights Act of 1964.[23] The Court's decision in *Gilbert* demonstrated the lack of protection that pregnant women had under Title VII and prompted a congressional discussion about women in the workforce and their workplace protections; ultimately, it set in motion new legislation to protect pregnant employees.[24]

B. *The Pregnancy Discrimination Act*

One year after the decision in *Gilbert*, Congress introduced the Pregnancy Discrimination Act.[25] Congress understood that this legislation was "made necessary" after the Supreme Court's ruling in *Gilbert*.[26]

1. Congressional Intent

Senator Williams, the Chairman of the Subcommittee on Labor and principal sponsor of the PDA, considered *Gilbert* "a critical blow" and "major setback in the battle for women's rights."[27] He also emphasized in committee hearings the "devasting [economic and social] effects [pregnancy discrimination has] on entire families."[28] The concern was that women disabled by pregnancy would be unable to provide for themselves and their families.[29] The belief surrounding the congressional debates on the Pregnancy Discrimination Act demonstrated congressional enactment of this bill would provide for disability due to pregnancy on an equal basis with other medical disabilities.[30] The Act was intended "to restore basic rights to . . . working women" and "require employers to treat women affected by pregnancy . . . equally for all employment-related purposes."[31]

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[22] *Gilbert*, 429 U.S. at 128–29.

[23] *Id.* at 145–46.

[24] *Discrimination on the Basis of Pregnancy: Hearings on S. 995 Before the Subcomm. on Lab. of the S. Comm. on Hum. Res.*, 95th Cong. 1 (1977) [hereinafter *Hearings*].

[25] S. REP. NO. 95-331, at 1–2 (1977).

[26] *Hearings*, *supra* note 24, at 1.

[27] *Id.* at 1, 6.

[28] *Id.* at 1–2.

[29] *Id.* at 2.

[30] *Id.* at 33–34 (statements of Ethel Bent Walsh, Vice Chairman of the EEOC, and Alexis Herman, Dir. of the Women's Bureau for the U.S. Dep't of Lab.).

[31] *Id.* at 2.

2. Language of the Act

On October 31, 1978, the Pregnancy Discrimination Act became law, and Title VII of the Civil Rights Act of 1964 was amended to prohibit sex discrimination on the basis of pregnancy.[32] The Pregnancy Discrimination Act, codified at 42 U.S.C. § 2000e(k), states:

> 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 work, and nothing in section 703(h) of this title [§ 2000e-2(h)] shall be interpreted to permit otherwise.[33]

The Act is generally considered to contain two clauses that should be read and interpreted together.[34] The first clause expanded the definition of "'because of sex' or 'on the basis of sex'" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions."[35] The second clause of the PDA states that women "shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[36] The second clause provides the basis for pregnant employees to bring discrimination claims against their employer.[37] The need for a comparator to prove a discrimination claim arises from the PDA's language "other persons not so affected but similar in their ability or inability to work."[38] When applied to disparate treatment claims, this language is interpreted to require the plaintiff to provide evidence that shows the employer intentionally treated the employee less favorably because of the

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[32] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), *amended by* Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

[33] *Id.*

[34] *See generally* Young v. UPS, Inc., 575 U.S. 206, 212 (2015).

[35] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), *amended by* Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

[36] *Id.*

[37] *See generally Young*, 575 U.S. at 212.

[38] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), *amended by* Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

employee's protected trait—pregnancy.[39]

3. *McDonnell Douglas*' Application to Claims Under the PDA

The *McDonnell Douglas* framework is used to analyze disparate treatment claims under the PDA, and the Court affirmed this use in *Young*.[40] The *McDonnell Douglas* framework requires the employee to show "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work'" to establish a prima facie case of discrimination.[41] Once the employee has provided evidence to establish all four requirements, the employer has the opportunity "to justify its refusal to accommodate the plaintiff by relying on 'legitimate, nondiscriminatory' reasons for denying her accommodation."[42] The employee may rebut the employer's reason for denying an accommodation by showing it was a pretext for discrimination.[43]

Employees bringing PDA claims have a difficult time surviving summary judgment because the employee, under the *McDonnell Douglas* framework, is unable to establish a *comparator* (one who is similar in ability or inability to work).[44] Without the ability to establish a comparator, the employee is unable to establish a prima facie case of discrimination and the employee's case is dismissed. The broad comparison language used in the Act has prompted an uphill court battle for most women seeking relief under it. If a comparator had been defined in the PDA, the courts would look to the employee for their analysis of whether a prima facie case had been made. A clear understanding of who is an appropriate comparator is vital to the survival of disparate treatment claims under the PDA. Since this issue has been left to the courts to decide, there has been a lack of uniformity in their interpretation.[45]

C. *Circuit Split: Narrow vs. Broad Interpretation of the Act*

Since the PDA's enactment, courts have varied their interpretations of

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[39] *Young*, 575 U.S. at 210.

[40] *Id.* at 213.

[41] *Id*. at 229 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

[42] *Id.* (quoting *McDonnell Douglas*, 411 U.S. at 802).

[43] *Id.*

[44] *See id.*

[45] *See generally* Young v. UPS, Inc., 784 F.3d 192 (4th Cir. 2013), *rev'd*, 575 U.S. 206 (2015); Ensley-Gaines v. Runyon, 100 F.3d 1220 (6th Cir. 1996); Troupe v. May Dept. Stores Co., 20 F.3d 734 (7th Cir. 1994); EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184 (10th Cir. 2000); Spivey v. Beverly Enters., Inc., 196 F.3d 1309 (11th Cir. 1999).

who the identity of the "similarly situated" person is.[46] Two main interpretations have emerged from the courts. The first interpretation is narrow and has been adopted by the Fourth, Fifth, Seventh, and Eleventh Circuits.[47] This interpretation is considered "narrow" because the comparator is a nonpregnant employee.[48] These courts consider treatment of a pregnant employee to be nondiscriminatory when the pregnancy is not a factor in accommodating the employee.[49] The narrow interpretation allows employers to implement pregnancy-blind or pregnancy-neutral policies that prohibit an employer from distinguishing between pregnant and nonpregnant employees of similar ability.[50] This interpretation also allows employers to distinguish between two employees' accommodations,[51] if, for example, both employees suffer a significant injury.[52]

The broad interpretation of the second clause of the PDA has been adopted by the Sixth, Eighth, and Tenth Circuits.[53] This interpretation requires the employer to treat a pregnant employee's disability the same as a

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[46] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), *amended by* Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

[47] *See Young*, 784 F.3d at 204 (holding that the employer's pregnancy-blind policy did not violate the PDA); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 207 (5th Cir. 1998) (stating that there is not "an affirmative obligation on employers to grant preferential treatment to pregnant women"); *Troupe*, 20 F.3d at 738 (holding that the PDA does not require employers to provide accommodations to pregnant women in their place of employment; it only requires employees to "ignore an employee's pregnancy"); *Spivey*, 196 F.3d at 1313 (stating that an employer could "provide an accommodation to employees injured on the job without extending this accommodation to pregnant employees" because "[u]nder the PDA, the employer must ignore an employee's pregnancy and treat her 'as well as it would have if she were not pregnant'" (quoting Piraino v. Int'l Orientation Res., Inc., 84 F.3d 270, 274 (7th Cir. 1996))).

[48] *See Young*, 784 F.3d at 204; *Urbano*, 138 F.3d at 207; *Troupe*, 20 F.3d at 738; *Spivey*, 136 F.3d at 1313.

[49] *Young*, 784 F.3d at 201–02; Reeves v. Swift Transp. Co., 446 F.3d 637, 641 (6th Cir. 2006); *Young*, 575 U.S. at 242–43 (Scalia, J., dissenting).

[50] *Young*, 784 F.3d at 201.

[51] *Young*, 575 U.S. at 224.

[52] *Id.* at 218, 227.

[53] Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996) (holding that a plaintiff may prove discriminatory practices by establishing that similarly situated employees with disabilities received preferential treatment); Deneen v. Nw. Airlines, Inc., 132 F.3d 431, 437 (8th Cir. 1998) (stating that the "relevant question in a pregnancy discrimination case is whether the employer treated the pregnant plaintiff 'differently than nonpregnant employees'"); EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1200 (10th Cir. 2000) (holding that a prima facie discrimination case may be brought when nonpregnant employees who have suffered an off the job injury are offered accommodations and a plaintiff with pregnancy-related injuries is not).

nonpregnant employee's disability when the nonpregnant employee is similar in ability or inability to perform the same job functions.[54] An employer must not distinguish between the sources of the disabilities; instead, if the employer accommodates one employee's disability, it must accommodate a disability that arises from pregnancy.[55] The United States Court of Appeals for the Sixth Circuit interprets the comparator to be one who receives accommodations and is similar in inability to work, meaning the court considered the disability itself and the manifestations of it, not the fact that it resulted from the pregnancy.[56]

1. The Court's Attempt to Resolve a Circuit Split: *Young v. UPS, Inc.*

After decades of litigating claims under the PDA, the Supreme Court granted certiorari on the Fourth Circuit's most recent ruling on pregnancy discrimination.[57] The Supreme Court had the opportunity to resolve this circuit split and provide a better understanding of workplace accommodations for employees and employers.[58] It was time for the Court to take on this issue; as of March 2014, close to 71% of women in the workforce were mothers with children under eighteen.[59] Ultimately, close to three-fourths[60] of women in the workforce have been or would be impacted regarding their right to be free from pregnancy-based discrimination in the workforce. On the other hand, this means that most of these women's employers would also be affected by how the law treats pregnancy discrimination. By resolving the split, pregnant employees would have clarity in understanding their right to accommodations and legal protections under the PDA. Employers and businesses would also benefit from clarity in understanding the obligations to their employees because it would allow them to allocate finances for reasonable accommodations, educate their

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[54] *See Ensley-Gaines*, 100 F.3d at 1226; *Deneen*, 132 F.3d at 437; *Horizon*, 220 F.3d at 1199, 1200.

[55] *Young*, 575 U.S. at 224.

[56] *Ensley-Gaines*, 100 F.3d at 1226.

[57] *Young*, 575 U.S. at 206.

[58] Joanna L. Grossman & Deborah L. Brake, *Afterbirth: The Supreme Court's Ruling in* Young v. UPS *Leaves Many Questions Unanswered*, VERDICT: LEGAL ANALYSIS & COMMENT FROM JUSTIA (Apr. 20, 2015), https://verdict.justia.com/2015/04/20/afterbirth-the-supreme-courts-ruling-in-young-v-ups-leaves-many-questions-unanswered.

[59] U.S. Bureau of Lab. Stats., *Women in the Labor Force: A Databook*, U.S. DEP'T OF LAB. at 2 (Dec. 2015), https://www.bls.gov/opub/reports/womens-databook/archive/women-in-the-labor-force-a-databook-2015.pdf.

[60] *Id.*

managers, and avoid litigation. *Young* represents the Court's latest attempt to clarify the meaning of the PDA for the thousands of employees and employers that litigate pregnancy discrimination claims each year.[61]

III. *YOUNG V. UPS, INC.*

A. *Background and State Court Proceedings*

Peggy Young was an employee for United Parcel Service (UPS).[62] She began her employment in 1999 and became a driver by 2002.[63] As a driver, she was assigned to pick up and deliver packages that arrived by air carrier.[64] Drivers in this position were required to load and unload their trucks when picking up and making deliveries.[65] UPS has a seventy-pound lifting requirement for its employees in Young's position.[66] After Young had suffered two unsuccessful rounds of in vitro fertilization, she became pregnant.[67] In September 2006, she informed her supervisor with a note from her doctor stating "she should not lift more than twenty pounds for the first twenty weeks of her pregnancy and not more than ten pounds thereafter."[68] UPS's occupational health manager explained to Young that UPS's policy stated that she could not to continue work if she had a twenty-pound lifting restriction.[69]

However, Young tried to continue working with the help of other UPS employees that agreed to assist her.[70] After Young received another note regarding her lifting restrictions, she informed her supervisor again of the twenty-pound restriction and requested "light duty work."[71] Young's supervisor concluded that she "was unable to perform the essential functions of her job and was ineligible for light duty assignment."[72] The supervisor explained that UPS only "offered light duty for those with on-the-job injuries,

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[61] *See Pregnancy Discrimination Charges FY 2010–FY 2020*, EEOC, https://www.eeoc.gov/statistics/pregnancy-discrimination-charges-fy-2010-fy-2020 (last visited Sept. 16, 2021).

[62] Young v. UPS, Inc., 784 F.3d 192, 195 (4th Cir. 2013), *rev'd*, 575 U.S. 206 (2015).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Young*, 784 F.3d at 195.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 196.

[72] *Id.*

those accommodated under the ADA, and those who had lost D[epartment] O[f] T[ransportation (DOT)] certification, but not for pregnancy."[73] Young wanted to continue working, so she approached the division manager who dismissed her desire to continue working by explaining "she was 'too much of a liability' while pregnant and that she 'could not come back . . . until [she] was no longer pregnant.'"[74] Young's unpaid leave under the Family and Medical Leave Act expired in November 2006 since she had used it for her attempts to become pregnant, so she decided to take an extended leave of absence in which she received no pay and eventually lost her medical insurance.[75] By May 2007, Young had given birth and returned to work for UPS.[76] Young filed allegations of "discrimination on the basis of . . . pregnancy" with the Equal Employment Opportunity Commission (EEOC) in July 2007.[77] By September 2008, the EEOC issued a right to sue letter.[78] Young filed suit against UPS in October 2008.[79] Thereafter, the court granted summary judgment for UPS.[80] The district court concluded that under the *McDonnell Douglas* framework, Young failed to establish a claim because she could not identify a "similarly situated comparator who received more favorable treatment than she did."[81] Young subsequently appealed the district court ruling.[82]

The Fourth Circuit considered the "core contention" of Young's claim to be "the UPS policy limiting light duty work to some employees—those injured on-the-job, disabled within the meaning of the ADA, or who have lost their DOT certification—but not to pregnant workers like Young violates the PDA's command to treat pregnant employees the same" under the PDA's second clause.[83] Young contended this was discriminatory because the PDA requires employers to treat their employees "as other persons not so affected but similar in their ability or inability to work."[84] The Fourth Circuit concluded that she could not fulfill the last element of the *McDonnell Douglas*

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[73] *Id.*

[74] *Young*, 784 F.3d at 197.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Young*, 784 F.3d at 197.

[81] *Id.* at 197–98.

[82] *Id.* at 198.

[83] *Id.* at 200–01.

[84] *Id.* (quoting 42 U.S.C. § 2000e(k)).

framework because she could not "establish that similarly situated employees received more favorable treatment than she did, and therefore [could not] establish the fourth element of the prima facie case for pregnancy discrimination."[85] The court refused to adopt Young's definition of an appropriate comparator under the ADA; instead the court reasoned that she was "not similar in her 'ability or inability to work' to an employee disabled within the meaning of the ADA . . . or injured on the job."[86] The court further reasoned, "Young is dissimilar to an employee disabled under the ADA for the same reason she herself was not disabled: her lifting limitation was temporary and not a significant restriction on her ability to perform major life activities."[87] As a result, the Fourth Circuit affirmed the district court's holding that UPS's "neutral, pregnancy-blind policy" was lawful under the PDA.[88] The Supreme Court granted certiorari to hear Young's case in 2014.[89]

B. *Petitioner's Argument vs. Respondent's Argument*

Petitioner and Respondent argued for widely differing interpretations of the appropriate PDA comparator in their briefs. Each party disagreed on how to interpret and apply the PDA's second clause as it refers to "other persons not so affected but similar in their ability or inability to work."[90] The Court considered both interpretations but declined to adopt either of them in *Young*.[91]

1. Petitioner's Argument

Young's position on the interpretation of the PDA aligns with the broader interpretation among the circuits. Her brief stated that "the PDA's 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."[92] Young argued that the second clause functions to ensure that when an employer accommodates one subset of workers with disabilities, the PDA requires pregnant employees of similar ability to also receive

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[85] *Id.* at 206.

[86] *Young*, 784 F.3d at 205.

[87] *Id.*

[88] *Id.* at 205–06.

[89] Young v. UPS, Inc., 784 F.3d 192 (4th Cir. 2013), *cert. granted*, 573 U.S. 957 (2014) (No. 12-1226).

[90] 42 U.S.C. § 2000e(k).

[91] Young v. UPS, Inc., 575 U.S. 206, 220–21 (2015).

[92] Petitioner's Brief, *supra* note 11, at 23.

accommodations.[93] By contrast, if an employer accommodates none of its workers, then it does not have to accommodate pregnant women.[94] The main distinction is that employers must treat pregnant employees the same as other groups of similar workers.[95] Young supported her argument with the general meaning of the statutory text, in which the phrase "as other persons" plainly means that "when an employer accommodates a group of workers, it must give pregnant workers with similar limitations the same treatment."[96]

The Petitioner then provided the Court with options of a similar comparator that could be used in its analysis.[97] The brief presented three categories that Young could have been compared to in this case; however, the most relevant and broadly applicable was comparing Young's disability to those covered by the ADA.[98] The Petitioner summed up her argument by stating that:

> If her lifting restriction had resulted from an ADA-qualifying disability, UPS would have offered Young accommodated work. But because her restriction resulted from her pregnancy—which is not an "impairment" and thus cannot be an ADA disability, see 29 C.F.R. Pt. 1630 App. § 1630.2(h)—the company refused to provide her the same treatment. That violates the plain text of the PDA.[99]

According to Young, the relevant question under the PDA should have been whether she was similar to other employees.[100] Because the PDA does not prescribe an inquiry into whether a disability was temporary or affected an employee's major life activities, Young argued that the scope of inquiry should end with whether she is like other employees under the PDA.[101]

2. Respondent's Argument

Respondent, UPS, argued that the Court should adopt the narrower interpretation of the PDA's second clause.[102] "Under this view, courts would compare the accommodations an employer provides to pregnant women

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[93] *Id.* at 29.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 30.

[97] *Id.* at 30–45.

[98] Petitioner's Brief, *supra* note 11, at 30–45.

[99] *Id.* at 38.

[100] *Id.* at 39.

[101] *Id.*

[102] *Young*, 575 U.S. at 221.

with the accommodations it provides to others within a facially neutral category (such as those with off-the-job injuries) to determine whether the employer has violated Title VII."[103] UPS argued that allowing only pregnant women who fell within a disability category to receive accommodations was a nondiscriminatory policy.[104] The manager testified that she had never authorized light-duty assignments for off-the-job injuries unless it was an ADA qualifying disability.[105] Therefore, Young's injury from pregnancy fell within the same classification as an employee with an off-the-job injury that UPS would not accommodate.[106] UPS maintained that its reasoning for not giving accommodations was that it created a "pregnancy-blind policy" as required by the PDA.[107]

UPS reiterated that the PDA does not mandate that employers accommodate special treatment for pregnant employees.[108] They argued that the statute's ordinary and plain meaning is unclear in defining the comparator and is only clear on allowing disparate treatment and disparate impact claims to be brought by pregnant women.[109] UPS also argued that each branch of government supported the narrow interpretation: courts have held that pregnancy neutral policies are nondiscriminatory; Congress has yet to adopt positive law regarding accommodations; and, on behalf of the executive branch, the Department of Justice stated the PDA is only an expansion on the definition of sex.[110]

C. *The Decision*

1. Majority Opinion

The majority opinion adopted neither Respondent's nor Petitioner's arguments.[111] The Court stated that Young's view was too broad and ultimately would grant pregnant women "'most-favored-nation' status."[112] Whereas, the Court found that UPS's interpretation failed to satisfy the congressional object of overturning *Gilbert*, in which the distinguishing

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[103] *Id.*

[104] Brief for Respondent, *supra* note 11, at 5–6.

[105] *Id.* at 5.

[106] *Id.* at 6.

[107] *Id.* at 9.

[108] *Id.*

[109] *Id.* at 26–27.

[110] Brief for Respondent, *supra* note 11, at 13–16.

[111] Young v. UPS, Inc., 575 U.S. 206, 220–21 (2015).

[112] *Id.* at 221.

factor was based on a "neutral ground."[113] The Court's analysis centered around applying the *McDonnell Douglas* framework to claims brought under the PDA based on circumstantial evidence.[114] The Court held that if an employee brings a disparate treatment claim under the PDA, she must show "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[115] Once the employee establishes these four elements, "[t]he employer may then seek to justify its refusal to accommodate the plaintiff by relying on 'legitimate, nondiscriminatory' reasons for denying her accommodation."[116] The Court clarified that, in PDA cases, neither expense nor convenience is considered a "legitimate, nondiscriminatory" reason for denying the pregnant employee's accommodation request.[117] The employee may then show that the employer's reasons are insufficient to justify its actions but instead are a pretext for intentional discrimination.[118] The Court ended its analysis of this framework by reaffirming that once the employee creates a genuine dispute of material fact, the case may proceed past summary judgment.[119]

The Court's analysis of the *McDonnell Douglas* framework stops short in one area: the comparator analysis. Although both Petitioner and Respondent identified appropriate comparators for the Court, the Court declined to subscribe to either view and reiterated that "[t]he 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."[120] The analysis stopped short because the Court only stated that the plaintiff had to show accommodation of "nonpregnant workers;" thus it is unclear whether the Court was pointing to nonpregnant workers with the same disability or nonpregnant workers with no disability.[121]

The Court supported its approach by holding that it "is consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an

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[113] *Id.* at 226–27.

[114] *Id.* at 230.

[115] *Id.* at 229.

[116] *Id.* (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

[117] *Young*, 575 U.S. at 229.

[118] *Id.*

[119] *Id.* at 231.

[120] *Id.* at 229–30.

[121] *Id.* at 230.

employer's apparently legitimate, nondiscriminatory reasons for treating individuals within a protected class differently than those outside the protected class."[122] The majority addressed Congress's intent in enacting the PDA, stating the PDA was passed to overrule *Gilbert* and that accommodations denied to pregnant women on a neutral basis are nondiscriminatory.[123] The majority rebuked the dissent's argument that the statutory language "treated the same" means "on the same basis as it denied accommodations to other employees."[124] The Court ultimately held that under this framework, Young had sufficiently fulfilled her burden of establishing a genuine dispute of material fact.[125] She demonstrated that under the fourth prong of the analysis, there was a genuine dispute regarding UPS's policies of providing accommodations to nonpregnant employees.[126] The Court remanded the case to the Fourth Circuit Court of Appeals, directing it to consider combining these policies and the employer's justifications.[127]

2. Concurring Opinion

Justice Alito concurred in the judgment to emphasize the interpretation of the second clause.[128] He reasoned that the addition of the PDA to Title VII was an addition of pregnancy to adverse employment actions and should "be treated like discrimination because of race, sex, etc."[129] Therefore, when an employer deliberately treats a pregnant employee less favorably than an employee similarly situated in ability or inability to work, an unlawful employment practice occurs.[130] In Justice Alito's opinion, the statute states that pregnant employees must be treated the same as those who are "similar in their ability or inability to work," making the comparator "employees performing the same or very similar jobs."[131] Therefore, the employee's comparator is another employee performing the same job, but not an employee who has a similar injury.[132] The employer can deny

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[122] *Id.*

[123] *Young*, 575 U.S. at 227.

[124] *Id.* at 230–31.

[125] *Id.* at 231.

[126] *Id.*

[127] *Id.* at 232.

[128] *Id.* at 233–35 (Alito, J., concurring).

[129] *Young*, 575 U.S. at 233–35 (Alito, J., concurring).

[130] *Id.* at 234.

[131] *Id.* at 235.

[132] *Id.* at 237.

accommodations to pregnant women so long as it denies accommodations to those in similar jobs based on a "neutral business reason," other than convenience or cost.[133] In *Young*, UPS was unable to provide a neutral business reason for failing to accommodate pregnant employees while accommodating "at least some" of its nonpregnant employees.[134]

3. Dissenting Opinion

The dissenting opinion focused on interpreting the statute's text rather than the majority's "policy-driven compromise between the possible readings of the law."[135] Writing for the dissent, Justice Scalia stated "[t]he most natural way to understand the same-treatment clause is that an employer may not distinguish between pregnant women and others of similar ability or inability *because of pregnancy*."[136] Therefore, denying accommodations to pregnant women "*on the same terms*" as other workers was a correct application because the employer had complied with the statute in the sense that the pregnant employee was "treated the same" as other employees.[137] If the same treatment clause was to be interpreted otherwise, the pregnant employees would be the "most favored employees," which is contrary to Title VII's purpose.[138]

While advocating for a textual-based interpretation of the clause, the dissent pointed out only two possible ways this statute could have been interpreted.[139] In the dissent's view the majority went awry and accepted neither the "natural" narrow view of the statute nor the broad policy-driven view.[140] It decided to settle in the middle of the two viewpoints and created "a new law that is splendidly unconnected with the text and even the legislative history of the Act."[141] Further, the dissent contended that this was why the majority "[did] not even *try* to connect the interpretation it adopt[ed] with the text it purport[ed] to interpret."[142] The dissent concluded by stating that Young did not establish a prima facie case because she failed to demonstrate

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133 *Id.* at 237–38.

134 *Id.* at 241.

135 *Young*, 575 U.S. at 250 (Scalia, J., dissenting).

136 *Id.* at 242.

137 *Id.* at 242–43.

138 *Id.* at 243.

139 *Id.* at 241.

140 *Id.* at 241–42, 250.

141 *Young*, 575 U.S. at 241.

142 *Id.* at 247.

that UPS violated the PDA's same-treatment requirement.[143] Dissenting separately, Justice Kennedy emphasized the disadvantages pregnant women face in the workplace and the PDA's legislative significance.[144]

IV. PROPOSAL

When the Supreme Court granted certiorari to Young, many scholars and litigators believed a more precise interpretation of the PDA's second clause was needed.[145] Because the circuits courts widely differed in their interpretations, the Court could have adopted one of the already articulated narrow or broad interpretations of the statute.[146] Instead, the Court attempted to settle the interpretation somewhere in the middle. Although reaching a middle ground between interpretations is not inherently an undesirable place for a court to rule, the Court's middle ground decision in *Young* proved to be undesirable. At first glance, the decision in *Young* provides a clear application of the *McDonnell Douglas* framework. However, in its attempt to apply the framework, the Court left open a fundamental question: who are the employees that are "similar in their ability or inability to work" to pregnant employees requesting accommodations?[147] An answer to this question would impact all employers and employees that encounter pregnancy. By leaving this fundamental question unanswered, the Court left employers and employees without clarity. This lack of clarity creates new liability for employers and leaves pregnant employees uncertain about their rights to workplace accommodations. Employers should have clear instructions on the extent to which they should accommodate pregnant employees, and pregnant employees should be able to understand their right to accommodations under the PDA in comparison to their colleagues.

A. *A Clearer Solution to Answering the Comparator Question*

In *Young*, the Court held that, in order to establish a prima facie case, an employee must show that "she belongs to the protected class, that she sought

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[143] *Id.* at 250–51.

[144] *Id.* at 251–53 (Kennedy, J., dissenting).

[145] *See generally* 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 (2013) [hereinafter Widiss, Gilbert *Redux*]; Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After* Young v. UPS, 50 U. C. DAVIS L. REV. 1423 (2017); Lara Grow, *Pregnancy Discrimination in the Wake of* Young v. UPS, 19 U. PA. J.L. & SOC. CHANGE 133 (2016); Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443 (2012).

[146] *See* discussion *supra* Section II.C.

[147] Civil Rights Act of 1964, 42 U.S.C. § 2000e(k).

accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[148] Although all of the elements are interrelated, the first three may be the most transparent in allowing a plaintiff to proceed past the summary judgment stage. However, the fourth prong of the analysis proves to be the most complicated in its application, because it requires the employee to identify other employees "similar in their ability or inability to work" with which the employee should be compared.[149] Petitioners, Respondents, and amici proposed various comparators to the *Young* Court; however, the Court chose not to accept any of them and failed to identify a comparator.[150]

By not identifying a comparator, the Court failed to give pregnant women a clear understanding of whether they had been discriminated against. A pregnant employee should be able to understand her right to accommodations and whether she has been discriminated against in receiving reasonable workplace accommodations. This is a unique situation for employees because they may not know to whom in the workplace they may compare themselves. For example, when racial discrimination occurs, an employee knows he can look at how people of other races were treated.[151] But with a pregnant employee, the question becomes: to whom do they look for a comparison?

On the other hand, the Court's decision also failed to assist employers in understanding their obligation to provide accommodations. Are employers supposed to accommodate the disability of each individual employee because they accommodated others, or are they to accommodate the individual because of a pregnancy? These questions demonstrate the practical implications of the PDA and its interpretation.

The Court's definition of a comparator is essential because it affects an employer and employee's understanding of the PDA. The Court's holding affirmed that pregnant employees can bring a disparate treatment claim for being denied reasonable accommodations by their employer, and the evidence to establish their case hinges on how they were treated compared to other employees.[152] Furthermore, the holding seems clear until the practical issue of collecting evidence to establish this comparison arises and raises a series of questions that are fundamental to establishing a prima facie case. For example, how does an employee know that she has a discrimination claim

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[148] *Young*, 575 U.S. at 229.

[149] *Id.*

[150] *Id.* at 252–53 (Kennedy, J., dissenting).

[151] McDonnell Douglas Corp. v. Green , 411 U.S. 792, 802, 804 (1973).

[152] *Young*, 575 U.S. at 229.

when her employer denies her accommodations required by her pregnancy but grants accommodations to another employee? The holding also raises questions for employers. Do employers have to offer pregnant employees accommodations if they offer them to other disabled employees? If employers do so, are they discriminating because they are treating pregnant employees differently *because* of the pregnancy? How can an employer comply with Title VII and protect itself from litigation if it is unclear as to whom it must provide reasonable accommodations? These are only a few of the questions the Court created with its decision in *Young*. However, these questions can be answered by considering a series of solutions for the next employer and pregnant employee facing this dilemma.

1. ADA-Accommodated Employees

Many scholars have advocated that "ADA-accommodated employees are appropriate comparators for PDA analysis" because the disabilities of both employees are similar.[153] Under the ADA, it is "unlawful for employers to discriminate against individuals because of a qualifying disability and requires employers to make 'reasonable accommodations.'"[154] The ADA Amendments Act of 2008 (ADAAA) expanded the coverage of disabilities but did not directly address pregnancy concerns.[155] This expansion also requires employers to provide accommodations for temporary restrictions, which strengthens the argument for why pregnancy disabilities should be likened to other disabilities covered by the ADA.[156] Although pregnant employees face similar disabilities, many women cannot qualify under the ADA because of the interpretation of the definition of disability.[157] The ADAAA's expansion of the definition of a "major life activity" now includes reproductive function, which may include some qualifying disabilities caused

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[153] Widiss, Gilbert *Redux*, *supra* note 145, at 968.

[154] *Id.* at 1006.

[155] *Id.* at 1007.

[156] *Id.* at 1024.

[157] Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA's Pregnancy Exclusion*, 27 WIS. J. L., GENDER & SOC'Y 1, 5 (2012) (explaining that pregnancy is not considered a disability due to it being considered a natural "physiological condition"; therefore, pregnancy does not qualify as a "physical impairment[]" that is protected under the ADA). *But 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, 99–101 (2013) (contending that with the expansion of the ADAAA, "courts have begun to recognize that the ADA now offers accommodations for many pregnant women" and that "[t]he ADA makes no distinction between pregnancy-related conditions and conditions not related to pregnancy").

by pregnancy;[158] however, pregnancy "falls short" from being covered as a disability and is still excluded from being considered a disability under the ADAAA.[159] A better understanding of the disabilities that arise from pregnancy would lead to an improved approach in providing reasonable workplace accommodations under the PDA.[160]

If employees protected under the ADA could be compared to employees with similar disabilities caused by pregnancy, then it would broaden the understanding of the comparator under the PDA. Instead of accommodating an employee because of the pregnancy, the employer would accommodate based on the disability. The ADA would be an appropriate comparator for PDA claims. However, the basis of considering the ADA as a comparator could be reimagined as a more fundamental solution. Instead of the comparator being a specific class of individuals, such as the ADA, the Court should look beyond the specific comparators mentioned and consider whether the "effect" of the disability should be accommodated or whether the disability should be accommodated on the basis of the "source."[161]

2. Rethinking Comparators

To provide a better understanding of the PDA for both employees and employers, the Court should re-think and consider a deeper analysis of an appropriate comparator by looking beyond the classes of comparators to a general factor of comparison. The general factor of comparison would be based on either the disability itself or how the disability was acquired. If this analysis was adopted, cases could be decided on a case-by-case basis by providing a general distinguishing factor between different types of accommodation-seeking employees. However, there are two main considerations of what this factor should be. The first consideration is whether the employees should be compared by the "*source* of their work limitations," by looking at the cause of the disability, and the second consideration is the "*effect* of their work limitations," which only considers the disability and its limitations.[162] These two interpretations would provide a uniform understanding of comparators that could be established and applied in any place of employment. However, both of these considerations

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[158] Alemzadeh, *supra* note 157, at 4.

[159] Williams et al., *supra* note 157, at 109.

[160] Alemzadeh, *supra* note 157, at 4.

[161] Brief for the United States as Amicus Curiae Supporting Petitioner at *29–30, Young v. UPS, Inc., 575 U.S. 206 (2015) (No. 12-1226) (the Solicitor General wrote in support of Petitioner, arguing that the Court should consider the effect versus the source of the limitation).

[162] *Id.*

have very different implications and further either a broad or narrow interpretation of the second clause of the Act.

a. Source-based comparison

The source of a work limitation refers to the reason for the disability. When an employer considers the source of the disability, it is taking into account how the disability came about and is providing accommodations to the employee on that basis. This is a narrow approach to interpreting the second clause of the PDA because it allows the employer to deny accommodations for the disability because the need for an accommodation arises out of pregnancy. Since this interpretation is narrower in scope, a source-based analysis would ultimately lead to a comparison with nonpregnant peers because the PDA requires employers to not distinguish among their employees based on pregnancy.[163] The support for a source-based comparator is the plain text of the statute, that states "women affected by pregnancy . . . shall be treated *the same* . . . as other persons not so affected but similar in their ability or inability to work."[164] Dissenting in *Young*, Justice Scalia pointed out the "most natural way" to understand the PDA is by reading the second clause as requiring an employer to refrain from making decisions based on a woman's pregnancy.[165] In allowing the comparator to be based on the source, the focus is purely interpreting "same" to mean equal treatment, not preferential treatment because of the employee's pregnancy.[166] When pregnancy becomes a motivating factor for an employer, then the employer has violated the PDA's intention and Title VII's guarantee of equality.[167]

Additionally, consideration of a source-based comparator raises the argument of congressional intent. Congress has not affirmatively required employers to provide accommodations under the PDA.[168] Since the PDA was an addition to Title VII's definition, it is an extension of discrimination protection—not an accommodation law.[169] It does not extend

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[163] Brief Amici Curiae of the Equal Employment Advisory Council, National Federation of Independent Business Small Business Legal Center and Society for Human Resource Management in Support of Respondent at *15, *Young*, 575 U.S. 206 (2015) (No. 12-1226).

[164] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), *amended by* Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)) (emphasis added).

[165] *Young*, 575 U.S. at 242 (Scalia, J., dissenting).

[166] *Id.* at 242–43.

[167] *See id.* at 242.

[168] *See* Brief Amicus Curiae of American Trucking Ass'ns, Inc. in Support of Respondent at *6–7, *Young*, 575 U.S. 206 (2015) (No. 12-1226).

[169] *See id.*

accommodations as the ADA does, and if it was meant to be interpreted to provide accommodations, then the plain text would have expounded upon accommodations.[170] Therefore, under a source-based analysis, if an employer provides accommodations, then it directly violates the PDA as it currently stands, permitting the employer to compare the pregnant employee to her nonpregnant peers, on the basis of her pregnancy; and, employers are at risk of providing accommodations unequally and elevating their pregnant employees unfairly.

b. Effect-based comparison

The "effect" of an employee's workplace limitation stems from her disability and how it affects her ability to perform the job's essential functions. By considering the limitation's effect, the employer only considers the disability and provides accommodations for it. An effect-based comparator supports the broad interpretation of a similarly situated person. Therefore, it may include employees who suffered from occupational injuries,[171] any subset of disabled employees—whether the disability occurred on or off the job,[172] any similarly disabled employees covered under the ADA,[173] or any employees with comparable conditions the employer offers accommodations for.[174] Petitioner Young and many other amici argued that she should have been compared in this way. On behalf of the United States, the Solicitor General argued that the appropriate comparators in *Young* were "employees injured on the job, employees entitled to accommodations under the version of the ADA applicable at the time, and drivers who had temporarily lost their DOT certification and therefore required a non-driving job."[175] The Solicitor General pointed to the legislature to support its position, stating that "Congress did not distinguish among employees based on the *source* of their work limitations. Congress distinguished among employees based on the work-related *effect* of their work limitations."[176]

If the effect of the limitation is taken into consideration, then when an employer denies accommodations to a pregnant employee that were given to other employees with similar conditions or disabilities, it has violated the PDA's second clause to treat pregnant employees the same as those "similar

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[170] *See id.*

[171] *See id.* at *10.

[172] Petitioner's Brief, *supra* note 11, at *23.

[173] Brief for the United States as Amicus Curiae, *supra* note 161, at *14.

[174] Brief of Amici Curiae 23 Pro-Life Organizations and the Judicial Education Project in Support of Petitioner Peggy Young at *19, *Young*, 575 U.S. 206 (2015) (No. 12-1226).

[175] Brief for the United States as Amicus Curiae, *supra* note 161, at *23.

[176] *Id.* at *21.

in their ability or inability to work."[177] By considering the employee's limitations and accommodating on that basis, the employer is being equal in its accommodations in accordance with the PDA's language "similar" in the "inability to work."

c. Best solution

Overall, an effect-based comparator is the solution the Court should adopt. When employers are considering the disability itself, the effect-view extends the opportunity for pregnant employees to receive workplace accommodations. It prompts employers to treat employees' limitations or disabilities equally and focus on the "*extent* of their ability to work" not the pregnancy.[178] The legislative intent of the PDA was to overrule *Gilbert*, in which the Court held that employers could exclude pregnancy-related disabilities from an employee's disability plan.[179] If the intent of the PDA was to include pregnancy-related disabilities in employee disability plans,[180] then that conclusion points to an understanding that pregnancy-related disabilities are like other disabilities. An effect-based comparator achieves this end and ensures that employers treat the pregnancy-related disability "as they treat any other health condition that causes similar limitations."[181]

The *Young* Court ended with a powerful question that recognizes the support of an effect-based interpretation. The majority asked, "when the employer [has] accommodated so many, could it not accommodate pregnant women as well?"[182] This question captures an understanding of the effect-based comparator because it reinforces that many other employees receive reasonable accommodations for their disabilities but pregnant employees with the same disabilities do not—purely because the disabilities stem from pregnancy. A pregnant employee would be able to compare herself to her peers with similar disabilities and provide evidence of discrimination if it occurs. On the other hand, an employer would be able to consider the employee's limitations and grant accommodations on that basis, not deny them because the employee is pregnant and then face the possibility of

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[177] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), *amended by* Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

[178] Brief of Amici Curiae 23 Pro-Life Organizations and the Judicial Education Project in Support of Petitioner Peggy Young, *supra* note 174, at *13–14.

[179] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 127–28 (1976), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978), *as recognized in* Young v. UPS, Inc., 575 U.S. 206, 227 (2015).

[180] *Young*, 575 U.S. at 227.

[181] *See* Widiss, Gilbert *Redux*, s*upra* note 145, at 997.

[182] *Young*, 575 U.S. at 231.

litigation. The effect-based analysis would focus on an *individual* employee's ability and an *individual* employee's limitations caused by pregnancy; this employee-centric model would help facilitate communication between the employer and employee to fulfill the individual needs of the employee. Not only would this approach benefit pregnant employees, but it would also benefit employers by allowing them to forego adopting an overarching policy that would police every pregnant employee. Instead, employers would be able to create individualized plans, as needed. For example, an employer like UPS would not have to adopt a policy that says all pregnant employees are not allowed to deliver packages over twenty pounds. But instead, UPS would accommodate pregnant employees with a twenty-pound lift limitation. Overall, UPS may only be required to accommodate very few pregnant employees, for a short period of time. With a better understanding of what accommodations are required, through the mechanism of an employee communicating her own limitations, an employer would be better able to understand the law and how to enact compliant policies. Under an effect-based comparator, both employees and employers would more clearly understand workplace accommodations.

Clarity should be one of the driving factors in the Court's interpretation of the PDA, which would create a better outcome for both employee and employer. The lower courts would also have a better chance at developing a unified understanding and creating stronger equity for all pregnant employees regardless of the jurisdiction of the case. That is why the proposed solution of an effect-based or even source-based analysis would have been a better solution for employers and employees. The broad and narrow arguments the Court considered in *Young*, making nonpregnant peers or ADA disabled peers the comparator, should be abandoned. Instead, a source or effect-based understanding of limitations should be adopted to establish clear boundaries for workplace accommodations for pregnant employees. Furthermore, the adoption of the effect-based comparator would be more efficient and fair.

A. *Difficulty After* Young

Without a clear comparator, the lower courts have had difficulty in applying the *Young* framework. A case with similar facts to those in *Young* recently made its way to the Eleventh Circuit Court of Appeals. The court considered whether discrimination occurred when an employer denied the pregnant employee's accommodations request. In *Durham v. Rural/Metro Corp.*, Durham's job as an EMT required her to lift up to one-hundred

pounds on a regular basis.[183] However, Durham's doctor limited her lifting to fifty pounds for the remainder of her pregnancy.[184] She applied to be transferred to light-duty work for the remainder of her pregnancy but was denied an accommodation.[185] The employer, Rural, denied these accommodations because it did not provide accommodations to those injured off the job except on a case-by-case basis.[186] Durham then filed a suit alleging discrimination under the PDA.[187]

The Eleventh Circuit stated that Durham's claim "presents a question of first impression as to how to implement the *Young* test."[188] It held that the district court was mistaken when it dismissed Durham's claim and reasoned its analysis was incorrect in comparing her to nonpregnant EMTs.[189] The district court "erroneously" considered nonpregnant EMTs to be dissimilar "in their ability or inability to work."[190] The Eleventh Circuit vacated and remanded Durham's case, holding instead that the comparator is based on whether an employee is limited in her ability to lift and therefore the same in her "inability to work."[191] The court considered the Supreme Court's decision in *Young* to be informative with regard to the fourth prong of the analysis, in which the focus should be "one's ability to do the job."[192] However, the concurrence brings up an important point in the Court's application of *Young*.[193] The concurrence stated that the facts of Young's case and the number of potential comparators in UPS's workplace triggered the Supreme Court's conclusion, but noted that it is "not altogether clear the accommodation of which categories of employees triggered the Court's conclusion."[194]

Durham represents district courts' lack of understanding of PDA claims and circuit courts' uncertainty in interpreting the PDA. The concurring opinion in *Durham* recognized the complexities of answering the comparator question when comparators are decided on the basis of

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[183] Durham v. Rural/Metro Corp., 955 F.3d 1279, 1281 (11th Cir. 2020) (per curiam).

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Durham*, 955 F.3d at 1281.

[190] *Id.*

[191] *Id.*

[192] *Id.* at 1286 (quoting Lewis v. City of Union City, 918 F.3d 1213, 1228 n.14 (11th Cir. 2019) (en banc)).

[193] *Id.* at 1288 (Boggs, J., concurring).

[194] *Id.*

categories of employees.[195] However, if the Court answered the comparator question in *Young*, and focused on the limitation's source or effect, then litigating claims under the PDA would be less ambiguous. The Eleventh Circuit came close to deciding the comparator on an effect basis when it concluded the focus was on the "ability to do the job."[196] But even with the focus on the ability, it is unclear what an appropriate comparator would be in situations like that in *Durham*. If the Eleventh Circuit had applied the effect-based comparator, as this Note suggests, the outcome would have been the same, but the reasoning would have been more effective. For example, under the effect-based comparator, Durham would have been accommodated on the basis of a lifting disability, because nonpregnant EMT's have accommodations for their lifting disabilities.

Although the Eleventh Circuit has been one of the only circuits to apply the *Young* analysis, a recent class-action lawsuit settled for $14 million in a federal district court in the Seventh Circuit.[197] Walmart was accused of discrimination under the PDA for denying pregnant employees reasonable workplace accommodations.[198] The class-action consisted of 4,000 employees that had been denied reasonable accommodations because of pregnancy over a period of one year.[199] Walmart had implemented a pregnancy-blind policy, much like UPS's, in which it provided other employees with disabilities accommodations while explicitly excluding pregnant employees from receiving those accommodations.[200] Some believe that this settlement is a reflection of the current state of bringing a discrimination claim under the PDA and that, even after *Young*, there is a "heavy burden on pregnant workers to demonstrate that an employer discriminated."[201] For employers, this settlement "sends a clear message to employers across the country about why pregnancy accommodations have to be a focus, and why pregnant workers' health and safety is a key issue for businesses."[202]

Durham and the recent Walmart settlement represent the aftermath of

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[195] *Durham*, 955 F.3d at 1288.

[196] *Id.* at 1286 (majority opinion).

[197] Samantha Schmidt, *Judge Approves $14 Million Settlement in Walmart Pregnancy Discrimination Case*, WASH. POST (Apr. 29, 2020), https://www.washingtonpost.com/dc-md-va/2020/04/29/walmart-pregnant-workers-discrimination-settlement/.

[198] Mike LaSusa, *Walmart Inks $14M Deal to End Pregnancy Bias Class Action*, LAW 360 (Oct. 15, 2019, 10:47 PM), https://www.law360.com/articles/1209869/print?section=classaction.

[199] *See* Schmidt, *sup*ra note 197.

[200] *Id.*

[201] *Id.*

[202] *Id.*

Young and its application to cases going forward. Since the Court in *Young* left the comparator question unanswered, there is uncertainty as to who an appropriate comparator is for a pregnancy discrimination case. However, this unanswered question gives the Court another opportunity to properly answer this question and create a fair opportunity for pregnant employees to continue their cases past summary judgement. It also allows employers to be more aware of the importance of their legal obligations to their pregnant employees. The implementation of an effect-based comparator would contribute to a more reasonable and individualized process for all parties involved.

V. CONCLUSION

Pregnancy is an issue employers and employees will continue to address. As society observes an ever-expanding workforce consisting of women and mothers the law must take the steps needed to achieve equity in this sector of the workforce. Congress took steps to do this in 1978 by passing the Pregnancy Discrimination Act to overrule the discriminatory notions of *Gilbert*.[203] In 2015, the Court took steps to consider the problem of workplace discrimination against pregnant employees by taking up *Young v. UPS, Inc.*,[204] but it still left the comparator question unanswered, which impacts the achievement of equality the PDA intended to resolve.

The best solution to *Young*'s unanswered comparator question is the source verses effect comparison analysis. By answering the comparator question in this way, the lower courts would better understand how to apply the *McDonnell Douglas* framework and determine if an employee established a prima facie case. Although both proposed solutions provide clarity and ultimately more protection for both employers and pregnant employees, the effect-based comparator is a stronger solution for both. A pregnant employee would have clarity in what accommodations she can receive, based on her limitations, when she requests accommodations from the employer. Additionally, employers would be able to protect themselves from liability and litigation when a request for accommodations is made. While the PDA has provided pregnant women with some protection from discrimination in the workplace, the Court's lack of clarity in the *Young* interpretation has proved to leave employees and employers with little understanding of appropriate application. A future judicial interpretation adopting an effect-based comparator is the solution for achieving an understanding of the rights pregnant employees have in the workplace. A judicial decision that reaches

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[203] *See* discussion *supra* Section II.B.1.

[204] Young v. UPS, Inc., 575 U.S. 206, 231 (2015).

for a better understanding of the unique workforce of mothers and interprets the PDA to achieve the clarity discussed throughout this Note is a decision that reflects the true intent of equity for all in the workforce.