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CASE COMMENT

CONFUSING CLARITY: THE PREGNANCY DISCRIMINATION ACT AFTER *YOUNG V. UPS, INC.*

*Jessica M. Bretl**

"Our task is to clarify the law—not to muddy the waters . . . ."
—Justice Antonin Scalia[1]

INTRODUCTION

On March 25, 2015, the Supreme Court issued an opinion in *Young v. UPS, Inc.*[2]—the most recent case in the Court's pregnancy discrimination jurisprudence. *Young* focused on an interpretation of one clause of the Pregnancy Discrimination Act (PDA) and how that interpretation would shape claims of employment discrimination by pregnant employees seeking work accommodations. This Comment argues that the majority opinion in *Young* did not clarify, but only muddied the waters: the *Young* framework presents challenges for the lower courts tasked with applying the framework and creates uncertainty for future pregnancy discrimination litigation.

Part I of this Comment provides background on the PDA and describes the Court's approach to pregnancy discrimination prior to *Young*. Part II summarizes the facts and procedural history of the case, and Part III explains the majority opinion by Justice Breyer. Part IV analyzes three main weaknesses in the majority's argument: (i) the uncertainty and problems resulting from the Court's new framework, (ii) the uncertainty surrounding how to handle Equal Employment Opportunity Commission (EEOC) guidelines, and (iii) the confusion that will result from the Court's failure to address new statutory changes. Part IV then concedes the major strengths of the Court's argument: (i) consistency with respect to "most-favored-nation" status for employee accommodations, and (ii) the Court's clear application of rules of statutory interpretation.

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1 United States v. Virginia, 518 U.S. 515, 574 (1996) (Scalia, J., dissenting).

2 135 S. Ct. 1338 (2015).

I. BACKGROUND: *GENERAL ELECTRIC CO. V. GILBERT* AND THE PDA

In 1964, Congress passed the Civil Rights Act,[3] and in Title VII addressed employment discrimination. Section 703(a)(1) states that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin."[4] Thus, Title VII did not expressly mention pregnancy, and there was extensive controversy in the 1970s over whether sex discrimination included pregnancy discrimination.[5]

In *General Electric Co. v. Gilbert*,[6] the Supreme Court held that discrimination based on pregnancy does not necessarily constitute unlawful sex discrimination and is not sex discrimination on its face.[7] At issue in *Gilbert* was General Electric's disability plan for its employees, which paid weekly non-occupational sickness and accident benefits, but excluded disabilities arising from pregnancy.[8] A class of female employees from a General Electric plant in Virginia argued that the exclusion of pregnancy from the disability plan constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[9] Each employee presented a claim for disability benefits under the plan to cover the employee's absence from work due to pregnancy.[10] These claims were denied on the ground that the plan did not provide disability-benefit payments for any absence due to pregnancy.[11] The women filed complaints with the Equal Employment Opportunity Commission and then filed suit.[12]

In *Gilbert*, the Court overturned the district court and the Fourth Circuit, who had both reasoned that Title VII required equal opportunities for men and women and that the cost-differential resulting from adding pregnancy to the disabilities plan was not a defense to sex discrimination.[13] The *Gilbert* Court also said that pregnancy discrimination was not per se discrimination based on sex.[14] While acknowledging that pregnancy was, of course, applicable only to women, the Court stated that pregnancy was

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3 Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C. (2012)).

4 *Id.* § 703(a)(1) (codified at 42 U.S.C. § 2000e-2(a)(1)) (emphasis added).

5 P. DANIEL WILLIAMS, THE PREGNANCY DISCRIMINATION ACT: A GUIDE FOR PLAINTIFF EMPLOYMENT LAWYERS 3 (2011).

6 429 U.S. 125 (1976).

7 *Id.* at 127–28.

8 *Id.* at 127.

9 *Id.* at 127–28.

10 *Id.* at 128–29.

11 *Id.* at 129.

12 *Id.*

13 *Id.* at 130–32.

14 *Id.* at 136.

still significantly different than the diseases the plan typically covered.[15] The Court even emphasized the district court's finding that pregnancy "is not a 'disease' at all" but "a voluntarily undertaken and desired condition."[16] Therefore, the Court found that there was no reason to conclude the exclusion of pregnancy was simply a pretext for sex-based discrimination.[17] The majority opinion further concluded that the concept of "discrimination" was recognized at the time Title VII was enacted as being associated with the Fourteenth Amendment, so when Congress made it unlawful for an employer to "discriminate . . . because of . . . sex . . . ," the Court would "not readily infer that it meant something different from what the concept of discrimination has traditionally meant."[18]

Then in 1978, Congress, spurred on by the controversy surrounding *Gilbert*,[19] amended Title VII with the Pregnancy Discrimination Act.[20] The PDA added new language to the definitions section of Title VII.[21] The first clause of the PDA states that Title VII's prohibition against sex discrimination applies to discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."[22] The second clause says that employers must treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[23] In *Young v. UPS, Inc.*,[24] the Court addressed the issue of how to interpret this second clause of the PDA. The issue was whether the second clause of the PDA applies when an employer's policy "accommodates many, but not all, workers with nonpregnancy-related disabilities."[25]

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15 *Id.*

16 *Id.* (quoting Gilbert v. Gen. Elec. Co., 375 F. Supp. 367, 377 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 421 U.S. 125 (1976)).

17 *Id.*

18 *Id.* at 145 (citing Morton v. Mancari, 417 U.S. 535 (1974); then citing Ozawa v. United States, 260 U.S. 178 (1922)).

19 WILLIAMS, *supra* note 5, at v.

20 Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000 (2012)).

21 The definitions section of Title VII now states, in relevant part:

> 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 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k) (2012).

22 *Id.*

23 *Id.*

24 135 S. Ct. 1338 (2015).

25 *Id.* at 1344.

II. *YOUNG V. UPS, INC.*: SUMMARY OF THE FACTS AND PROCEDURAL HISTORY

The plaintiff, Peggy Young, was a part-time driver for defendant United Parcel Service, Inc. (UPS).[26] Her job was to pick up and deliver packages.[27] In 2006, Young became pregnant, and her doctor advised her that she should not lift certain weights: anything over twenty pounds during the first twenty weeks of pregnancy and anything over ten pounds thereafter.[28] UPS, however, required drivers to be able to lift packages weighing up to seventy pounds.[29] When informed of Young's restriction, UPS told Young that she could not work while under the lifting restriction.[30] Young was therefore forced to stay home without pay during her pregnancy, eventually losing her employee medical coverage.[31]

Young alleged that UPS accommodated other drivers "similar in their . . . inability to work."[32] UPS responded that the other accommodated drivers were "(1) drivers who had become disabled on the job, (2) those who had lost their Department of Transportation (DOT) certifications, and (3) those who suffered from a disability covered by the Americans with Disabilities Act of 1990."[33] UPS claimed that Young was not accommodated during her lifting restriction because she did not fall within those categories, and it treated her just like it would all other relevant persons.[34]

In 2007, Young filed a pregnancy discrimination charge with the EEOC.[35] The EEOC provided her with a right-to-sue letter, and she subsequently brought a federal lawsuit.[36] Young alleged "that she could show by direct evidence that UPS had intended to discriminate against her because of her pregnancy" and also could establish a case of disparate treatment.[37] For her intentional discrimination claim, Young pointed to a statement made by a UPS manager saying while she was pregnant she was "too much of a liability" and could "not come back" until she "was no

26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.* (quoting Petitioner's Brief at 31, *Young*, 135 S. Ct. 1338 (2015) (No. 12-1226), 2014 WL 4441528, at *31).
33 *Id.* These categories were referred to in general as the facially neutral category of "off-the-job injuries." *See id.* at 1349.
34 *Id.* (citing Brief for Respondent at 34, *Young*, 135 S. Ct. 1338 (2015) (No. 12-1226), 2014 WL 5464086, at *34).
35 *Id.* at 1346.
36 *Id.*
37 *Id.*

longer pregnant."[38] For her disparate treatment claim, Young pointed to the fact that UPS had a light-duty-for-injury policy with respect to several other persons (including the three categories described above) but not for pregnant workers.[39]

After discovery, UPS filed a motion for summary judgment.[40] The district court granted UPS's motion for summary judgment,[41] citing mainly that the people Young had compared herself to were too different to qualify as "similarly situated comparator[s]."[42] The Fourth Circuit affirmed, writing that UPS's policy was "pregnancy-blind," that the policy was "at least facially a 'neutral and legitimate business practice,' and was not motivated by animus toward pregnant women.[43] Interestingly, the Fourth Circuit noted that Young was more like an employee who had injured his back while lifting up his young child, or injured himself during off-the-job work as a volunteer firefighter, neither of whom would have been eligible for accommodations for lift restrictions at UPS.[44]

III. THE COURT'S INTERPRETATION OF THE SECOND CLAUSE

Justice Breyer's majority opinion focused almost entirely on how to interpret the second clause of the PDA, which provides that women affected by pregnancy shall be treated the same for employment purposes "as *other persons* not so affected but *similar in their ability or inability to work*."[45] The policy at issue in *Young* distinguished between pregnant and nonpregnant employees based on characteristics *not related* to pregnancy, specifically in this case, categorizing accommodated employees in a facially neutral category of "off-the-job injuries."[46]

Each side presented very different theories on how to interpret the second clause of the PDA. Young argued that the second clause of the PDA means that when an employer "accommodates only a subset of workers with disabling conditions," a court should find them in violation of Title VII if "'pregnant workers who are similar in the ability to work' do

38 *Id.* (quoting Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 20, Young v. UPS, Inc., No. DKC 08-2586, 2011 WL 665321 (D. Md. Feb. 14, 2011) (No. DKC 08 CV 2586), 2010 WL 10839226).

39 *Id.* at 1347 (citing Plaintiff's Memorandum, *supra* note 38, at 29).

40 *Id.* at 1346.

41 *Id.* at 1347.

42 *Id.* (alteration in original) (quoting *Young*, 2011 WL 665321, at *14).

43 *Id.* at 1347–48 (quoting Young v. UPS, Inc., 707 F.3d 437, 446 (4th Cir. 2013)). This argument sounds very similar to the argument Justice Alito espoused in his test, which would simply require employers to assert a neutral business reason for treating employees differently. *Id.* at 1359 (Alito, J., concurring).

44 *Id.* at 1348 (majority opinion) (quoting *Young*, 707 F. 3d at 448).

45 *Id.* (quoting 42 U.S.C. § 2000e(k) (2012)).

46 *Id.* at 1349.

not 'receive the same [accommodation] even if still other non-pregnant workers do not receive accommodations.'"[47] UPS argued that the second clause of the PDA does not add an additional requirement of employers other than to simply define sex discrimination to include pregnancy discrimination.[48] Under this interpretation, courts simply have to compare the accommodations provided to pregnant employees with the accommodations provided to others within a facially neutral category, like "off-the-job injuries."[49]

The Court found both Young's and UPS's arguments unpersuasive. The Court first argued that Young's approach was too broad and literal.[50] Young's interpretation turned solely on evidence that pregnant and nonpregnant workers were not treated the same, and the Court said such an interpretation could not stand.[51] The Court's main problem with Young's argument was that it reads the statute to grant to all pregnant employees a most-favored-nation status.[52] This means that if an employer provided any worker with an accommodation—including, for example, employees with particularly hazardous jobs—then the employer would have to give accommodations to all pregnant workers.[53] Furthermore, the Court

47 *Id.* at 1349 (alteration in original) (quoting Petitioner's Brief, *supra* note 32, at 28).

48 *Id.* (citing Brief for Respondent, *supra* note 34, at 25).

49 *Id.*

50 *Id.*

51 *Id.* Earlier in the Court's opinion, the Court laid out the framework for how to prove a disparate treatment claim. The Court said that a plaintiff could prove disparate treatment by showing "either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas*." *Id.* at 1345. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court said the plaintiff must carry the initial burden of establishing a prima facie case of discrimination by showing:

> (i) that he belongs to a . . . minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Young, 135 S. Ct. at 1349 (quoting *McDonnell Douglas*, 411 U.S. at 802). The Court in *McDonnell Douglas* also stated that if a plaintiff makes the requisite showing, then the employer must have an opportunity "to articulate some legitimate, non-discriminatory reason for" treating employees outside the protected class better than employees within the protected class. *Id.* (quoting *McDonnell Douglas*, 411 U.S. at 802). If the employer is able to articulate such a reason, the plaintiff then has the "opportunity to prove by preponderance of the evidence that the legitimate reasons offered by the defendant [*i.e.*, the employer] were not its true reasons, but were a pretext for discrimination." *Id.* (alteration in original) (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)). Therefore, the *McDonnell Douglas* framework governs disparate treatment claims.

52 *Young*, 135 S. Ct. at 1349; *see also infra* notes 97–101 and accompanying text.

53 *Young*, 135 S. Ct. at 1349–50.

doubted that Congress intended to grant such an unconditional preferred status to pregnant workers, because the second clause uses the open-ended term "other persons" and does not specify that employers treat pregnant women the "same" as "*any* other persons."[54]

The Court also rejected UPS's interpretation of the second clause. UPS simply read the second clause to define sex discrimination to include pregnancy discrimination.[55] The Court found that conclusion incorrect, as the first clause of the PDA already expressly amends Title VII's definitional provision to clarify that pregnancy discrimination counts as sex discrimination.[56] The Court used two arguments to debunk UPS's theory. First, the Court reasoned that "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause' is rendered 'superfluous, void, or insignificant.'"[57] However, under UPS's interpretation, the second clause simply reiterates exactly what the first clause said, in contravention of this common canon of statutory interpretation. Second, the Court argued that UPS's interpretation would also fail to carry out an important congressional objective: overturning *Gilbert*.[58] In *California Federal Savings & Loan Ass'n v. Guerra*, the Court reasoned that the first clause of the PDA reflected congressional disapproval of the Court's reasoning in *Gilbert*, and the second clause was intended to overrule it by "illustrat[ing] how discrimination against pregnancy is to be remedied."[59] *Guerra* established that both clauses are needed to overrule *Gilbert*, and to read the second clause as merely a repetition of the first would ignore precedent and defeat the congressional objective of the PDA.

After dismissing both Young's and UPS's interpretations of the second clause of the PDA, the Court set forth its own interpretation. The Court laid out a framework for how a pregnant worker can succeed on a disparate treatment theory through direct evidence. The Court followed the *McDonnell Douglas* framework,[60] which requires a plaintiff to make a prima facie case of discrimination by "'showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under' Title VII."[61] The Court noted that this showing is not onerous or burdensome, and does not require a showing

54 *Id.* at 1350.

55 *Id.* at 1352 (citing Brief for Respondent, *supra* note 34, at 25).

56 *Id.*

57 *Id.* (quoting TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)).

58 *Id.* at 1353. For an explanation of the Court's approach in *Gilbert*, see notes 6–18 and accompanying text.

59 479 U.S. 272, 285 (1987).

60 *See supra* note 51.

61 *Young*, 135 S. Ct. at 1354 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978)).

that those whom the employer favored and disfavored were similar in all but the protected ways.[62]

Thus, the Court suggested the following framework: First, a plaintiff must show she belongs to a protected class, then show she applied for an accommodation from her employer.[63] Next, she must show that the employer did not accommodate her, but did accommodate others "similar in their ability or inability to work."[64] Then, the employer has the burden of showing its refusal of an accommodation was justified because the employer relied "on 'legitimate, nondiscriminatory' reasons" for denying the accommodation.[65] If the employer succeeds, then the burden shifts back to the plaintiff to show that the employer's stated reasons are, in fact, pretextual.[66] This is the point in the framework at which the Court proposed a new standard. The Court said that, regarding the employer's stated reasons, a plaintiff could reach a jury by simply providing

> sufficient evidence 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.
>
> The 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.[67]

This last part of the Court's framework, and the standards it sets forth, are what this Comment will focus on.

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62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.* (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). The Court also noted that the employer's reason for rejection cannot be that it was simply more expensive or less convenient to add pregnant women to the class the employer accommodates. *Id.* The Court explained that, if such reasoning justified rejecting accommodations for pregnant women, then the employer in *Gilbert* could have succeeded. *Id.*

66 *Id.*

67 *Id.*

IV. ANALYSIS OF THE COURT'S OPINION IN *YOUNG*

A. Weaknesses

1. An Uncertain Framework

The framework set out by the Court directly above initially reads fairly clearly. However, when the Court applies this framework, the seeming clarity obscures into a vague and potentially subjective application. First, the Court initially states that Young could use the evidence that UPS had multiple policies for accommodating certain nonpregnant employees with lifting restrictions as evidence that UPS's reason not to similarly accommodate pregnant workers are "not sufficiently strong." [68] This reasoning is consistent with the Court's framework. However, the Court goes on to state that it will not consider whether UPS's reasons were sufficiently strong, but remands to the Fourth Circuit to make that determination.[69] This seems to contradict the Court's earlier statement that the three accommodations policies would show that UPS's reasons were "not sufficiently strong."[70] The Court's lack of clarity regarding what would qualify as "sufficiently strong" might cause problems for the lower court in determining what constitutes a sufficiently strong justification for the burden.

Second, the Court stated, "[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."[71] However, the Court did not cite this language again when it applied its new framework to Young's case. The Court simply said that it would leave the lower court to determine if UPS's reasons were pretextual. This leaves open the question of whether the lower court should simply make a judgment call as to what constitutes "a large percentage" to create a burden. Does large percentage mean 51% or 75%? What is sufficiently large for the plaintiff to establish an issue of material fact? Such an ambiguous standard could lead to subjective calls by lower courts when deciding whether the percentage is large enough to tip the scales in the plaintiff's direction. The Court does not provide enough guidance to lead the lower courts to determine what the Court means when it says "large percentage."

An additional problem with the Court's test is that it seems to come out of thin air: there is no clear basis for these new standards that the Court

68 *Id.*
69 *Id.* at 1356.
70 *Id.* at 1354.
71 *Id.* (emphasis added).

creates. Justice Rehnquist once famously analyzed another standard apparently self-created by the Court by saying: "The Court's conclusion . . . apparently comes out of thin air. . . . [T]he phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices . . . ."[72] Subjective application of the new phrases the Court proposes in *Young* could lead to confusion, not clarity, when lower courts interpret future pregnancy discrimination cases under the PDA.

2. What To Do with the EEOC Guidelines

Young began her claim in July 2007 by filing a pregnancy discrimination charge with the EEOC, and in September 2008 they provided her with a right-to-sue letter.[73] Young's actions were consistent with her obligation, under Title VII, to exhaust administrative routes before filing suit against her employer.[74] Under Title VII, claimants must file with the EEOC within 180 days from the act of discrimination.[75] The EEOC is then responsible for investigating the alleged act of discrimination.[76] Then, the claimant must wait for at least six months before receiving a ninety-day notice of a right to sue, and then must file suit within ninety days.[77] The EEOC also issues general guidelines, which the Court in *Young* declined to follow.[78]

The EEOC issued guidance before Congress passed the PDA, stating that, "'[d]isabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities' and . . . 'benefits and privileges . . . shall be applied to disability due to pregnancy . . . on the same . . . conditions as they are applied to other temporary disabilities.'"[79] After the PDA was passed, the EEOC issued guidance consistent with earlier statements saying, "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function."[80] Even recently, in July 2014, the EEOC put out another guideline clarifying any ambiguity in its position, saying, "[a]n employer may not refuse to treat a pregnant worker the same

72 Craig v. Boren, 429 U.S. 190, 220–21 (1976) (Rehnquist, J., dissenting).

73 *Young*, 135 S. Ct. at 1346.

74 Under Title VII, an employer is defined as a person or entity engaged in an industry affecting commerce that has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year. 42 U.S.C. § 2000e-5 (2012). For more information on the procedural requirements for filing a pregnancy discrimination claim, see WILLIAMS, *supra* note 5, at 4–5.

75 42 U.S.C. § 2000e-5(e)(1).

76 *Id.* § 2000e-5(b).

77 *Id.* § 2000e–5(f)(1).

78 *Young*, 135 S. Ct. at 1352.

79 *Id.* at 1351 (alteration in original) (quoting 29 C.F.R. § 1604.10(b) (1975)).

80 *Id.* (alteration in original) (quoting 29 C.F.R. app. § 1604 (1979)).

as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations . . . ."[81] All of these guidelines were noted by the majority opinion in *Young*. However, the Court went on to reject the EEOC guidelines.[82]

The Solicitor General pointed out that the Court has long held that "'the rulings, interpretations and opinions' of an agency charged with the mission of enforcing a particular statute, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[83] However, the Court ignored this precedent and disregarded the EEOC's clear guidance on this issue. The Court cited timing, consistency, and thoroughness of consideration as reasons to deny the EEOC guidelines.[84] The majority claimed that the 2014 guideline had been put forth only after the Court had granted certiorari in *Young*.[85] The Court seemed to take this timing issue as dispositive, and claimed that the 2014 guideline takes a position on which the EEOC had previously been silent.[86]

The EEOC guidelines seem perfectly clear: treating pregnant workers less favorably than other similar disabled workers is impermissible. It is hard to see why the Court thought the most specific recent guideline was suspect, just because it was recent. What better explains the Court's dismissal of the EEOC guidelines is that the guidelines do not address the most-favored-nation status.[87] The main focus of the majority opinion is to reject the most-favored-nation status and—without any prior guidance from the EEOC to the contrary—the Court was assuming the EEOC guidelines would support most-favored-nation status for pregnant employees. However, the Solicitor General's point about precedent cautions the Court against dismissing the EEOC guidelines too quickly. The agency charged with enforcing a statute should get to weigh in on how that statute is interpreted, and the content of the EEOC guidelines should be carefully considered by the Court—not quickly dismissed simply because of their release date.

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81 *Id.* (alteration in original) (quoting 2 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 626-I(A)(5), p. 626:0009 (July 2014)). This 2014 guideline especially seems to favor Young's claim.

82 *Id.* at 1351–52.

83 *Id.* at 1351 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) (citing Brief for the United States as Amicus Curiae Supporting Petitioner at 26, *Young*, 135 S. Ct. 1338 (2015) (No. 12-1226), 2014 WL 4536939, at *26).

84 *Id.* at 1352.

85 *Id.*

86 *Id.*

87 *Id.*

Another reason that the Court should not have rejected the EEOC guidelines in *Young* is that the PDA was widely accepted as overruling *Gilbert*, and *Gilbert* also ignored the EEOC guidelines. In *Gilbert*, the Court rejected the plaintiff's reliance on EEOC guidelines that stated (i) it was unlawful to discriminate between men and women with regard to fringe benefits, and (ii) pregnancy related conditions must be covered.[88] In his dissent, Justice Brennan focused on the majority's inattention to the 1972 EEOC guidelines.[89] He argued that it is prudent for Congress to leave complex economic and social matters of interpreting Title VII to the EEOC.[90] He cited prior Title VII decisions that regarded EEOC guidelines as persuasive, and urged that the guidelines should be given great deference.[91] Justice Brennan even noted that the EEOC guidelines were consistent with holdings made by "every other Western industrial country."[92]

Thus the majority in *Young* dismissed the EEOC guidelines too quickly and followed the same track as the majority in *Gilbert*. As Justice Brennan pointed out in his *Gilbert* dissent, the Court should have given the EEOC guidelines more deference.

3. Uncertainty Looking Forward

By its own admittance, the Court was concerned about uncertainty created by other legal authority, especially a statutory change that occurred after Young's case first began: "In 2008, Congress expanded the definition of 'disability' under the ADA to make clear that 'physical or mental impairment[s] that substantially limi[t]' an individual's ability to lift, stand, or bend are ADA-covered disabilities."[93] The Court mentioned that it was aware of this change, but stated it would express no view on this statutory change in this opinion.[94] The Court seems to have simply punted this issue to decide later.

However, the statutory change may be quite significant for future pregnancy discrimination jurisprudence; the expanded definition now

88 Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 140–41 (1976) (quoting 29 C.F.R. § 1604.10(b) (1975)); *id.* at 141 n.19 (quoting 29 C.F.R. § 1604.9(b)).

89 *Id.* at 155–56 (Brennan, J., dissenting).

90 *Id.* at 155.

91 *Id.* at 155–56 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring)).

92 *Id.* at 158 (citing OFFICE OF RESEARCH & STATISTICS, SOC. SEC. ADMIN., U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD, 1971, at ix, xviii, xix (1971)).

93 Young v. UPS, Inc., 135 S. Ct. 1338, 1348 (2015) (alteration in original) (quoting 42 U.S.C. §§ 12101(1)–(2) (2012)).

94 *Id.*

makes Young's claim covered not only by the PDA, but also the Americans with Disabilities Act (ADA). Before, the ADA did not consider normal pregnancies disabilities.[95] Therefore, only if there were something unusual about the pregnancy would a plaintiff be allowed to take advantage of the ADA.[96] As a result of the expanded definition of "disability," not only will abnormal pregnancy-related ailments be covered by the ADA, but so too will ailments related to normal pregnancy. By choosing not to address the implications of the expanded ADA, the Court's approach in *Young* could lead to more litigation, as plaintiffs attempt to apply the Court's new standard in an ADA case.

B. Strengths

1. "Most-Favored-Nation" Status Consistency and Clarity

A major strength of the majority opinion is its clear approach to the issue of "most-favored-nation" status for pregnant workers. The majority opinion is consistent and clear in its holding that no possible reading of the second clause of the Pregnancy Discrimination Act will lead to a most-favored-nation status for pregnant employees. The majority, concurrence, and dissent all agreed on this point. In his concurrence, Justice Alito stated that he "cannot accept this 'most favored employee' interpretation."[97] Justice Scalia, in his dissent, gave an excellent description of what it would mean if the second clause were interpreted as granting a most-favored-nation status to pregnant workers:

> If Boeing offered chauffeurs to injured directors, it would have to offer chauffeurs to pregnant mechanics. And if Disney paid pensions to workers who can no longer work because of old age, it would have to pay pensions to workers who can no longer work because of childbirth. It is implausible that Title VII, which elsewhere creates guarantees of *equal* treatment, here alone creates a guarantee of *favored* treatment.[98]

Justice Scalia concluded that the clause prohibits employers from distinguishing between pregnant women and others of similar ability or inability *because of pregnancy*, and that means that pregnant women are simply entitled to accommodations on the same terms as other workers.[99] He used UPS's accommodation for drivers who have lost their certifications as an example and said that a pregnant woman who lost her certification gets the benefit, just like any other worker who lost their

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95 *See e.g.*, Tysinger v. Police Dep't, 463 F.3d 569, 578 (6th Cir. 2006) (stating that pregnancy alone is not a disability).

96 *See* WILLIAMS, *supra* note 5, at 340.

97 *Young*, 135 S. Ct. at 1358 (Alito, J., concurring).

98 *Id.* at 1362 (Scalia, J., dissenting).

99 *Id.*

certification, which certainly looks like treating those who are pregnant the *same*.[100] He therefore concluded that the clause prohibits treating a worker differently because of a protected trait, and does not prohibit employers from treating workers differently for reasons that have nothing to do with protected traits, just as UPS did here.[101]

2. Clarity in Statutory Interpretation

Another strength of the majority opinion is its use of canons of statutory interpretation. The majority reasons that the second clause of the PDA cannot simply be read to be restating its first clause. The first clause expressly states that when Title VII prohibits discrimination "because of sex," that statutory phrase includes pregnancy. If the second clause were simply repeating that prohibition, the second clause would be superfluous. The Court has long held that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause . . . shall be superfluous, void, or insignificant."[102] Justice Scalia's dissent argued that the second clause is not superfluous, but clarifying.[103] The dissent seemed to think that the second clause simply makes "plain" that it would be unlawful to disfavor pregnant women relative to other workers of similar inability to work.[104] However, as the majority pointed out, *McDonnell Douglas* already made clear that courts should consider how a plaintiff was treated relative to other persons of the same qualifications.[105] In short, the dissent's interpretation of the second clause is superfluous, given the Court's approach in *McDonnell Douglas*. Thus, in interpreting the second clause, the dissent is searching for clarification where none is needed. The majority is more persuasive in arguing that lack of superfluous meaning is the better approach to interpreting the second clause. This reading is clearer for future courts to apply and thus turns out to be more clarifying than the "clarifying" interpretation proffered by the dissent.

CONCLUSION

The Court's approach in *Young* creates uncertainty about the application of the PDA, which will obscure future pregnancy discrimination litigation in lower courts. It is still unclear how the Fourth Circuit will evaluate standards like "sufficiently strong" justifications by

100 *Id.*

101 *Id.* at 1363.

102 TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)).

103 *Young*, 135 S. Ct. at 1363 (Scalia, J., dissenting).

104 *Id.*

105 *Id.* at 1352 (majority opinion) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

the state and accommodations for "a large percentage" of pregnant and nonpregnant workers. These two new phrases might lead to subjective interpretations by lower courts, resulting in varying sets of rules among the circuits. The Court was also too dismissive of the EEOC guidelines, and a more careful consideration of those guidelines would have helped the Court maintain consistency with precedent. Finally, the Court's opinion sidestepped the possible confusion that new statutory changes will have on future pregnancy discrimination cases. In short, the new rule proposed by the Court in *Young* confuses, rather than clarifies. With its remand to the Fourth Circuit, time will soon tell if lower courts will be confused by the Court's new rule, or if it will clarify, rather than obscure, application of the Pregnancy Discrimination Act to this and future cases.