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**COMMENT: *YOUNG V. UPS*, THE  
PREGNANCY DISCRIMINATION ACT, AND  
THE FUTURE OF PREGNANCY  
DISCRIMINATION LAW**

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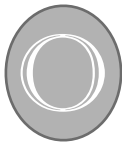
**Abstract:** Women who continue to work during pregnancy need legal protections to prevent discrimination. While the Pregnancy Discrimination Act strives to protect women from adverse employment actions stemming from pregnancy discrimination, a lack of clarity in the relevant case law has undermined the statute. This comment explores *Young v. UPS*, a case that will be heard by the Supreme Court this term. *Young* presents the Court with an opportunity to clarify the statute and enable the law to better protect working women.

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## COMMENT: *YOUNG v. UPS*, THE PREGNANCY DISCRIMINATION ACT, AND THE FUTURE OF PREGNANCY DISCRIMINATION LAW

*Katharine M. Deabler*

### INTRODUCTION



On December 3, the Supreme Court will hear *Young v. UPS*,<sup>1</sup> a case stemming from UPS's policy of refusing to grant light duty to pregnant employees.<sup>2</sup> The plaintiff, Peggy Young, was a delivery driver when she became pregnant.<sup>3</sup> When her pregnancy rendered her unable to lift boxes up to the weight required by her job, she requested a light duty assignment and, when it was denied, was forced to take unpaid leave.<sup>4</sup> The primary issue in *Young* is whether UPS's light duty policy, which allows for accommodations for certain employees but not pregnant women, is a violation of the Pregnancy Discrimination Act (PDA).<sup>5</sup>

In 1978, Congress enacted the PDA to protect women from pregnancy discrimination in the workplace by legally mandating that pregnant workers be treated the same as other employees.<sup>6</sup> Laws prohibiting discrimination based on pregnancy are essential for women to continue working during and after their

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<sup>1</sup> *Supreme Court of the United States October Term 2014 For the Session Beginning December 1, 2014*, SUPREME COURT OF THE UNITED STATES, [http://www.supremecourt.gov/oral\\_arguments/argument\\_calendars/MonthlyArgumentCalDec2014.pdf](http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalDec2014.pdf) (last updated Sept. 4, 2014).

<sup>2</sup> See *Young v. UPS, Inc.*, 707 F.3d 437, 439–440 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 2898 (2014).

<sup>3</sup> *Id.* at 440.

<sup>4</sup> *Id.* at 440–41.

<sup>5</sup> *Id.* at 439.

<sup>6</sup> See Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 *YALE L. & POL'Y REV.* 97, 105 (2013).

pregnancies.<sup>7</sup> Without this legal protection, pregnant women face discrimination that results in missed promotions, lost benefits, and even termination.<sup>8</sup> However, the PDA has not completely eliminated pregnancy discrimination.<sup>9</sup> Discrimination stills stem from the structure of the statute itself and from confusing and contradictory case law across circuits.<sup>10</sup> *Young v. UPS* has the potential to resolve some of this confusion; what remains to be seen is whether the resolution will strengthen protections for pregnant women or strip them away, making pregnant women even more vulnerable.

#### THE PASSAGE AND INTERPRETATION OF THE PREGNANCY DISCRIMINATION ACT

In 1976, the Supreme Court decided *General Electric Co. v. Gilbert*.<sup>11</sup> The Supreme Court held that General Electric's disability plan, which covered all non-work related disabilities and illnesses other than those arising from pregnancy,<sup>12</sup> did not violate Title VII<sup>13</sup> because it simply differentiated between medical conditions and did not discriminate based on gender.<sup>14</sup> According to the Court, the disability plan "divide[d] potential recipients into two groups pregnant women and nonpregnant persons."<sup>15</sup> *Gilbert* severed pregnancy from gender under Title VII leaving pregnant women with no protection from employment discrimination.<sup>16</sup>

Public outcry followed the Court's decision,<sup>17</sup> and Congress swiftly amended Title VII by passing the Pregnancy Discrimination Act.<sup>18</sup> The Act was

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<sup>7</sup> See NAT'L WOMEN'S LAW CTR. & A BETTER BALANCE, IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS 14 (2013), available at [http://www.nwlc.org/sites/default/files/pdfs/pregnant\\_workers.pdf](http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf) [hereinafter, A HEAVY LIFT].

<sup>8</sup> See 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, 972–73 (2013).

<sup>9</sup> See e.g., Amicus Curiae Brief of the American Civil Liberties Union and a Better Balance, et al., in Support of Petitioner, *Young v. UPS, Inc.*, No. 12-1226 (Filed Sept. 10, 2014), 2014 WL 4536938, at \*16–21 [hereinafter Brief for the ACLU]; A HEAVY LIFT, *supra* note 7, at 14, 16; *The Pregnancy Discrimination Act at 35*, NAT'L P'SHIP FOR WOMEN & FAMILIES, 1–2 (Oct. 2013) <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/the-pregnancy-discrimination-act-at-35.pdf> ("Pregnancy discrimination complaints are actually on the rise, particularly among women in lower-wage jobs and among women of color.").

<sup>10</sup> Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67, 90–93 (2013); Widiss, *supra* note 8, at 963–65.

<sup>11</sup> 429 U.S. 125 (1976). In an earlier case pertaining to a California policy similar to that found in *Gilbert*, the Court held that benefits programs that only excluded pregnancy-related conditions did not violate the Fourteenth Amendment because they did not discriminate based on gender. *Geduldig v. Aiello*, 417 U.S. 484, 494–95 (1974).

<sup>12</sup> *Gilbert*, 429 U.S. at 127–28.

<sup>13</sup> Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex. 42 U.S.C. § 2000e (2013).

<sup>14</sup> *Gilbert*, 429 U.S. at 145–46.

<sup>15</sup> *Id.* at 135 (quoting *Geduldig*, 417 U.S. at 496–97).

<sup>16</sup> See Widiss, *supra* note 8, at 963.

<sup>17</sup> See *Cal. Fed. Sav. & Loan Ass'n. v. Guerra*, 479 U.S. 272, 276–77 (1987).

passed with the specific goal of overruling *Gilbert* and ensuring that pregnancy discrimination was synonymous with gender discrimination.<sup>19</sup> Today, few employers are audacious enough to openly fire or demote a woman for becoming pregnant.<sup>20</sup> However, even a healthy pregnancy is hard on a woman's body, and many pregnant women need some type of minor change in their job duties to accommodate the physical realities of their pregnancy.<sup>21</sup> Many employers refuse to make these accommodations, forcing women off the job when they cannot perform their unmodified duties.<sup>22</sup> There is little disagreement on the point that such behavior on the part of an employer is pregnancy discrimination in some circumstances, but there is disagreement on what those circumstances are.<sup>23</sup>

This disagreement stems from differing interpretations of the second clause of the PDA. While the first clause of the PDA simply incorporates pregnancy into the definition of sex discrimination under Title VII, the second clause is more complicated. It states that "women affected by pregnancy, childbirth, or related medical conditions 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."<sup>24</sup> This second clause has been the subject of ongoing debate and is the statutory clause most at issue in *Young v. UPS*.

The primary area of disagreement between the circuits is the identification of which employees pregnant women should be compared to (typically called "comparators")<sup>25</sup> when determining whether or not pregnancy discrimination has taken place. Plaintiffs bringing pregnancy discrimination claims typically utilize comparators to demonstrate that they were treated differently than their non-pregnant counterparts.<sup>26</sup> Five circuits, including the Fourth,<sup>27</sup> have upheld policies which grant light duty or other accommodations to individuals injured on the job or individuals covered by the Americans with Disabilities Act (ADA)<sup>28</sup> but do not

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<sup>18</sup> 42 U.S.C. § 2000e(k) (2013); *Guerra*, 107 U.S. at 276–77.

<sup>19</sup> See Brake & Grossman, *supra* note 10, at 75; see also *Guerra*, 107 U.S. at 277; Widiss, *supra* note 8, at 963.

<sup>20</sup> See Widiss, *supra* note 8, at 1014–15.

<sup>21</sup> See A HEAVY LIFT, *supra* note 7, at 4, 6, 8, 10, 11, 13, 15, 18 (listing examples of the kinds of accommodations often needed during pregnancy); Widiss, *supra* note 8, at 973–74;.

<sup>22</sup> See Widiss, *supra* note 8, at 974–75.

<sup>23</sup> Compare *Young v. UPS, Inc.*, 707 F.3d 437, 446 (4th Cir. 2013), and *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006), with *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1225 (6th Cir. 1996), and Widiss, *supra* note 8, at 963–64.

<sup>24</sup> 42 U.S.C. § 2000e(k) (2013).

<sup>25</sup> See Widiss, *supra* note 8, at 963–64.

<sup>26</sup> See *id.*

<sup>27</sup> *Young v. UPS* came out of the Fourth Circuit. For a more thorough discussion of that ruling, see *infra* notes 35–53 and accompanying text.

<sup>28</sup> Persons covered by the ADA in an employment context are those "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individ-

grant such accommodations to pregnant workers for whom an accommodation is a medical necessity.<sup>29</sup> Two circuits have held that a pregnant worker who is “similar in their ability or inability to work” to employees whose injuries and disabilities are accommodated must also be accommodated under the PDA. This allows pregnant women to use people who suffer from on-the-job injuries as comparators, even if the employer’s policy does not accommodate off-the-job conditions.<sup>30</sup>

On July 14, 2014, the Equal Employment Opportunity Commission (EEOC) issued new enforcement guidance pertaining to the application of the PDA and the ADA.<sup>31</sup> It states that “Title VII requires that individuals affected by pregnancy, childbirth, or related medical conditions be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work.”<sup>32</sup> It explains that:

An employer may not refuse to treat a pregnant worker the same 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 (e.g., a policy of providing light duty only to workers injured on the job).<sup>33</sup>

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ual holds or desires.” 42 U.S.C. § 12111(8) (2013). They are entitled to reasonable accommodations of their disability, so long as the needed accommodation does not cause their employer undue hardship. 42 U.S.C. § 12112 (5)(A) (2013); *see also* Widiss, *supra* note 8, at 1023–25 (discussing the potential impact of the ADAAA in allowing greater protections for pregnant women in the workplace).

<sup>29</sup> *See* *Young v. UPS, Inc.*, 707 F.3d 437, 446 (4th Cir. 2013); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548–49 (7th Cir. 2011) (holding that “an employer is not required to provide an accommodation to a pregnant employee unless it provides the same accommodation to its similarly situated nonpregnant employees,” and that employees injured on the job or accommodated under the ADA were not similarly situated employees); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006) (holding that Swift’s policy of granting light duty to workers injured on the job, but not to pregnant workers, was “indisputably pregnancy-blind.”); *Spivey v. Beverly Enters.*, 196 F.3d 1309, 1313 (11th Cir. 1999) (holding that defendant was “entitled to deny Appellant a modified duty assignment as long as it denied modified duty assignments to all employees who were not injured on the job.”); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 207 (5th Cir. 1998) (holding that “Continental was entitled to deny Urbano a light-duty assignment as long as it treat[s] similarly affected but nonpregnant employees the same.”) (internal quotations omitted).

<sup>30</sup> *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1194–95 (10th Cir. 2000) (citing *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996), and refusing to embrace argument that pregnant employees must be compared to workers injured off the job and utilizing said argument only because the EEOC was able to meet said burden); *Ensley-Gaines v. Runyon*, 100 F.3d at 1226 (holding that “the PDA explicitly alters the analysis to be applied in pregnancy discrimination cases. While Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated in all respects, the PDA requires only that the employee be similar in his or her ability or inability to work”) (internal quotations omitted).

<sup>31</sup> EEOC, No. 915.003, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (2014) [hereinafter “2014 GUIDANCE”].

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* While the Guidance is not dispositive in interpreting the PDA, the United States argues that it is entitled to *Skidmore* deference. Brief for the United States as Amicus Curiae Supporting Petition-

The guidance makes it clear that the EEOC believes that women like Peggy Young are entitled to those accommodations denied by Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits.<sup>34</sup>

#### *YOUNG v. UPS: FACTUAL AND PROCEDURAL HISTORY*

Peggy Young worked at UPS as a delivery truck driver, a position that required that she be able to “lift, lower, push, pull, leverage, and manipulate” items weighing up to 70 pounds and “assist in moving packages weighing up to 150 pounds.”<sup>35</sup> However, as a part-time, early-morning air driver, Young rarely had to move heavy boxes, since packages shipped by air are typically lighter than those shipped by ground transport.<sup>36</sup>

In July 2006, Young became pregnant, and delivered work restrictions from her doctor to UPS.<sup>37</sup> The restrictions stipulated that Young should lift no more than twenty pounds during the first twenty weeks of her pregnancy and no more than ten pounds thereafter.<sup>38</sup> In light of these restrictions, Young requested light duty which UPS denied.<sup>39</sup> UPS told Young that since she could not perform all of the essential functions of her job, she could not work.<sup>40</sup> After her Family and Medical Leave Act leave expired, Young was placed on unpaid leave and eventually lost her medical coverage.<sup>41</sup> She returned to work after giving birth.<sup>42</sup>

At the time of Young’s pregnancy,<sup>43</sup> UPS’s stated policy was to only provide light duty to those employees who are unable to perform their regular du-

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er, *Young vs. UPS, Inc.*, No. 12-1226 (Filed Sept. 11, 2014), 2014 WL 4536939, at \*26 (referencing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)) [hereinafter Brief for the United States].

<sup>34</sup> See *supra* note 29.

<sup>35</sup> *Young*, 707 F.3d at 439 (internal brackets omitted).

<sup>36</sup> *Id.* at 440.

<sup>37</sup> *Id.* Work restrictions and the relevant employer’s decision whether or not to accommodate them are frequently the subject of litigation under the PDA. See *e.g.*, *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637 (6th Cir. 2006); *Spivey v. Beverly Enters.*, 196 F.3d 1309 (11th Cir. 1999); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998); *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996).

<sup>38</sup> *Young*, 707 F.3d at 440.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 441.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 442.

<sup>43</sup> UPS recently announced that it is changing its policy and will “provide pregnant women the same accommodations as other employees with similar physical restrictions resulting from on-the-job activities” in the future. Brief for Respondent, *Young*, No. 12-1226 (Filed Oct. 24, 2014), 2014 WL 5512140, at \*10–11. As of this writing, UPS has not given back pay to Young and similarly situated women impacted by its old policy. Ariela Migdal, *UPS Finally Admits the Obvious—Letting Pregnant Workers Work is Good for Business*, ACLU WOMEN’S RIGHTS PROJECT (Oct. 28,

ties because they were injured on the job (as required by a Collective Bargaining Agreement) and those employees covered by the ADA.<sup>44</sup> Glaringly absent from this policy are pregnant women, who are treated like anyone with an off-the-job injury or condition: they are not accommodated.<sup>45</sup> However, Young argued that UPS made exceptions to its policy by providing light duty accommodations to employees suffering from cancer and off-the-job injuries,<sup>46</sup> and also found non-driving jobs for employees who had lost their driver's licenses.<sup>47</sup> She argued that providing light duty work to some employees, but not to pregnant workers, is direct evidence of discrimination.<sup>48</sup>

The Fourth Circuit found that UPS's policy—both stated and unstated—was pregnancy-blind and did not violate the PDA.<sup>49</sup> While Young argued that “UPS's policy of accommodating certain employees but not pregnant workers who are otherwise allegedly similar in their ability or inability to work nonetheless runs afoul of the PDA,” the court was unconvinced.<sup>50</sup> The Fourth Circuit dis-

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2014, 3:36 PM), <https://www.aclu.org/blog/womens-rights/ups-finally-admits-obvious-letting-pregnant-workers-work-good-business>.

<sup>44</sup> *Young*, 707 F.3d at 439–40. An amicus brief filed by the National Education Association and other labor organizations takes issue with UPS's implicit contention that the stated policy's reliance on a CBA somehow shields it from the dictates of federal anti-discrimination law. Brief Amicus Curiae of the National Education Association et al. in Support of Petitioner, *Young v. UPS, Inc.*, No. 12-1226 (Filed Sept. 10, 2014), 2014 WL 4537039, at \*7–13 [hereinafter Brief for the National Education Association].

<sup>45</sup> *Young*, 707 F.3d at 439–40.

<sup>46</sup> *Young v. UPS*, No. DKC 08-2586, 2011 WL 665321, at \*3 (D. Md. Feb. 14, 2011).

<sup>47</sup> *Id.* at 440–41. The Fourth Circuit noted that employees who had lost their commercial driver's licenses were, like those suffering from on-the-job injuries, protected by the CBA. *Id.* at 450–51. While the Fourth Circuit treated this as reason enough to reject the drivers as possible comparators, an amicus brief filed by labor unions and organizations took issue with the use of a CBA to deprive women of legal protections. See Brief for the National Education Association, *supra* note 44, at \*7–13.

<sup>48</sup> *Young*, 707 F.3d at 445. Under the PDA, pregnant women need not demonstrate animus to prove discrimination (though animus can be relevant as evidence in some cases). See Widiss, *supra* note 8, at 1026–27. They only need to demonstrate that they were treated differently than an appropriate comparator. See Widiss, *supra* note 8, at 1026. Animus need not be proved because of the particular nature of pregnancy discrimination, which often manifests as paternalism and the glorification of motherhood, not hostility. See Brief of Law Professors & Women's and Civil Rights Organizations as Amici Curiae in Support of Petitioner, *Young v. UPS, Inc.*, No. 12-1226 (Filed Sept. 10, 2014), 2014 WL 4536935, at \*16–17 [hereinafter Brief for Law Professors].

<sup>49</sup> *Young*, 707 F.3d at 446. After finding that Young had presented no direct evidence of discrimination, the Fourth Circuit also applied the *McDonnell-Douglas* test and held that Young did not meet the fourth prong of the test, in which the plaintiff is required to show that they were treated differently than a similarly situated employee. The court refused to accept any of the groups of employees who were accommodated by UPS as valid comparators. *Id.* at 450–51. See generally, *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>50</sup> *Young*, 707 F.3d at 446 (“By limiting accommodations to those employees injured on the job, disabled as defined under the ADA, and stripped of their DOT certification, UPS has crafted a pregnancy-blind policy, and Young does not contend otherwise.”).

agreed with Young's interpretation of the PDA's second clause.<sup>51</sup> Young argued that because her ability (or inability) to work was "similar" to accommodated drivers who were temporarily unable to work, she should have been accommodated under the PDA,<sup>52</sup> but the court held that the second clause only requires comparisons to workers injured while off-the-job.<sup>53</sup>

#### YOUNG AT THE SUPREME COURT

*Young v. UPS* has the potential to resolve ongoing uncertainty in federal pregnancy discrimination law which has made it difficult for both employees and employers to understand their rights and responsibilities under the PDA. The Court can take this opportunity to protect the rights of working pregnant women. However, if the Court upholds the Fourth Circuit's interpretation of the PDA, it will undercut the protections accorded to pregnant women by Congress<sup>54</sup> and endanger the economic stability of women and their families.<sup>55</sup>

Pregnancy discrimination is a serious threat to women and families. Women continue to face substantial gender inequality in the workplace, and forcing women out of their jobs while pregnant perpetuates that inequality.<sup>56</sup> Women who must stop working during a pregnancy face lost time, benefits, and opportu-

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<sup>51</sup> *Id.* at 447.

<sup>52</sup> The circuit court was not clear as to why UPS's action toward Young did not qualify as pregnancy discrimination under the second clause of the PDA. The decision states that "[c]onfusion arises when trying to reconcile language in the first clause suggesting the PDA simply expands the category of sex discrimination (without otherwise altering Title VII), and language in the second clause suggesting the statute requires different—perhaps even preferential—treatment for pregnant workers," and concludes that the second clause "make[s] [it] clear that it does not create a distinct and independent cause of action." *Id.* at 447. The court also expressed concerns that finding for Young would result in treating pregnancy better than any other basis for discrimination, including sex. *Id.* at 447–48.

<sup>53</sup> *Id.* at 448.

<sup>54</sup> See Brief for the ACLU, *supra* note 9, at \*15–16; Brief of Members of Congress as Amici Curiae in Support of Petitioner, *Young v. UPS, Inc.*, No. 12-1226 (Filed Sept. 10, 2014), 2014 WL 4536936, at \*9–11 [hereinafter Brief for Members of Congress]; Brief of Amici Curiae 23 Pro-Life Organizations & the Judicial Education Project in Support of Petitioner Peggy Young, *Young v. UPS, Inc.*, No. 12-1226 (Filed Sept. 11, 2014), 2014 WL 4536934, at \*16–17 [hereinafter Brief for the Judicial Education Project]; Brief for the United States, *supra* note 33, at \*21.

<sup>55</sup> See Widiss, *supra* note 8, at 970–72; Brief of Amicus Curiae Black Women's Health Imperative, Joined by Other Black Women's Health Organizations, in Support of Petitioner, *Young v. UPS, Inc.*, No. 12-1226 (Filed Sept. 11, 2014), 2014 WL 4477663, at \*16 [hereinafter Brief for the Black Women's Health Imperative]; Brief of the Leadership Conference on Civil and Human Rights as Amicus Curiae in Support of Petitioner, *Young v. UPS, Inc.*, No. 12-1226 (Filed Sept. 11, 2014), 2014 WL 4631950, at \*17 [hereinafter Brief for the Leadership Conference on Civil and Human Rights]; Brief for the Judicial Education Project, *supra* note 54, at \*19–22 (expressing concern that pregnancy discrimination might drive some women to seek abortions); A HEAVY LIFT, *supra* note 7, at 9.

<sup>56</sup> See Widiss, *supra* note 8, at 971–72; Brief for the ACLU, *supra* note 9, at \*15.



nities for advancement.<sup>57</sup> Additionally, a growing number of families are dependent on women's income to survive, making pregnancy discrimination a threat to the stability of families.<sup>58</sup>

The Fourth Circuit's interpretation of the PDA also ignores the plain meaning and the legislative history of the PDA, which indicates that "[t]he entire thrust . . . behind [that] legislation [was] to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."<sup>59</sup> In refusing to enforce the PDA's "ability or inability to work" language, it effectively reads the second clause out of existence—rendering the second clause superfluous.<sup>60</sup> Looking beyond the text, the Fourth Circuit interpretation undercuts the purpose of the statute.<sup>61</sup> As discussed above, the PDA was passed in response to the Supreme Court's decision in *Gilbert*, with the goal that the new statute would "eliminate the practices whereby pregnancy disadvantaged women by ending or interrupting their ability to make a living and provide for their families."<sup>62</sup> If the Supreme Court were to find with UPS and uphold the Fourth Circuit's decision, pregnancy discrimination law would be brought dangerously close to the post-*Gilbert*, pre-PDA state that Congress hoped to change in 1978.

Numerous *amici*, including women's rights organizations,<sup>63</sup> public health advocates,<sup>64</sup> pro-life organizations,<sup>65</sup> and the United States government,<sup>66</sup> have embraced the argument that the first and second clause of the PDA do two separate things. The first clause incorporates pregnancy into Title VII's prohibition on sex discrimination. At the same time, the second clause requires employers to

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<sup>57</sup> See, e.g., *Young* 707 F.3d at 441–42 (discussing Peggy Young's loss of medical coverage as a result of being placed on unpaid leave); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 639 (6th Cir. 2006) (stating that Amanda Swift was terminated after an accommodation request related to her pregnancy was denied); see also *A HEAVY LIFT*, *supra* note 7, at 6, 8, 11.

<sup>58</sup> See *Widiss*, *supra* note 8, at 970–72; Brief for the Black Women's Health Imperative, *supra* note 55, at \*16; Brief for the Leadership Conference on Civil and Human Rights, *supra* note 55, at \*16; Brief for the Judicial Education Project, *supra* note 54, at \*19–22 (expressing concern that pregnancy discrimination might drive some women to seek abortions); *A HEAVY LIFT*, *supra* note 7, at 9.

<sup>59</sup> Thomas H. Barnard & Adrienne L. Rapp, *Pregnant Employees, Working Mothers and the Workplace: Legislation, Social Change and Where We Are Today*, 22 J.L. & HEALTH 197, 238 (2009) (internal quotation omitted).

<sup>60</sup> See Brief for Members of Congress, *supra* note 54, at \*16–21; Brief for the Judicial Education Project, *supra* note 54, at \*11–13; see also *Widiss*, *supra* note 8, at 1012–1014.

<sup>61</sup> See Brief for the ACLU, *supra* note 9, at \*15–16; Brief for the Judicial Education Project, *supra* note 54, at \*16–17; Brief for the United States, *supra* note 33, at \*21; Brief for Members of Congress, *supra* note 54, at \*9–11. See also *Widiss*, *supra* note 8, at 995.

<sup>62</sup> Brief for the ACLU, *supra* note 9, at \*15–16.

<sup>63</sup> See Brief for the ACLU, *supra* note 9; Brief for Law Professors, *supra* note 48.

<sup>64</sup> See Brief for the Black Women's Health Imperative, *supra* note 55.

<sup>65</sup> See Brief for the Judicial Education Project, *supra* note 54.

<sup>66</sup> See Brief for the United States, *supra* note 33.

treat pregnant workers in the same way that they would treat any similarly abled or disabled employee.<sup>67</sup> Under this interpretation, UPS must treat Young the same as any other employee who faces work restrictions. According to the *amici*, UPS's accommodation of some workers temporary inability to work requires that they also accommodate pregnant workers who are similarly impaired.<sup>68</sup>

This popular viewpoint is true to the text of the statute, the legislative intent, and the enforcing agency's interpretation. It would enable the PDA to more effectively address the problems Congress hoped to solve when passing the PDA, such as gender inequality and economic instability.<sup>69</sup> Furthermore, this interpretation is true to the EEOC's approach to the PDA, in which the "ability or inability" language is used to identify comparators based on physical ability, and not other factors.<sup>70</sup>

### CONCLUSION

The result in *Young v. UPS* has the potential to protect the rights of pregnant women as Congress intended when it passed the PDA in 1978. However, it could also gut the PDA to such a degree that anti-discrimination law will return to a post-*Gilbert*, pre-PDA state. Either way, *Young v. UPS* will have a massive impact on the rights of working women across the United States.



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<sup>67</sup> See Brief for the ACLU, *supra* note 9, at \*11; Brief for the Black Women's Health Imperative, *supra* note 55, at \*4-7; Brief for Law Professor, *supra* note 48, at \*5-7; Brief for Members of Congress, *supra* note 54, at \*5-22; Brief for the Judicial Education Project, *supra* note 54, at \*11.

<sup>68</sup> Brief for the ACLU, *supra* note 9, at \*12-13; Brief for Law Professors, *supra* note 48, at \*10; Brief for Members of Congress, *supra* note 54, at \*24-27; Brief for the Judicial Education Project, *supra* note 54, at \*12-13. Other *amici* writing in support of Young include the Black Women's Health Imperative, Brief for the Black Women's Health Imperative, *supra* note 55, the U.S. Women's Chamber of Commerce, Brief of the U.S. Women's Chamber of Commerce et al. as Amicus Curie Supporting Petitioner, *Young v. UPS, Inc.*, No. 12-1226 (Filed Sept. 11, 2014), 2014 WL 4536937, the National Education Association, Brief for the National Education Association, *supra* note 44, a bipartisan coalition of state and local legislators, Brief of Bipartisan State and Local Legislators as Amici Curiae in Support of Petitioner, *Young v. UPS, Inc.*, No. 12-1226. (Filed Sept. 11, 2014), 2014 WL 4537037, a coalition of health care providers, Brief of Health Care Providers et al. as Amici Curiae in Support of Petitioner, *Young v. UPS, Inc.*, No. 12-1226, (Filed Sept. 11, 2014), 2014 WL 4579808, and the Leadership Conference on Civil and Human Rights, Brief for the Leadership Conference on Civil and Human Rights, *supra* note 55.

<sup>69</sup> Brief for Law Professors, *supra* note 48, at \*16-17; Brief for the ACLU, *supra* note 9, at \*15-16; Brief for Members of Congress, *supra* note 54, at \*31-37.

<sup>70</sup> Brief for the United States, *supra* note 33, at \*26; see *supra* notes 31-34 and accompanying text. The government contends that the EEOC's interpretation is entitled to deference under *Skidmore v. Swift*. Brief for the United States, *supra* note 33, at \*26 (referencing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).