Abortion Rights Are Pregnancy Rights: Interpreting the Scope of Pregnancy-Related Medical Conditions Under Title VII

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Abstract

This article considers the scope of the protections under Title VII of the Civil Rights Act, as amended by the Pregnancy Discrimination Act (PDA), for "pregnancy, childbirth, and related medical conditions." It argues that the text and purpose of the PDA support interpreting these terms broadly to reach the full range of reproductive choices related to the capacity for pregnancy. The paper will first examine the relevant history of the PDA and Supreme Court's interpretation of the PDA's protections. It will then review court decisions considering whether lactation, contraception, and infertility fall within the PDA and assess arguments about why the statute should be read to exclude these conditions. Finally, it will consider the rejection of nearly identical arguments in the context of abortion.

While the effects of Dobbs cannot be overstated, this paper will show that abortion-related protections in the workplace are deeply rooted in the PDA. Whether Title VII protects individuals from abortion-based discrimination does not depend on whether abortion is a constitutional right, but rather on whether abortion is considered "related" to pregnancy or the potential for pregnancy. This paper will show that courts considering this question have universally concluded that it does.

I. INTRODUCTION

In the same year that the Supreme Court overturned *Roe v. Wade*,[1] Congress passed the Pregnant Workers Fairness Act (PWFA),

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a historic law that enshrined the right for pregnant and postpartum workers to receive workplace accommodations that enable them to stay in the labor force.[2] PWFA, a victory over decades in the making, will enable millions more U.S. workers who experience pregnancy to continue working safely through their pregnancies instead of being forced to choose between their paycheck and their own well-being.[3] At the same time PWFA was passed, Congress also passed the PUMP for Nursing Mothers Act, extending critical protections—including a clean and private space and breaktime—for nursing workers to pump breastmilk at work in larger swaths of the country.[4]

At first blush, these developments might appear to be steps in the same direction—a move toward better protections for workers that choose continued pregnancy over abortion. In *Dobbs v. Jackson Women's Health Center*, describing notable factual changes since the decision in *Roe*, Justice Alito wrote,

> Americans who believe that abortion should be restricted press countervailing arguments about modern developments. They note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy; that leave for pregnancy and childbirth are now guaranteed by law in many cases . . . .[5]

But understanding rights during pregnancy as separate from or in tension with abortion rights reduces the experience of pregnancy to a single narrative—that of an uncomplicated, intended pregnancy carried to term, followed by an uncomplicated birth. This stereotype contradicts and erases the wide spectrum of experiences of people who get pregnant and give birth. Pregnancy termination is one of many pregnancy-related conditions that pregnant people experience, which

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Sherwin, Vania Leveille, and Ria Tabacco Mar for their groundbreaking work on behalf of pregnant workers, which, in many ways, shaped this article.

[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2259 (2022).

[2] Pregnant Workers Fairness Act, Pub. L. No. 117-328 div. II, 136 Stat. 4459, 6084 (2022) (codified at 42 U.S.C. § 2000gg).

[3] Gillian Thomas & Vania Leveille, *The Historic New Law Protecting Fairness for Pregnant Workers*, ACLU (June 27, 2023), https://www.aclu.org/news/womens-rights/the-historic-new-law-protecting-fairness-for-pregnant-workers.

[4] PUMP for Nursing Mothers Act, Pub. L. No. 117-328 div. KK, 136 Stat. 4459, 6093 (2022) (codified at 29 U.S.C. § 218d).

[5] *Dobbs*, 142 S. Ct. at 2258–59 (citing Pregnancy Discrimination Act, Pub. L. No. 95-555, §1, 92 Stat. 2076 (1978) (codified at 42 U.S.C.§ 2000e(k)).

range from menstruation; to pre-pregnancy treatments, including pregnancy prevention and treatments for infertility; to conditions during pregnancy, like miscarriage, abortion, gestational diabetes, anemia, preeclampsia, and birth; to post-partum conditions, like depression and anxiety and lactation; and ultimately, to menopause. Many people who become pregnant do not carry their pregnancies to term; pregnancy termination, either voluntary or involuntary, is indisputably common.[6]

This "pregnancy v. abortion" framework also does not comport with federal civil rights law. Indeed, the *Dobbs* decision itself suggested that the right to be free from discrimination based on pregnancy is intertwined with the right to be free from discrimination based on abortion. Expressing skepticism that abortion-based classifications triggered heightened scrutiny under the Equal Protection Clause of the Constitution, the majority relied on its 1974 decision, *Geduldig v. Aiello*,[7] which held that pregnancy-based classifications do not constitute a sex-based classification under the Constitution. Two years after *Geduldig*, in *General Electric Company v. Gilbert*, the Supreme Court extended this interpretation of sex discrimination to Title VII,[8] a decision which Congress acted swiftly to legislatively overrule. In 1978, the Pregnancy Discrimination Act (PDA) amended Title VII to state explicitly that discrimination on the basis of "pregnancy, childbirth, and related medical conditions" is sex discrimination.[9]

This paper will examine the broad scope of the terms "pregnancy, childbirth, and related medical conditions." It will first discuss the relevant history of the PDA and Supreme Court's interpretation of the reach of the amendment's protections. It will then review appellate and district court authority considering whether lactation, contraception, and infertility fall within the PDA and assess arguments about why the statute should be read to exclude these conditions. Finally, it will consider the treatment of nearly identical arguments in the context of abortion, specifically that: 1) Title VII

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[6] Early Pregnancy Loss; Frequently Asked Questions, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/womens-health/faqs/early-pregnancy-loss; News Release, Guttmacher Inst., Abortion Is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates (Oct. 19, 2017), https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates.

[7] Geduldig v. Aiello, 417 U.S. 484, 496 (1974).

[8] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 133 (1976).

[9] Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S C. § 2000e(k)).

only protects the status of ongoing pregnancy, not pre- or post-partum conditions or decisions; 2) the statute only protects sufficiently incapacitating conditions or effects; 3) the statute only protects conditions that are involuntary or arise out of medical necessity, not elective conditions or effects; and 4) discrimination against certain pregnancy-related conditions is not sex-based discrimination because both men and women are affected.[10]

Despite the reversal of the *Roe* and the abrogation of the right to abortion rooted in the constitutional right to privacy, this paper will show that abortion-related protections in the workplace are deeply rooted in the PDA. Indeed, whether Title VII protects individuals from abortion-based discrimination does not depend on whether abortion is a constitutional right, but rather on whether abortion is considered "related" to pregnancy or the potential for pregnancy. Courts considering this question have universally concluded that it does. *Dobbs* does not change this analysis.

Ultimately, the PDA is designed to protect *all* pregnancy-related conditions and the full range of reproductive choices attendant to pregnancy and childbirth. The statute does not require or permit inquiries about whether certain pregnancy-related conditions should be excluded because they are voluntary, insufficiently debilitating, or occur outside the duration of a pregnancy. The statute resists any framework that attempts to segregate "core" or "good" pregnancy-related conditions from "ancillary" or "bad" ones.[11]

After *Dobbs* and the passage of the PWFA—which, like the PDA, applies to employees "affected by pregnancy, childbirth, and related

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[10] Many of the cases discussed in this article rely on the flawed assumption that only women can become pregnant. While pregnancy discrimination is inextricably linked to the reinforcement of gender-based stereotypes of women as mothers and caretakers, the harms of discrimination are not limited to women, as all people with the capacity for pregnancy, including trans men and people with other gender identities, are affected by discrimination on the basis pregnancy and abortion.

[11] This is particularly important given attempts by anti-abortion advocates to isolate certain reproductive choices (abortion, contraception) as undesirable and subject to punishment and, even within these choices, to differentiate further between "acceptable" and "unacceptable" abortions or contraceptive methods. *See* Maggie Doherty, *The Abortion Stories We Tell*, YALE REV. (Jun. 24, 2022), https://yalereview.org/article/dobbs-roe-abortion-stories (discussing the challenges with abortion stories that attempt to differentiate between "justified" and "unjustified" abortions; "Narrators often emphasize that, in getting an abortion, they were following the best medical advice. They don't quite disclaim responsibility, but they suggest that the decision to terminate was mostly out of their hands").

medical conditions"—the dispute over the meaning of these words will have continued significance. The protections under Title VII and PWFA remain a crucial safeguard for the many workers who seek abortions, many of whom are early in their careers and living under the poverty line, and cannot afford to lose the financial security of their jobs.[12] Indeed, access to abortion improves economic and educational outcomes for women in the future.[13] In a time when federal constitutional protections for reproductive liberty are under attack, advocates have an opportunity to reaffirm and strengthen the federal statutory protections that exist for abortion and reproductive choice.

II. THE REPUDIATION OF *GILBERT* AND THE BREADTH OF THE PDA

The history behind the PDA makes clear that Title VII's prohibition against sex discrimination unequivocally extends beyond the constitutional floor as the Burger Court saw it. In 1976, the Supreme Court held in *Gilbert* that classifications based on pregnancy were not sex-based under Title VII. Specifically, the Supreme Court found General Electric's disability insurance plan, which provided coverage for nonoccupational sickness and accident benefits to all employees, but excluded coverage of disabilities arising from pregnancy, did not violate the statue's prohibition against sex discrimination.[14] Importing its faulty analysis under the Equal Protection Clause into the Title VII context, the *Gilbert* majority relied heavily on the Supreme Court's decision in *Geduldig*, where the Court held under similar facts that a state employer's exclusion of pregnancy benefits did not violate the Constitution.[15] The Court

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[12] *See* Margot Sanger-Katz, Claire Cain Miller & Quoctrung Bui, *Who Gets Abortions in America?* N.Y. TIMES (Dec. 14, 2021), https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html.

[13] *See* Kelly Jones, *At a Crossroads: The Impact of Abortion Access on Future Economic Outcomes* 14–16 (Am. Univ. Working Paper, 2021), https://doi.org/10.17606/0Q51-0R11; Jason M. Lindo, Mayra Pineda-Torres, David Pritchard & Hedieh Tajali, *Legal Access to Reproductive Control Technology, Women's Education, and Earnings Approaching Retirement*, 110 AEA PAPERS & PROC. 231, 233–34 (2020).

[14] *Gilbert,* 429 U.S. at 127–28.

[15] *Id.* at 135 ("The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups pregnant women and nonpregnant persons. While the first group is exclusively female,

characterized the General Electric plan as "facially nondiscriminatory" because "there is no risk from which men are protected and women are not" and "no risk from which women are protected and men are not."[16] In other words, since the employer's exclusion of pregnancy-related disability benefits affected some but not all women, the Court reasoned that this exclusion was not a sex-based classification[17] under Title VII unless the employer's conduct was motivated by discriminatory animus toward women.[18] A classification based on pregnancy would not be discriminatory, therefore, unless an employee could prove that the classification was "subterfuge to accomplish a forbidden discrimination."[19]

The Court further noted that pregnancy was different from the other disabilities covered under the healthcare plan because pregnancy is "often a voluntarily undertaken and desired condition and thus significantly differs from other disabilities or diseases that require accommodations."[20] *Gilbert* thus entrenched the view that treating pregnancy worse than other medical conditions was both sex-neutral and justified.

In the aftermath of *Gilbert*, a coalition of advocates urged Congress to pass the Pregnancy Discrimination Act, which amended Title VII's definition of sex discrimination explicitly to include discrimination on the basis of pregnancy. While the Coalition to End Discrimination Against Pregnant Workers included feminist organizations, civil rights organizations, including the American Civil

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the second includes members of both sexes." (quoting Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974)).

[16] *Id.*

[17] *Id.*

[18] *Id.* at 134–35.

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

[19] *Id.* at 136.

[20] *Id.* ("Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability … it is not a 'disease' at all, and is often a voluntarily undertaken and desired condition. We do not therefore infer that the exclusion of pregnancy disability benefits from petitioner's plan is a simple pretext for discriminating against women.").

Liberties Union and NAACP, doctors, and representatives from labor unions,[21] it also included anti-abortion advocates.[22] Interestingly, as Mary Ziegler convincingly argues, some members of the religious right regarded *Gilbert* as an improper constraint on reproductive choice.[23] For instance, Jacqueline Nolan-Haley, of American Citizens Concerned for Life, claimed that that pregnancy involved four fundamental rights: "[t]he decision to procreate, the decision not to terminate a pregnancy, the decision to prevent [pregnancy] through contraception, and the decision to terminate a pregnancy.'"[24] According to Nolan-Haley, *Gilbert* infringed on these first two rights by penalizing women who chose to carry pregnancies and have children.[25]

In 1978, Congress passed the PDA with overwhelming support in both chambers of Congress.[26] The amendment provided that Title VII's 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."[27] The amendment further provided that

> women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.[28]

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[21] Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 YALE J.L. & FEMINISM 1, 12 (2009).

[22] *Id.*

[23] Mary Ziegler, *Choice at Work:* Young v. United Parcel Service*, Pregnancy Discrimination, and Reproductive Liberty*, 93 DENV. L. REV. 219, 246–47 (2015).

[24] *Id*. at 245.

[25] *Id.*

[26] Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67, 75 (2013).

[27] 42 U.S.C. § 2000e(k).

[28] *Id.* The "second clause," specifically directed at employer benefits regimes like the one at issue in *Gilbert*, requires equal treatment of workers affected by pregnancy and related medical conditions to those who are similar in their ability and inability to work has been the source of extensive litigation. In a landmark decision, *Young v. United Parcel Service, Inc.*, the Supreme Court clarified that, under the PDA, employers must "accommodate" pregnant workers requiring job modifications on the same terms as other workers with similar limitations unless the employer could demonstrate a "sufficiently strong" reason for denying the accommodation. 575 U.S. 206, 229 (2015). Advocates and

While the amendment did not define the meaning of a "related medical condition," legislative history confirms that the scope of the language was meant to be as expansive as it is. The House Conference Report accompanying the bill stated that "[i]n using the broad phrase 'women affected by pregnancy, childbirth and related medical conditions,' the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process."[29]

The PDA also explicitly referenced abortion, providing that the amendment "shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion."[30] At the same time, the provision clarified that, nothing would "preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion."[31] The amendment's limited exclusion of certain types of abortion coverage under employer healthcare plans clarified the scope of the statute's protections; the narrow exception confirmed that the statute otherwise prohibited discrimination on the basis of abortion.

The House Conference Report confirmed that "[b]ecause the bill applies to all situations in which women are 'affected by pregnancy, childbirth, and related medical conditions,' its basic language covers

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scholars have discussed in depth courts' failure to interpret the PDA's mandate of equal treatment and the Supreme Court's opinion in *Young* correctly, in particular their applying improperly stringent comparator standards in determining who is considered similar in the "ability or inability to work" to pregnant workers. *See* Joanna Grossman & Gillian Thomas, *Making Sure Pregnancy Works: Accommodation Claims After* Young v. United Parcel Service, Inc., 14 HARV. L. & POL'Y REV. 319 (2020); Brake & Grossman, *supra* note 26; Lara Grow, *Pregnancy Discrimination in the Wake of* Young v. UPS, 19 U. PA. J.L. & SOC. CHANGE 133, 146 (2016); 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). The continued misinterpretation of the second clause of the PDA is what led to the passage of PWFA and the clear and affirmative obligation of employers to accommodate workers affected by pregnancy. While the first clause, concerning the scope of "pregnancy, childbirth, and related medical conditions," and the second clause are often interrelated, this paper will focus on courts' interpretation of the first clause.

[29] H.R. REP. NO. 95-948, at 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4749, 4753.

[30] 42 U.S.C. § 2000e(k).

[31] *Id.*

decisions by women who choose to terminate their pregnancies."[32] Despite this general prohibition on abortion-based discrimination, the PDA's exception concerning the employer's obligation to assume the costs of abortion in enumerated circumstances, the Report explained, was intended to accommodate employers that "harbored religious or moral objections to abortion."[33]

Shortly after the PDA became effective, the EEOC issued guidelines (1978 EEOC Guidelines) that codified these principles. The 1978 EEOC Guidelines recognized that, under the PDA, "health insurance for expenses arising from abortion is not required except where the life of the mother would be endangered if the fetus were carried to term, or where medical complications have arisen from an abortion."[34] Outside those circumstances, the 1978 EEOC Guidelines stated that "[a] woman is . . . protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion" and that an "employer cannot discriminate in its employment practices against a woman who has had an abortion."[35]

III. SUPREME COURT DECISIONS CONFIRM THE EXPANSIVE SCOPE OF THE PDA

Supreme Court decisions regarding the scope of Title VII since Congress passed the PDA have established that the statute reaches beyond employer policies and practices that affect women workers who are currently pregnant. These landmark decisions reflect the breadth of the statute's coverage to the full range of pregnancy-related conditions, and the full range of workers affected by policies addressing them.

The Supreme Court first interpreted Title VII's amended language in 1983, in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, where the Court recognized the congressional reversal of *Gilbert*. The Court held that an employer's policy that covered all hospital-related expenses for employees of all sexes and their dependents, but not pregnancy-related expenses of dependents violated Title VII.[36] In the case, a group of male employees challenged the shipping company's insurance policy under the PDA arguing that

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[32] H.R. REP. NO. 95-948, at 7, 1978 U.S.C.C.A.N. 4749, 4753.

[33] *Id.*

[34] 29 C.F.R. pt. 1604 app. (1978).

[35] *Id.*

[36] Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983).

the exclusion of pregnancy-related benefits for dependents was discriminatory.[37] The Court agreed, reasoning that the plan "unlawfully gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees."[38] Drawing heavily on the PDA's legislative history and its rebuke of *Gilbert*'s conclusion that pregnancy—due to its "voluntary" nature—could be treated differently from other disabilities or conditions, the decision explained that "[t]he [PDA] makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions."[39] Indeed, it recognized that "[w]hen Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision."[40]

The Court's analysis, of course, was based, in part, on the outdated assumption that—because only men could be married to women, and only women could become pregnant—the policy only penalized male employees.[41] But the Court recognized that both "[m]ale as well as female employees are protected against discrimination" and "[p]roponents of the [PDA] stressed throughout the debates that Congress had always intended to protect all individuals from sex discrimination in employment—including but not limited to pregnant women workers."[42] That the employer's pregnancy-based discrimination primarily affected its male workers did not save the policy from being unlawful. Put differently, a policy that treated pregnancy worse than other medical conditions was facially discriminatory even if women were not the only ones disadvantaged by it.

In 1991, the Supreme Court interpreted the reach of the PDA to prohibit discrimination based—not just on the status of pregnancy—but also on the *capacity* to become pregnant. Considering a challenge to a battery's company's "fetal protection policy" that excluded women capable of pregnancy from certain jobs, the Court held that "classif[ying] [workers] on the basis of potential for pregnancy" "must

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[37] *Id.* at 672–73.

[38] *Id.* at 684.

[39] *Id.*

[40] *Id.* at 678.

[41] *Id.* at 684 ("And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees.").

[42] *Id.* at 681–82.

be regarded, for Title VII purposes, in the same light as explicit sex discrimination."[43] Although the Court cited the PDA, it explained that the PDA merely "bolstered" its conclusion by "ma[king] clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."[44] Johnson Controls's policy was no less sex-based than a rule that, for instance, forbid women from being supervisors, or barred them from earning overtime.[45]

Having determined that the policy discriminated on the basis of sex, the Court then considered whether the employer had established the defense that the medically documented infertility of women workers was a "bona fide occupational qualification ('BFOQ') reasonably necessary to the normal operation of that particular business or enterprise." The employer argued that the "fetal protection" policy was justified by both moral and ethical concerns as well as liability under state tort laws for fetal injury.[46]

The Court dismissed the employer's "professed moral and ethical concerns about the welfare of the next generation" as insufficient to establish a BFOQ, observing that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities"[47] and that "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents."[48] It also reasoned that, to the extent that state fetal injury tort laws required the employer to exclude fertile women from dangerous jobs, these laws would be preempted by Title VII.[49]

The decision ultimately defined the limits of an employer's ability to control whether or how a worker became pregnant, concluding that "[i]t is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."[50] The Court thus interpreted Title VII's prohibition on sex discrimination to proscribe

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[43] Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 197 (1991).

[44] *Id.* at 199 (citing *Newport News*, 462 U.S. at 684).

[45] *Id.*

[46] *Id.* at 200.

[47] *Id.* at 211.

[48] *Id.* at 206.

[49] *Id.* at 209.

[50] *Id.* at 211.

an employer's interference with a worker's reproductive choices, or discrimination on the basis of the potential for pregnancy. An employer could not make pregnancy-related decisions for its employees by, for example, mandating that workers who were capable of bearing children avoid certain risks in hypothetical future pregnancies. The Court's deep skepticism about the employer's purported interest in "fetal protection" thwarted employer attempts—which had been previously found lawful under Title VII by several federal appellate courts[51]—to impose a specific view of a traditional reproductive life. In many ways, the decision echoed the reasoning in other Supreme Court decisions that repudiated stereotypes of women as mothers and caretakers first, and breadwinners second.[52]

Together, *Newport News* and *Johnson Controls* confirmed an interpretation of the PDA that rejected the constrained conception of sex discrimination in *Gilbert*. They also established that pregnancy discrimination could occur in circumstances where some had not contemplated: to workers who were not currently pregnant and who, in fact, may never experience a pregnancy. These decisions reinforced the principles that Congress—in passing the PDA—emphasized: that Title VII's prohibition on sex discrimination meant to eradicate discrimination in the "whole range of matters concerning the childbearing process."[53]

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[51] *Id.* at 193–94 (citing Hayes v. Shelby Mem'l Hosp., 726 F.2d 1543 (11th Cir. 1984) and Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982)).

[52] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 685 (1973) (rejecting a benefits program that treated male and females dependents differently and recognizing the history of stereotypes that "'[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother,'" have led to "statute books . . . laden with gross, stereotyped distinctions between the sexes," prohibiting women from "hold[ing] office, serv[ing] on juries, or bring[ing] suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children" (quoting Bradwell v. Illinois, 16 Wall. 130, 141, 21 L.Ed.2d 442 (1873) (Bradley, J., concurring)); Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003) ("Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.").

[53] H.R. REP. NO. 95-948, at 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4749, 4753.

IV. THE DEFINITION OF "RELATED MEDICAL CONDITION" OUTSIDE OF ABORTION

In the decades since *Newport News* and *Johnson Controls*, lower courts have confirmed that the terms "pregnancy, childbirth, and related medical conditions" applies to a wide range of conditions that occur before and after pregnancy, or that do not implicate a pregnancy at all.[54] Despite the reach of the statutory text to include protection for all pregnancy-related conditions, however, employers have sought to revive the arguments in *Gilbert* to substantially limit the definition of a "related condition" to medically necessary and involuntary conditions or treatments that only occur during pregnancy. Courts have most frequently considered these arguments in cases involving the breastfeeding, contraception, and infertility, where the scope of the terms "related condition" has been heavily litigated. In the contraception and infertility cases, in particular, employers have channeled *Gilbert*'s reasoning by arguing that discrimination on the basis of certain pregnancy-related conditions is "gender-neutral" because the discrimination impacts both men and women.

This section will discuss these atextual attempts to limit what constitutes a pregnancy-related condition, which generally have failed. It will first discuss cases addressing lactation discrimination and then discuss cases addressing contraception and infertility discrimination.

A. Nursing and Lactation

One of the most recent battlegrounds over the scope of the PDA arose over whether lactation and breastfeeding are pregnancy- or childbirth-related conditions. District courts were initially conflicted over whether these conditions fell within Title VII's reach. Indeed, courts either held or stated in dicta that lactation was outside the

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[54] *See, e.g.*, Piraino v. Int'l Orientation Res., Inc., 84 F.3d 270, 274 (7th Cir. 1996); Carney v. Martin Luther Home, Inc., 824 F.2d 643, 648 (8th Cir. 1987) ("By broadly defining pregnancy discrimination, Congress clearly intended to extend protection beyond the simple fact of an employee's pregnancy to include 'related medical conditions' such as nausea or potential miscarriage.") (citations and internal quotations omitted); Donaldson v. Am. Banco Corp., Inc., 945 F. Supp. 1456, 1464 (D. Colo. 1996) ("It would make little sense to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place. The plain language of the statute does not require it, and common sense precludes it.").

scope of a "related condition" because: 1) breastfeeding occurs after pregnancy so could not be considered a related medical condition;[55] 2) breastfeeding is a voluntary parental choice;[56] and 3) breastfeeding was not a sufficiently incapacitating condition.[57]

In 2013, however, the Fifth Circuit decided *EEOC v. Houston Funding II, Ltd.*, which held that "discriminating against a woman who is lactating or expressing breast milk violates Title VII."[58] In interpreting the terms "medical condition" "related" to pregnancy and childbirth, the court referred to the ordinary meaning in general and medical dictionaries to conclude that the words are "broadly constru[ed]."[59] The court also examined whether lactation and pregnancy were causally related, reasoning that lactation and expressing breastmilk were conditions that resulted from, and thus related to, pregnancy.[60] After the foundational decision in *Houston Funding*, district courts across the country began to follow suit in recognizing lactation and breastfeeding discrimination.[61]

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[55] Falk v. City of Glendale, No. 12-cv-00925-JLK, 2012 WL 2390556, at *3 (D. Colo. June 25, 2012).

[56] Vachon v. R.M. Davis, Inc., No. 03-234-P-H, 2004 WL 1146630, at *10 (D. Me. Apr. 13, 2004). For a discussion and refutation of the argument that breastfeeding is a childcare choice, not a pregnancy related medical condition, see Madeleine Gyory, *Medical Condition or Childcare Choice? Breastfeeding and Lactation Discrimination After* Young v. UPS, 43 N.Y.U. REV. L. & SOC. CHANGE 475, 495 (2019).

[57] Wallace v. Pyro Min. Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991); *Wallace* relies on a decision from the Fourth Circuit that concluded that "[u]nder the Pregnancy Discrimination Act . . . , pregnancy and related conditions must be treated as illnesses only when incapacitating." Barrash v. Bowen, 846 F.2d 927, 931 (4th Cir. 1988).

[58] EEOC v. Hous. Funding II, Ltd., 717 F.3d 425, 430 (5th Cir. 2013).

[59] *Id.* at 428–29.

[60] *Id.*

[61] Allen-Brown v. Dist. of Columbia, 174 F. Supp. 3d 463, 479 (D.D.C. 2016); Gonzales v. Marriott Int'l, Inc., 142 F. Supp. 3d 961, 978 & n. 47 (C.D. Cal. 2015); EEOC v. Vamco Sheet Metals, Inc., No. 13 Civ. 6088 JPO, 2014 WL 2619812, at *6 (S.D.N.Y. June 5, 2014); Martin v. Canon Bus. Sols., Inc., No. 11-CV-02565-WJM-KMT, 2013 WL 4838913, at *8 n.4 (D. Colo. Sept. 10, 2013); EEOC, EEOC-CVG-2015-1, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES, § I.A.4.b (2015) [hereinafter PDA ENFORCEMENT GUIDANCE], https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IA4b ("[L]ess favorable treatment of a lactating employee may raise an inference of unlawful discrimination.").

In 2017, the Eleventh Circuit's decision in *Hicks v. City of Tuscaloosa* appears to have definitively resolved the question.[62] In *Hicks*, the plaintiff was an officer with the Tuscaloosa Police Department, who, upon returning from parental leave, was assigned to patrol duty, where she was required to wear a tight-fitting protective vest that had the potential to interfere with her production of breastmilk. Despite the plaintiff's request for desk duty as an accommodation, the only alternative that the police department offered was for the plaintiff to wear gear that was looser fitting and provided substantially less protection.

The district court acknowledged the conflicting authority that limited protections for breastfeeding and lactation, where employers had successfully argued that these conditions were insufficiently related to pregnancy.[63] Nevertheless, the district court, relying heavily on the reasoning in *Houston Funding*, found that "lactating is a medical condition related to pregnancy and childbirth, . . . a lactating employee may not be treated differently in the workplace from other employees with similar abilities to work."[64] The more difficult question, according to the district court, was the extent to which employers had to accommodate lactating workers.[65]

On appeal, the Eleventh Circuit had "little trouble concluding that Congress intended the PDA to include physiological conditions post-pregnancy."[66] Like the Fifth Circuit, the *Hicks* court held that "it is a common-sense conclusion that breastfeeding is a sufficiently similar gender-specific condition covered by the broad catchall phrase

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[62] Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1259 (11th Cir. 2017).

[63] Hicks v. City of Tuscaloosa, No. 7:13-CV-02063-TMP, 2015 WL 6123209, at *19 (N.D. Ala. Oct. 19, 2015).

[64] *Id.*

[65] *Id.*

[66] *Hicks*, 870 F.3d at 1260. The ACLU submitted an amicus brief arguing that "all medical conditions related to pregnancy are protected under Title VII, no matter whether they are, like lactation, voluntarily chosen or continued." Brief of Amici Curiae American Civil Liberties Union Foundation, American Civil Liberties Union of Alabama, Center for WorkLife Law et al. in Support of Plaintiff-Appellee and in Support of Affirmance at 15, *Hicks*, 870 F.3d 1253 (No. 16-13003), 2016 WL 6905753 [hereinafter *Hicks* ACLU Brief] (relying on EEOC v. Hous. Funding, 717 F.3d 425, 428 (5th Cir. 2013) (holding that breastfeeding is a gender-specific condition because it "clearly imposes upon women a burden that male employees need not—indeed, could not—suffer")).

included in the PDA."[67] The decision affirmed the principle that protection for pregnancy and childbirth necessarily includes protection for related medical conditions regardless of when in the pregnancy process they occur. Indeed, the Eleventh Circuit reasoned that Title VII's prohibition on pregnancy discrimination would "be rendered a nullity if women were protected during a pregnancy but then could be readily terminated for breastfeeding—an important pregnancy-related 'physiological process.'"[68]

While the Eleventh Circuit did not directly address the employer's arguments about whether conditions had to be incapacitating or involuntary in order be considered "pregnancy-related," the decision implicitly dismissed these limiting principles. More recent decisions expressly considered and rejected the merits of these arguments.[69]

The trend in these lactation cases vindicate the strength of arguments that advocate a plain sense reading of the statutory text over those that urge courts to impose atextual limitations.[70] Under the statute, once a court determines that a condition is related to pregnancy, the condition falls within the statute's definition; there is no further inquiry into when the condition occurs, how serious it is, or whether it could be avoided. The straightforward analysis in *Houston Funding* and *Hicks*—which examined whether lactation can be defined in relation to pregnancy—is the sole inquiry that the PDA contemplates.

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[67] *Hicks*, 870 F.3d at 1259. The ACLU's brief explained that lactation-related discrimination was precisely the kind of conduct that the PDA was designed to prevent. *Hicks* ACLU Brief, *supra* note 66, at 5.

[68] *Hicks*, 870 F.3d at 1259.

[69] *See* Notter v. N. Hand Prot., a Div. of Siebe, Inc., 89 F.3d 829 (4th Cir. 1996) (unpublished table decision per curiam) (recognizing that "[i]n *Barrash* we said in *dicta* without any citation of authority, 'Under the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), pregnancy and related conditions must be treated as illnesses only when incapacitating.' The text of the Pregnancy Discrimination Act contains no requirement that "related medical conditions" be "incapacitating"); Allen-Brown v. D.C., 174 F. Supp. 3d 463, 480 (D.D.C. 2016) ("[T]he fact that this "medical condition" is at times a result of a decision made by the mother to breastfeed does not mean that it is not a medical condition or that it is unrelated to pregnancy.").

[70] The success of these lactation cases under the PDA also reflects the success of the larger campaign in support of breastfeeding workers, which led to the victory of the passage of the PUMP Act. A BETTER BALANCE, ACLU & U.S. BREASTFEEDING COMM., CONGRESS SHOULD PASS THE PUMP (PROVIDING URGENT MATERNAL PROTECTIONS) FOR NURSING MOTHERS ACT (H.R. 3110/S. 1658) (2021), https://www.aclu.org/wp-content/uploads/legal-documents/pump_for_nursing_mothers_act_fact_sheet_updated-5-17-21.pdf.

B. Contraception and Infertility

As with the lactation cases pre-*Hicks*, cases addressing contraception and infertility discrimination have reached inconsistent conclusions. While some courts have properly recognized that use of contraception and infertility treatment prevent or initiate a pregnancy, and thus are pregnancy-related, other decisions have repeated *Gilbert*'s analytical errors. Indeed, two appellate courts have read the PDA to exclude protection before a pregnancy is conceived or in circumstances where the challenged conduct negatively impacts both men and women. These decisions improperly limit what can be considered a sufficiently "related medical condition" and cannot be reconciled with the conclusion in *Johnson Controls* that PDA protects reproductive choice and does not permit employers to penalize certain pregnancy-related decisions or the appellate cases prohibiting lactation discrimination discussed above. They serve to illustrate continuing resistance to understanding pregnancy-related discrimination outside of an ongoing pregnancy, and the deeply flawed yet enduring appeal, decades post-*Gilbert*, of labeling pregnancy-related classifications as "sex-neutral."

1. Cases Recognizing Contraceptive Use and Infertility Treatments as Pregnancy-Related

Returning to the well-litigated territory of *Gilbert* and *Newport News*, many of these cases arise out of disputes over the coverage of employer insurance plans. The EEOC and several district courts have recognized that contraception-related discrimination, either in the form of animus toward workers who use contraception or in terms of inferior health plan coverage, violates Title VII. The most in-depth analysis is found in *Erickson v. Bartell Drug Co.*, where the Western District of Washington considered and explicitly rejected the employer's familiar arguments that 1) "contraceptives are voluntary, preventative, do not treat or prevent an illness or disease, and are not truly a 'healthcare' issue"; 2) "control of one's fertility is not 'pregnancy, childbirth, or related medical conditions' as those terms are used in the PDA"; and 3) "the exclusion of all 'family planning' drugs and devices is facially neutral."[71]

In doing so, the court recognized how Title VII—in light of broad purpose of the PDA—applied to policies that treat those with the capacity to become pregnant differently.

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[71] Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1272 (W.D. Wash. 2001)

> The PDA is not a begrudging recognition of a limited grant of rights to a strictly defined group of women who happen to be pregnant. Read in the context of Title VII as a whole, it is a broad acknowledgment of the intent of Congress to outlaw any and all discrimination against any and all women in the terms and conditions of their employment, including the benefits an employer provides to its employees.[72]

Accordingly, despite the employer's efforts to characterize its healthcare plan's exclusion of prescription contraception—available exclusively to those with the capacity to become pregnant—as facially neutral, the court held that "the exclusion of women-only benefits from a generally comprehensive prescription plan is sex discrimination under Title VII."[73] The EEOC has applied similar reasoning in concluding that the failure to cover prescription contraception in an employer's healthcare plan was discriminatory.[74]

Courts have relied on similar reasoning in concluding that discrimination on the basis of an employee's infertility treatment violates Title VII. For example, in *Pacourek v. Inland Steel Co.*, the employer fired a worker, who experienced infertility and sought treatment, for absenteeism.[75] The district court refused to dismiss the complaint, finding that the worker had plausibly stated both a claim for discrimination on the basis of pregnancy and on the basis of a pregnancy-related medical condition.[76] Seeking infertility treatment,

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[72] *Id.* at 1271.

[73] *Id.* at 1272.

[74] The Commission issued a decision in a case on this topic, stating:

> Contraception is a means by which a woman controls her ability to become pregnant. The PDA's prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives. Under the PDA, for example, Respondents could not discharge an employee from her job because she uses contraceptives. So, too, Respondents may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices.

Decision on Coverage of Contraception (EEOC Dec. 14, 2000), https://www.eeoc.gov/commission-decision-coverage-contraception.

[75] Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1396–97 (N.D. Ill. 1994).

[76] *Id.* at 1403. In finding discrimination on both the grounds of potential pregnancy and a pregnancy-related condition, the *Pacourek* court's analysis as similar to that in Ducharme Ducharme v. Crescent City Déjà Vu, L.L.C., 406 F. Supp. 3d 548 (E.D. La. 2019). *Ducharme* is discussed *infra* text accompanying notes 135–42.

it reasoned, concerned the worker's intention and potential to become pregnant and thus discrimination on this basis was squarely prohibited under *Johnson Controls*.[77] It also noted that Congress, in proscribing discrimination against medical conditions "related" to pregnancy, exhibited a "a generous choice of wording, suggesting that interpretation should favor inclusion rather than exclusion in the close cases."[78] Addressing the employer's arguments that infertility was a "gender-neutral" condition and thus insufficiently related to pregnancy, the court explained that the "basic theory" of the PDA was that "classifications based on pregnancy and related medical conditions are never gender-neutral."[79]

In *Hall v. Nalco*, the Seventh Circuit reversed a grant of summary judgment in similar circumstances, where employer that fired a worker for absences due to in vitro fertilization—a procedure that requires numerous medical appointments over the course of several weeks, culminating in transfer of a fertilized embryo into a uterus.[80] The Seventh Circuit focused on the sex-linked nature of the procedure and found as error the district court's conclusion that the employee did not have a cognizable claim under Title VII because infertility was allegedly "gender neutral."[81] It reasoned that "IVF is one of several assisted reproductive technologies that involves a surgical impregnation procedure" and so ""[e]mployees terminated for taking time off to undergo IVF—just like those terminated for taking time off to give birth or receive other pregnancy—related care-will always be women."[82] The court explained that "contrary to the district court's conclusion, [the plaintiff] was terminated not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity."[83] The fact that men also experience infertility, thus, did not bear on the analysis of whether IVF was considered a pregnancy-related condition, nor did it negate the possibility that an employer could discriminate on this basis.

These decisions affirmed the principle that, in evaluating pregnancy discrimination claims, courts must look beyond the employer's own characterizations of gender neutrality to determine whether, in fact, the challenged employment decisions unfairly

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[77] *Pacourek*, 858 F. Supp. at 1401.

[78] *Id.* at 1402.

[79] *Id.* at 1401.

[80] Hall v. Nalco Co., 534 F.3d 644, 645–46 (7th Cir. 2008).

[81] *Id.* at 647–48.

[82] *Id.* at 648–49.

[83] *Id.* at 649.

targeted pregnancy-related conditions, and thus discriminated on the basis of sex. In other words, even if men use contraception and experience infertility, employer conduct that penalizes contraceptive use or infertility treatment may still violate the PDA.

2. Flawed Decisions Concluding that Contraception and Infertility Treatment Are Outside the Scope of the PDA

Other courts, however, reached the opposite view. The Eighth Circuit, the only federal appellate court to address whether contraception-related discrimination violates Title VII, held that use of contraceptives is not "related" to pregnancy because it "is not a medical treatment that occurs when or if a woman becomes pregnant; instead, contraception prevents pregnancy from even occurring."[84] The court further reasoned that *Johnson Controls* did not apply because, "contraception is not a gender-specific term like 'potential pregnancy,'" and instead "applies to both men and women."[85] Accordingly, the court found that an employer's exclusion of contraceptives from its health care plan did not violate the PDA. The court did not address the issue of whether contraception differs for men or women, and therefore, did not address whether the exclusion of the contraceptive benefit imposes disparate costs.[86]

The Second and Eighth Circuits have also both declined to extend Title VII to cover infertility-related discrimination in the employers' healthcare plans. In *Krauel v. Iowa Methodist Medical Center*, the Eighth Circuit considered the lawfulness of a plan that excluded coverage for "fertility and infertility problems."[87] The Court reasoned, as it did when considering the PDA's application to contraception, that the statute did not apply "outside the context of 'pregnancy' and 'childbirth.'"[88] It further concluded that the employer's "fertility treatment exclusion is not a sex-based classification because it applies

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[84] In re Union Pac. R.R. Emp. Pracs. Litig., 479 F.3d 936, 942 (8th Cir. 2007); *see also* Cummins v. Illinois, No. 2002-CV-4201-JPG, 2005 WL 8143169, at *1 (S.D. Ill. Aug. 30, 2005).

[85] *In re Union Pac. R.R. Emp. Pracs. Litig.*, 479 F.3d at 942.

[86] *Id*.

[87] Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 680 (8th Cir. 1996). *Krauel* also declined to find that infertility was a protected disability under the American with Disabilities Act. The Supreme Court's later decision in *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) holding reproduction to be a substantial life activity abrogated this determination.

[88] *Krauel*, 95 F.3d at 679.

equally to all individuals, male or female."[89] The Second Circuit, in *Saks v. Franklin Covey Co.*, acknowledged that Title VII applied outside the time period of the pregnancy itself, but found that an employer's healthcare plan, which covered almost all infertility-related treatments except surgeries involving implantation of an embryo into a uterus (including in vitro fertilization), not to violate the statute.[90] The *Saks* Court adopted a similar analysis to the Eighth Circuit in finding that "including infertility within the PDA's protection as a 'related medical condition[ ]' would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination."[91]

Both the Second and Eighth Circuits also distinguished *Johnson Controls*, noting that the Supreme Court's finding of discrimination relied on the distinction that the employer's policy made between men and women—interpreting the decision to mean that a policy that discriminated on the basis of "fertility alone" would be not be considered sex discrimination.[92] Despite its characterization of infertility as sex-neutral, however, the Second Circuit in *Saks* expressly "decline[d] to consider whether an infertile female employee would be able to state a claim under the PDA or Title VII for adverse employment action taken against her because she has taken numerous sick days in order to undergo surgical impregnation procedures."[93]

Notably, these decisions from the Second and Eighth Circuits suffer from several common defects, several of which the *Erikson*, *Pacourek*, and *Nalco* courts identified. First, they avoid the most straightforward interpretation of "related medical condition" to include conditions or treatments for conditions that directly prevent or initiate a pregnancy—both conditions that can only be defined in relation to pregnancy. In limiting the statute's protection to conditions that occur during pregnancy and childbirth, these decisions read in a temporal limitation that does not exist and that the Supreme Court expressly rejected in *Johnson Controls* and that appellate courts have rejected in the context of lactation and miscarriage.[94] To the extent that any ambiguity exists, they fail to consider the

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[89] *Id.* at 680.

[90] Saks v. Franklin Covey Co., 316 F.3d 337, 346–47 (2d Cir. 2003).

[91] *Id.* at 346.

[92] *Id.* at 348; *Krauel*, 95 F.3d at 680.

[93] *Saks*, 316 F.3d at 346 n.4.

[94] *See supra* notes 41–49 and accompanying text.

statutory language in light of the PDA's purpose to protect the broad range of conditions related to the childbearing process.

Second, the decisions conflate the question of whether a condition is pregnancy-related with the question of whether the employer discriminated on the basis of that condition. In other words, the assumption that some contraception or infertility treatment policies could have "gender neutral" effects led to the sweeping conclusion that contraceptive use and infertility could *never be a basis* for discrimination. Even the Second Circuit implicitly recognized this error in refusing to reach the scenario where an employer fired a worker for undergoing infertility treatment.[95] Despite its blanket reasoning that infertility was not pregnancy-related and thus not protected under Title VII, the court then contradicted itself in suggesting that certain infertility-related discrimination could be actionable.

Third, and relatedly, these decisions simply concluded at the highest level of generality that contraceptive and infertility discrimination *can* affect men and women equally without any meaningful examination of whether the challenged policies, in fact, discriminated against a particular individual because of their sex. As *Erickson* and *Nalco* observe, practices that target or exclude a particular contraceptive method or infertility treatment, like prescription contraception or surgical implantation, that are available only to people who are able to become pregnant discriminates on the basis of capacity for pregnancy and falls squarely under the framework of *Johnson Controls*.[96] The Eighth Circuit, in particular, ignored evidence of the employer's discriminatory intent. The court found irrelevant the employer's comments that the insurance plan excluded infertility treatments because it believed that too many women would try to become pregnant[97]—evidence that even the *Gilbert* court recognized as probative of sex discrimination.[98] Additionally, these decisions failed to recognize that exclusions from coverage for contraception and IVF, even if considered facially

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[95] *Saks*, 316 F.3d at 346 n.4.

[96] *See supra* notes 41–49 and accompanying text.

[97] *Krauel*, 95 F.3d at 680.

[98] *Gilbert* confirmed that an employer's pregnancy-based discrimination was actionable if it was "subterfuge" for sex discrimination. Gilbert v. Gen. Elec. Co., 429 U.S. 125, 136 (1976).

neutral, could be discriminatory because they have a disparate impact on women.[99]

Finally, these decisions rely on the flawed premise from *Gilbert* that all sex discrimination claims depend on the existence a disadvantaged group that includes every woman and a preferenced group that includes only men. The Supreme Court addressed this error at length in *Bostock v. Clayton County*, where it confirmed that Title VII's definition of "because of sex" must be interpreted expansively. In *Bostock*, the Court rejected the argument that discrimination on the basis of sexual orientation and gender identity was sex-neutral because discriminatory practices potentially affected men and women, explaining that Title VII's focus is "on individuals rather than groups."[100] Therefore, it is not a defense under Title VII "for an employer to say it discriminates against both men and women because of sex."[101] The Court considered the example of "an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine."[102] Although the policy "may treat men and women as groups more or less equally," "in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it."[103]

Applying *Bostock's* reasoning to the policies that the Supreme Court considered in *Newport News* helps to illustrate this concept in the context of pregnancy-related classifications in healthcare plans. In *Newport News*, the Court first acknowledged that Congress, in repudiating the holding in *Gilbert*, concluded that an employer's insurance policy that excluded coverage for workers' pregnancies unlawfully discriminated against women employees in violation of the PDA.[104] Based on this logic, the Court found that the "mirror image" of the policy—a policy that covered the medical conditions of pregnant workers but not of their dependent spouses—*also* violated the PDA because it discriminated against men—i.e., individuals who would never be pregnant themselves.[105] The fact that an employer's

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[99] *See* PDA ENFORCEMENT GUIDANCE, *supra* note 61, § I.B.2, https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IB2.

[100] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1740–41 (2020).

[101] *Id.* at 1741.

[102] *Id.*

[103] *Id.*

[104] Newport News Shipbuilding Co. v. EEOC, 462 U.S. 669, 677–78 (1983).

[105] *Id.* at 683–84.

insurance policy could discriminate against men therefore does not negate the possibility that it could also discriminate against women; it doubles the potential liability. Both of these policies discussed in *Newport News* were examples of sex discrimination that violated the PDA. It would make little sense if employers could remedy the discriminatory exclusion of workers' pregnancies from a healthcare plan by excluding the pregnancies of workers' dependents from coverage as well, even if the overall effect on both men and women could arguably be characterized as equal. Tellingly, the Supreme Court recognized in *Newport News* that treating pregnancy itself differently from other health conditions was sex discrimination under Title VII, regardless of whether the victim of that discrimination is a man or a woman.[106]

Discrimination on the basis of pregnancy or related conditions thus cannot be made sex-neutral by ensuring that the effects of discrimination fall roughly evenly on men and women. The principle appears most clearly in cases like *Hall* and *Pacourek*—circumstances that the Second Circuit expressly declined to consider—where an employer fired a woman for undergoing infertility treatment.[107] In these cases, the courts found that the plaintiffs had made a showing of discrimination under Title VII, without examining whether the employer would have discriminated against a hypothetical man who sought fertility-related treatment.[108] As the *Pacourek* court explained, "once it is determined that a classification is in contravention of the PDA, that classification is not to be further tested for gender neutrality with an eye toward approving the classification if it is found to be gender neutral in its specific context."[109]

Ultimately, returning to the statutory text, if the employer discriminates on the basis of a pregnancy-related condition, Title VII is violated; the PDA does not sanction additional inquiries into

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[106] *Id.*

[107] Saks v. Franklin Covey Co., 316 F.3d 337, 346 n.4 (2d Cir. 2003).

[108] *See generally* Hall v. Nalco Co., 534 F.3d 644 (7th Cir. 2008); Pacourek v. Inland Steel Co., 858 F. Supp. 1393 (N.D. Ill. 1994). Of course, discrimination against a man for not being sufficiently fertile could also violate Title VII. An employer that sought to impose stereotypes of fecundity and virility on its employees could discriminate against both infertile men and women. Under *Bostock*, these individuals would all have potential claims of sex discrimination; the employer's discrimination against infertile women does not depend on the absence of discrimination against infertile men. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1740–41 (2020).

[109] *Pacourek*, 858 F. Supp. at 1404.

whether the condition occurs pre- or post-pregnancy or whether the discriminatory conduct affects only women.

The mixed outcomes in the contraception and infertility cases provide insight into how courts can stray from the simple analytical framework of the PDA to impose other improper threshold requirements to a finding of discrimination because of "related medical conditions." They illustrate the intractability of some of the arguments that sprung from *Gilbert* and *Geduldig*—seeking to justify differential treatment of pregnancy—despite being overwhelmingly repudiated.

V. ABORTION WITHIN THE PDA'S DEFINITION OF PREGNANCY

Despite some mixed decisions at the margins of what constitutes a pregnancy-related condition, abortion has been universally recognized as within the scope of the PDA. In contrast to the cases in the lactation, contraception, and infertility contexts, courts considering whether the terms "pregnancy, childbirth, and related medical conditions" include abortion have all held in the affirmative.

Since 1978, several federal district and appellate cases have directly addressed this question. As with the cases discussed in the previous section, employers raised nearly identical arguments about the PDA's limiting principles. Specifically, that: 1) Title VII only protects the status of ongoing pregnancy, not pre- or post-partum conditions or decisions; 2) the statute only protects sufficiently incapacitating conditions or effects; 3) the statute only protects conditions that are involuntary or arise out of medical necessity, not elective conditions or effects; and 4) discrimination against certain pregnancy-related conditions, like abortion, is not sex-based discrimination because men and women are on both sides. This section will examine how courts evaluated these arguments in light of the text of the PDA, bolstered by congressional purpose and the 1978 EEOC Guidelines.

The first case to consider whether abortion fell under the protections of the PDA came almost a decade after the statute's passage. In *Doe v. First National Bank of Chicago*, a district court in Chicago held a bench trial in which the plaintiff alleged that she was fired after her manager, who was an anti-abortion advocate, learned of her abortion.[110] The court recognized the question of "whether or not Title VII prohibits adverse employment-related actions taken against an individual because she has had an abortion" was an issue

[110] Doe v. First Nat'l Bank of Chi., 668 F. Supp. 1110, 1117 (N.D. Ill. 1987).

of "first impression"[111] and, based solely on the text, reasoned that it "is a conceivable interpretation [that] . . . because the act of a woman in undergoing an abortion is 'affected by pregnancy . . . or related medical conditions.'"[112] Ultimately persuaded by text in light of the legislative history and the 1978 EEOC Guidance, the court concluded that Congress expressed an "apparent desire" to "to protect an individual's choice to procure an abortion."[113]

At the same time, however, the *Doe* court questioned whether abortion-related discrimination differed from discrimination on the basis of other protected characteristics, positing that

> [d]islike for abortions is unlike other types of dis[a]ffections based on immutable traditions regarding class, status and stereotypes. . . . The morality versus the immorality issue about abortions is like a personal philosophy that is directed for or against the particular aborting woman herself, and not against some group or class or segment of the population with which her conduct causes her to be identified.[114]

Based on this conclusion, the court proposed a heightened evidentiary standard for plaintiffs alleging abortion discrimination under Title VII, requiring plaintiffs to demonstrate that the person responsible for the termination decision both showed animus toward abortion and had knowledge of the abortion, as well as make out the other elements of a prima facie case of pregnancy discrimination under *McDonnell Douglas*.[115] Despite recognizing that PDA protected against abortion-based discrimination, the *Doe* court, without any basis in the statutory text, raised the possibility that abortion should be treated differently from other pregnancy-related conditions.

Almost a decade later, in *Turic v. Holland Hospitality Inc.*, the Sixth Circuit was the first federal court of appeals to decide that discrimination for obtaining or contemplating an abortion violates

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[111] *Id.* at 1111.

[112] *Id.* at 1112.

[113] *Id.*

[114] *Id.* at 1113.

[115] *Id.*; In *McDonnell Douglas Corp. v. Green*, the Supreme Court set out the elements of proof a plaintiff must meet in order to establish a case of disparate treatment under Title VII using circumstantial evidence: 1) the worker was a member of a class protected by Title VII; 2) they were qualified for the position; 3) they were discharged; and 4) following their discharge, the position remained open and they were replaced by someone with similar qualifications who was not a member of her Title VII class. 411 U.S. 792, 802 (1973).

Title VII.[116] In the case, Kimberly Turic, a restaurant worker disclosed to some of her colleagues that she was pregnant and considering having an abortion, and, after the news spurred controversy among certain members of the restaurant staff, the employer punished the plaintiff, disciplining and eventually firing her.[117]

The district court ruled in a bench trial that the employer had discriminated on the basis of a "related medical condition" to pregnancy, giving both deference to the 1978 EEOC Guidelines and consideration to congressional purpose.[118] While the district court cited the *Doe* decision as support for its interpretation of Title VII, it explicitly disavowed the *Doe* court's heightened evidentiary standard for abortion-related discrimination cases, explaining that "[i]n enacting the PDA, Congress explicitly overrode the Supreme Court's decision . . . women are not a 'class,' and that pregnancy discrimination is not a form of sex discrimination."[119] Therefore, "[f]or purposes of Title VII analysis, pregnant women are to be considered a 'class,' and that class subsumes those women who do not carry their pregnancies to term."[120] The district court's reasoning recognized the illogic of reading the PDA to prohibit discrimination on the basis of pregnancy generally but then permitting employers on the basis of reproductive decisions of which they did not approve. Under *Johnson Controls*, the court concluded, "employers are illegally imposing negative economic consequences on certain reproductive options" because "Title VII lodges control over fertility and reproductive decision-making with potential parents, not employers."[121]

On appeal, the employer raised several arguments as to why abortion-related discrimination did not constitute sex discrimination. First, it attempted to limit the PDA's purpose and argued that the statute did not protect against an "elective abortion" because the amendment "was passed to provide maternity related insurance and disability benefits on the same basis as employers provide it for other medical conditions."[122] Referencing the PDA's carve-out for abortion-

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[116] Turic v. Holland Hosp., Inc., 85 F.3d 1211, 1214 (6th Cir. 1996).

[117] Turic v. Holland Hosp., Inc., 849 F. Supp. 544, 546–47 (W.D. Mich. 1994).

[118] *Id.* at 549–51.

[119] *Id.* at 551 n.6.

[120] *Id.*

[121] *Id.* at 550 (citing Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, 499 U.S. 187, 206–07 (1991)).

[122] Brief of Appellant/Cross-Appellee, *Turic*, 85 F.3d 1211 (6th Cir. 1996) (Nos. 94–1424, 94–1467), 1994 WL 16477574.

related health coverage—which requires employers to cover the cost of an abortion only when "the life of the mother would be endangered if the fetus were carried to term" or "medical complications have arisen from an abortion"—the employer claimed that the amendment only applied "[t]o the extent a woman's pregnancy related 'medical condition' threatens her life, (such as in the case of a pregnant woman with gestational diabetes whose kidneys begin to fail)."[123]

Second, the employer sought to isolate abortion discrimination from other forms of sex discrimination and cast abortion-based discrimination as gender-neutral. Relying heavily on *Bray v. Alexandria Women's Health Clinic*,[124] decided after the passage of the PDA (and after *Doe*), the employer invoked the Supreme Court's justifications for finding that animus toward abortion could not be presumed to be sex-based animus.[125] The employer, quoting *Bray*, argued that "hatred of abortion" was not sex-based animus because "it cannot be denied that there are common and respectable reasons for opposing it" and that "men and women are on both sides of the issue."[126] In other words, because abortion remained an issue that affects men and women, discriminating on this basis could not constitute discrimination on the basis of sex. [127]

The Sixth Circuit rejected the employer's circumscribed interpretation of the Title VII and found that the statute protected against abortion-based discrimination.[128] Like the district court and court in *Doe*, the Sixth Circuit based its decision primarily on the "plain language of the statute, the legislative history of the PDA, the EEOC guidelines."[129] As further support, the Sixth Circuit, as the

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[123] *Id.*

[124] *Id.* (citing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 272–73 (1993)).

[125] *Id.*

[126] *Id.* (citing *Bray*, 506 U.S. at 270).

[127] *Id.*; *see Bray*, 506 U.S. at 274 ("Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself (apart from the use of unlawful means to achieve it, which is not relevant to our discussion of animus) does not remotely qualify for such harsh description, and for such derogatory association with racism.").

[128] *Turic*, 85 F.3d at 1214–15. The American Civil Liberties Union submitted an amicus brief on appeal explaining that the PDA protects a worker's decision to continue or terminate their pregnancy. Brief of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Michigan in Support of Plaintiff-Appellee at 13–19, *Turic*, 85 F.3d 1211 (6th Cir. 1996) (Nos. 94–1424, 94–1467), 1995 WL 17810047.

[129] *Turic*, 85 F.3d at 1214–15.

district court did, cited *Johnson Controls*, where "the Supreme Court [had] considered the impact of the PDA in broadening the scope of prohibited sex discrimination under Title VII" to hold that "discriminating against a woman because of her capacity to become pregnant" was sex discrimination.[130] Penalizing abortion discriminated against those with the potential for pregnancy, which the Supreme Court had proscribed.

Notably, while the Sixth Circuit recognized abortion as a constitutional right, its decision did not hinge on this finding. Indeed, whether abortion is a constitutionally protected right does not answer the question of whether on this basis constituted sex-based discrimination under Title VII.[131] As the district court concluded, Congress itself answered this latter question. In amending Title VII to restore Congress's original interpretation of the statute, Congress explicitly overrode the Supreme Court's underlying reasoning in *Bray*, which relied on *Geduldig*'s holding that pregnancy-based classifications were not sex-based classifications under the Constitution.[132] The decision in *Bray* thus could not, as the employer urged, constrain the interpretation of Title VII.

Rejecting invitations to find implicit limitations in the statutory text, the *Turic* court understood the broad remedial goals of the PDA in eradicating "*all* situations in which women are 'affected by pregnancy, childbirth, and related medical conditions.'"[133] Other courts, including the Third Circuit, have followed *Turic*'s reasoning.[134]

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[130] *Id.* (citing Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, 499 U.S. 187, 206 (1991)).

[131] In *Bray*, Justice Scalia, writing for the majority, took pains to explain why the "right to abortion" was not implicated in the Court's analysis of whether abortion-related discrimination was sex discrimination. 506 U.S. at 278 ("[O]ther elements of those more general rights are obviously *not* protected against private infringement. (A burglar does not violate the Fourth Amendment, for example, nor does a mugger violate the Fourteenth.)").

[132] *See supra* note 13.

[133] *Turic*, 85 F.3d at 1214–15 (citing H.R. REP. NO. 95-948, at 4 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4749, 4753).

[134] Since *Turic*, the Third Circuit has also held that abortion is a protected condition under the PDA, adopting largely the same reasoning as the Sixth Circuit. Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358, 363–64 (3d Cir. 2008), *order clarified*, 543 F.3d 178 (3d Cir.) (citing *Turic*, 85 F.3d at 1214, EEOC guidance, and legislative history of PDA as persuasive). In 2018, a district court in Florida followed the Third Circuit's decision in *Doe*. DeJesus v. Fla. Cent. Credit Union, No. 8:17-CV-2502-T-36TGW, 2018 WL 4931817, at *3 (M.D. Fla. Oct. 11, 2018).

The most recent case to consider whether Title VII prohibits abortion-based discrimination, *Ducharme v. Crescent City Déjà Vu, L.L.C.* in 2019, also arose in restaurant context, where a bartender sued after her manager fired her after she decided to have an abortion due to complications in her pregnancy.[135] Despite the employer's argument that abortion was not a medical condition related to pregnancy, and instead "the antithesis to a pregnancy," and that state public policy stood firmly against abortion,[136] the Eastern District of Louisiana found that "abortion is encompassed within the statutory text."[137] The court characterized abortion in this case as a "a medical procedure that may be used to treat a pregnancy related medical condition," which it interpreted to be included in the definition of a protected "medical condition."[138] Drawing on the Fifth Circuit's decision in *EEOC v. Houston Funding II, Ltd.*, discussed above, the court recognized "if a person has to take breaks to pump milk because she is lactating as a result of a pregnancy, she is protected from termination by Title VII."[139] It followed, then, that "[i]f a person has to have an abortion because she is suffering from anemia as a result of a pregnancy, she, too, is protected from termination."[140]

In addition to the analysis of whether an abortion was a medical condition related to pregnancy, the court also concluded on the broader and slightly different ground that because "an abortion is only something that can be undergone during a pregnancy," "[a] woman terminated from employment because she had an abortion was terminated because she was affected by pregnancy."[141] This straightforward analysis of the text thus identified termination of a pregnancy both as a protected act that occurs *during* a pregnancy in addition to one that is *related* to a pregnancy. In firing the worker for having an abortion, the employer discriminated on the basis of pregnancy *and* a pregnancy-related medical condition. While both kinds of discrimination are equally unlawful, the analysis rooted

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[135] Ducharme v. Crescent City Déjà Vu, L.L.C., 406 F. Supp. 3d 548, 552 (E.D. La. 2019).

[136] Crescent City Déjà Vu LLC's Memorandum in Support of Motion for Judgment on the Pleadings, *Ducharme*, 406 F. Supp. 3d 548 (E.D. La. 2019) (No. 18-cv-04484-JVM), 2019 WL 13189599.

[137] *Ducharme*, 406 F. Supp. 3d at 556.

[138] *Id.*

[139] *Id.* (citing EEOC v. Hous. Funding II, Ltd., 717 F.3d 425, 430 (5th Cir. 2013)).

[140] *Id.*

[141] *Id.*

abortion-based protections within another part of the statute.[142] Indeed, this reading comports with the *Turic* court's reliance on *Johnson Controls*, which held that discrimination against potential pregnancy was discrimination on the basis of pregnancy itself.

From *Doe* to *Ducharme*, we see the emergence of similar categories of arguments for the exclusion or limitation of Title VII's protection of abortion, which mirror employer arguments in the lactation, contraception, and fertility contexts. These arguments show an effort to establish a framework under Title VII of "core," "worthy" pregnancy-related effects and conditions that are protected and "ancillary," "unworthy" conditions that are not, and reflect value judgments about which kinds of pregnancies should be protected. In many ways, they echo the Supreme Court's reasoning in *Gilbert*, particularly in their focus on the voluntary nature of reproductive choices and their inquiry into whether members of both sexes fall in- or outside of the protected class.[143] These arguments are a reminder of the reality that employers' expectations about workers' reproductive lives have long shaped—and continue to shape—the workplace. Prohibiting employers from penalizing certain experiences of pregnancy or reproductive choices, therefore, drew considerable resistance. Indeed, despite the PDA, pregnancy discrimination persists.

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[142] The court also interpreted parallel language in the state's Civil Rights Code in the same manner. *Id.* at 558.

[143] Since *Gilbert*, courts have also increasingly recognized that discrimination against certain subclasses within protected classes is unlawful discrimination (often described as "sex plus" discrimination). In *Harper v. Thiokol Chem. Corp.*, the Fifth Circuit found pregnancy discrimination to be an unlawful form of "sex plus" discrimination and held unlawful under Title VII an employer's policy requiring women to have a menstrual period following their pregnancies before returning to work. 619 F.2d 489, 491–93 (5th Cir. 1980). In *Harper*, the plaintiff had experienced miscarriage but, when she sought to return to work after the termination of the pregnancy, her employer refused on the basis that she had not yet had a "normal" menstrual period. The court explained:

> Thiokol's policy is also unlawful under the recent "sex plus" decisions by this court and others. . . . [C]ourts have consistently held that company rules which single out certain subclasses of women for disparate treatment constitute unlawful sex discrimination. Thus employers can no longer escape violations of Title VII by adding nonsex factors in creating discriminatory policies. . . . Thus, under the rationale of these cases an employer may not lawfully single out postpartal women who have failed to sustain a normal menstrual cycle for discriminatory treatment.

Id. at 493.

The decisions discussed in this section, however, have uniformly rejected the attempt to limit the scope of Title VII's protections only to ongoing pregnancies or to differentiate among "core" and "ancillary," "worthy" or "unworthy," pregnancy-related conditions. Instead, they have relied on the text to conclude that discrimination on the basis of pregnancy includes discrimination against any condition or treatment for that condition, like abortion, that can only be defined in relation to pregnancy. Because abortion can only arise in the context of a pregnancy, discriminating on this basis constitutes pregnancy discrimination.

Notably, these courts have all looked to the text and context of the PDA. Congress's rejection of the *Gilbert* majority's myopic view of sex discrimination and clear intent to prohibit discrimination across the "whole range of matters concerning the childbearing process" necessarily targets more than discrimination during ongoing pregnancy. As *Johnson Controls* established, Title VII does not permit an employer to impose its views about when, whether, and how a worker should have a child because Congress left decisions about a woman's reproductive role as "hers to make."[144]

Importantly, these cases have also made clear that the contours of sex discrimination under Title VII must be construed independently from the constitutional floor of the federal equal protection analysis, especially in light of Congress's explicit repudiation of the *Gilbert* majority's reasoning and holding. Despite Justice Alito's aside in *Dobbs* that pregnancy- and abortion-related discrimination do not trigger heightened scrutiny under the Equal Protection Clause in the Constitution, *Dobbs* does not change the interpretation of Title VII's broader and explicit statutory mandate to eradicate all pregnancy-related discrimination in the workplace. Abortion is protected under Title VII not because it is a constitutional right, but because it is one of a range of medical procedures and treatments—like a cesarean section or treatment for preeclampsia or post-partum depression—that can only be defined in relation to a pregnancy. As the EEOC recently confirmed in its Notice of Proposed Rulemaking in its "Regulation to Implement the Pregnant Workers Fairness Act," the interpretation of the Title VII's definition of "pregnancy, childbirth, and related medical conditions" remains unaltered post-*Dobbs*.[145]

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[144] Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, 499 U.S. 187, 211 (1991)).

[145] Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54715, 54721 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. 1636),

While *Dobbs* stripped individuals of the fundamental right to an abortion under the Due Process Clause of the federal Constitution, it did not abrogate our rights under federal civil rights statutes. Employers covered under Title VII must comply with these statutory obligations not to discriminate on the basis of pregnancy-related conditions, including abortion, regardless of state laws regulating the procedure. Indeed, the Supreme Court recognized in *Johnson Controls* that state regulations conflicting with federal pregnancy-related protections would be preempted.[146] These critical federal civil rights protections help the people who seek abortion—half of whom are living in poverty—maintain their health as well as their financial security.[147] Workers should not and cannot be forced to choose between being fired or carrying a pregnancy to term.

Nevertheless, the debate over what constitutes a condition related to pregnancy and childbirth will continue under both Title VII and PWFA. Emboldened by *Dobbs,* employers and antiabortion advocates may once again argue that certain conditions like abortion fall outside the realm of protection for pregnancy discrimination because they are voluntarily undertaken or not life-threatening. But these misguided arguments rely on the same reasoning, drawn from *Gilbert*, that have been rejected time and again by courts. And ultimately, they fail for the same simple reason that they find no support in the plain language of the statute.

The longstanding, universal recognition that abortion is pregnancy-related under Title VII by every court that has considered the question provides for a reasonable expectation that courts will continue to follow this interpretation. While *Dobbs* altered the federal constitutional landscape governing states' ability to regulate abortion consistent with the Due Process Clause, it did not change employers' obligations under the broad scope of federal antidiscrimination law.

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https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act.

[146] *See supra* note 47.

[147] *See supra* note 12.