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Henry L. Chambers, Jr.

University of Richmond, hchamber@richmond.edu

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PANEL II: CLASSIFICATIONS AND CATEGORIES IN THE 1964 ACT AND IN SUBSEQUENT CIVIL RIGHTS LAWS

READING AMENDMENTS AND EXPANSIONS OF TITLE VII NARROWLY

HENRY L. CHAMBERS, JR.*

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INTRODUCTION

Throughout Title VII's history, Congress has amended and expanded Title VII. Often, the Supreme Court has read such amendments and expansions narrowly, even as it generally reads Title VII broadly or narrowly depending on the case before it. The Court's approach to Title VII expansions may merely indicate that the Court believes that such statutory alterations should be read only as broadly as necessary to effectuate their purposes. However, regardless of why the Court has interpreted these expansions narrowly, that the Court has

* Professor of Law, University of Richmond. The author wishes to thank all who made the Civil Rights Act of 1964 at 50: Past, Present & Future conference possible.

done so suggests that Congress ought to consider carefully how it amends or expands Title VII in the future.

This brief Essay examines how the Court has interpreted various amendments and expansions of Title VII and suggests that Congress will need to be very careful in how it expands Title VII to cover additional demographic characteristics and protect employees against all instances of discrimination Congress intends to ban. The Court's interpretations may have implications for the legislation like the proposed Employment Non-Discrimination Act ("ENDA"), which expands Title VII's coverage to sexual orientation and gender identity.¹ Part I of this Essay discusses how the Court has interpreted Title VII's motivating factor test, which Congress installed as part of the Civil Rights Act of 1991 ("1991 Act").² Part II discusses how the Court has interpreted Title VII's disparate impact cause of action, also part of the 1991 Act. Part III discusses how the Court has addressed the reasonable accommodation requirement in Title VII religion cases, which Congress installed through its 1972 Amendments to Title VII. Part IV discusses how the Court has interpreted pregnancy discrimination under the Pregnancy Discrimination Act of 1978,³ which amended Title VII.

I. MOTIVATING FACTOR: READING PROOF STRUCTURES NARROWLY

Title VII prohibits discrimination by an employer against an individual "because of such individual's race, color, religion, sex, or national origin."⁴ However, when initially codified, Title VII did not specify how to prove that an employer had discriminated against an employee because of that employee's race, color, religion, sex, or national origin. Congress rectified that by adding the motivating factor test to Title VII through the 1991 Act.⁵ That test deems Title VII violated whenever an employer's decision is motivated in part by consideration of any factor deemed illegitimate under Title VII.⁶

¹ See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013) (adding "an individual's actual or perceived sexual orientation or gender identity" to the list of characteristics on which an employer cannot discriminate). To be clear, the suggestion is not that ENDA will or can pass. The point is that any bill that expands employment discrimination coverage to sexual orientation, gender identity, and the like will have to address interpretive issues.

² Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

³ Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. 2000e(k) (2000)).

⁴ 42 U.S.C. § 2000e-2(a) (2012).

⁵ For a longer discussion of the genesis of the motivating factor test, see Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 92-93 (2004) [hereinafter Chambers, *The Effect of Eliminating Distinctions*] ("In the wake of *Price Waterhouse*, Congress passed the Civil Rights Act of 1991, which included changes to Title VII. The Act clarified the *Price Waterhouse* plurality's motivating factor test and made it a formal part of Title VII.").

⁶ See *infra* note 20 and accompanying text.

However, rather than treat the motivating factor test as the causation test for all employment discrimination claims, the Supreme Court has treated the motivating factor test as a secondary and inferior way to prove causation.⁷ In the process, the Court has narrowed the effect of the motivating factor test and rejected its expansion outside of a narrow portion of Title VII.⁸

A. *Price Waterhouse v. Hopkins and the Motivating Factor Test*

Congress installed the motivating factor test in response to the Supreme Court's fractured decision in *Price Waterhouse v. Hopkins*.⁹ In that case, plaintiff Ann Hopkins was a senior manager who had been proposed for partnership at Price Waterhouse.¹⁰ Rather than being granted or rejected, Hopkins's partnership bid was held for reconsideration.¹¹ The partners cited Hopkins's interpersonal skills as reasons for the hold.¹² The trial court deemed those reasons legitimate and nondiscriminatory.¹³ However, other reasons also triggered the hold. Those reasons appeared to be based on discriminatory sex stereotyping.¹⁴ The Supreme Court had to determine how to analyze Title VII's causation clause when some motives for the employment action were legitimate and others were illegitimate.

Price Waterhouse produced four opinions: a four-justice plurality, a concurrence by Justice O'Connor, a concurrence by Justice White, and a three-justice dissent. The plurality opinion ruled that proof that a discriminatory reason motivated the employment decision proved the elements of a Title VII violation, subject to the employer's affirmative defense that it would have made the same decision had it not considered the discriminatory reason.¹⁵ The plurality indicated that it was merely interpreting Title VII, rather than altering

⁷ See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2526 (2013) (calling the motivating factor test a "lessened causation standard").

⁸ See, e.g., *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173 (2009) (refusing to expand the motivating factor test to age discrimination claims).

⁹ 490 U.S. 228 (1989).

¹⁰ *Id.* at 231 (plurality opinion).

¹¹ *Id.*

¹² See *id.* at 234-35 (stating that the trial court judge found that Hopkins's supporters and detractors "indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff").

¹³ See *id.* at 236 (stating that the trial court judge "found that Price Waterhouse legitimately emphasized interpersonal skills . . . [and] had not fabricated its complaints about Hopkins' interpersonal skills as a pretext for discrimination").

¹⁴ See *id.* at 235 (citing partners' remarks critiquing Hopkins as acting too masculine).

¹⁵ See *id.* at 244-45 ("We think these principles require that, once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.").

it.¹⁶ Justices O'Connor and White stated that proof that a discriminatory reason was a substantial or significant factor in the decision shifted the burden of persuasion on causation to the employer, leaving the employer to prove that it would have made the same employment decision without using the discriminatory reason.¹⁷ The dissent argued that the plaintiff ought to be required to prove that the discriminatory reason was the but-for cause of the adverse job action in order to recover.¹⁸

Congress installed the motivating factor test in the wake of *Price Waterhouse* to clarify the mixed-motives causation issue.¹⁹ The motivating factor test deems an unlawful employment practice to have occurred as soon as an illegitimate factor motivates an employment decision, even if other factors also motivated the decision.²⁰ If the employer can prove that it would have made the same decision regardless of the use of the illegitimate factor, it will not be liable for substantive discrimination.²¹ However, the employer will still be responsible for the employee's attorney's fees and costs.²² Though the motivating factor test was passed in response to a mixed-motives case, its language does not limit it to such cases.²³ Consequently, the motivating factor test arguably should apply to every substantive discrimination claim under Title VII because it reflects how Congress defines "because of" in the context of Title VII. The test reflects Congress's view that discrimination occurs as soon as an illegitimate factor motivates an employment decision, regardless of whether the factor affected the outcome.

A broad reading of the motivating factor test suggests that it defines what "because of" means not only in the context of Title VII, but also in the context of other employment discrimination statutes.²⁴ A narrow reading of the motivating factor test suggests that the motivating factor test was installed in Title VII solely to fix to the mixed-motives causation issue in *Price*

¹⁶ See *id.* at 248 (stating that its approach was consistent with prior Title VII cases).

¹⁷ See *id.* at 271, 276 (O'Connor, J., concurring); *id.* at 259-260 (White, J., concurring).

¹⁸ See *id.* at 295 (Kennedy, J., dissenting) ("The language of Title VII and our well-considered precedents require this plaintiff to establish that the decision to place her candidacy on hold was made 'because of' sex.>").

¹⁹ See Chambers, *The Effect of Eliminating Distinctions*, *supra* note 5, at 92-93.

²⁰ See 42 U.S.C. § 2000e-2(m) (2012) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.>").

²¹ See *id.*

²² See *id.* § 2000e-5(g)(2)(B)(i) (describing the scheme, which excludes recovery for substantive harm, but allows recovery for "attorney's fees and costs," when the employer proves it would have made the same decision had it not considered the illegitimate factors in the decision-making process).

²³ See *id.* §2000e-2(m).

²⁴ See *infra* note 120 and accompanying text (describing what "because of" means in the PDA).

Waterhouse. Such a narrow reading might limit the test's use to substantive discrimination claims under Title VII.²⁵ The Court has chosen the narrow interpretation and has refused to extend the motivating factor test to substantive discrimination claims under the Age Discrimination in Employment Act ("ADEA")²⁶ or to Title VII retaliation cases.²⁷

B. *Gross v. FBL Financial Services: Rejecting the Motivating Factor Test in ADEA Cases*

In *Gross v. FBL Financial Services*,²⁸ the Supreme Court decided that the motivating factor test does not extend to claims under ADEA, which bars discrimination on the basis of an employee's age.²⁹ In that case, the employee (Gross) sued, claiming that his reassignment was an age-related demotion in favor of a younger colleague whom he had previously supervised.³⁰ Gross presented evidence that age was a factor in the reassignment; the employer claimed the reassignment was based on corporate restructuring and that Gross's new position was better suited to his skills.³¹ The trial court gave a jury instruction that reflected Title VII's motivating factor test.³² The Supreme Court found that providing the motivating factor instruction was improper and that motivating factor claims are not cognizable under the ADEA.³³ Noting

²⁵ The Court has not limited the mixed-motives claim to situations that involve direct evidence of illegitimate factors, as Justice O'Connor would have. *See Price Waterhouse*, 490 U.S. at 261, 276 (O'Connor, J., concurring). Rather, circumstantial proof of the use of illegitimate factors in decision-making can trigger the motivating factor test. *See Desert Palace Inc. v. Costa*, 539 U.S. 90, 99-101 (2003) (holding that "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice'"). This makes the differences between a motivating factor case and a pretext case slender. *See Chambers, The Effect of Eliminating Distinctions, supra* note 5, at 93-94 ("[S]ome Justices see virtually no difference between mixed-motives and non-mixed-motives cases . . .").

²⁶ Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202 (codified at 29 U.S.C. §§ 621-634).

²⁷ *See infra* Part I.B.

²⁸ 557 U.S. 167 (2009).

²⁹ Technically, the issue was "whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction" under ADEA. *Id.* at 169-70. However, it morphed into the bigger question of whether the motivating factor test from the 1991 Act should apply in ADEA cases.

³⁰ *See id.* at 170 (discussing that Plaintiff considered the reassignment a demotion in part because his employer reallocated some of his job responsibilities to his younger colleague).

³¹ *See id.* ("FBL defended its decision on the grounds that Gross' reassignment was part of a corporate restructuring and that Gross' new position was better suited to his skills.").

³² *See id.* at 170-71.

³³ *See id.* at 169 (stating that a motivating factor jury instruction "is never proper in an ADEA case").

that the ADEA and Title VII are different statutes and that the 1991 Act codified the motivating factor test in Title VII and nowhere else, the Supreme Court also held that mixed-motives causation—the precursor to the motivating factor test—is not the correct causation standard under the ADEA.³⁴ Consequently, the Court ruled that the proper standard under the ADEA is but-for causation.³⁵

The *Gross* Court's holding is not surprising if one believes that the motivating factor test merely reflects Congress's desire to clarify *Price Waterhouse*. If *Price Waterhouse* merely interpreted Title VII, a clarification of *Price Waterhouse* should arguably affect only Title VII. However, the Court's holding is surprising if one believes that the motivating factor test reflects Congress's definition of causation in the broader employment discrimination context. If so, the expansion of the motivating factor test to the ADEA would merely reflect the expansion of Congress's definition of causation to the ADEA, rather than the functional installation of new statutory language—the motivating factor test—in the ADEA.

Ironically, the *Gross* Court rejected both Congress's vision of causation—the motivating factor test—and the vision of causation found in the plurality decision and concurrences from *Price Waterhouse*.³⁶ The Court's refusal to expand the motivating factor test to the ADEA may be justifiable. However, after the Court rejected the installation of the motivating factor test, the more sensible approach would have been to revert to *Price Waterhouse*'s definition of causation in mixed-motives cases.³⁷ The question at issue in *Gross*—causation in a mixed-motives discrimination case—was the precise issue in *Price Waterhouse*. Yet the Court ignored its *Price Waterhouse* decision and chose but-for causation as the standard, even though that standard had garnered only three votes in a *Price Waterhouse* dissent.³⁸ The Court took the

³⁴ See *id.* at 180 (“We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the challenged adverse employment action.”). Justice Breyer dissented, suggesting that the most an employee can be expected to prove is that a “forbidden motive” was used in some way in the relevant decision. See *id.* at 191 (Breyer, J., dissenting).

³⁵ See *id.* at 176 (“To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the ‘but-for’ cause of the employer’s adverse decision.”).

³⁶ See *id.* at 182-84 (Stevens, J., dissenting) (“In *Price Waterhouse*, we concluded that the words “‘because of’ such individual’s . . . sex . . . mean that gender must be irrelevant to employment decisions.’ . . . Today, however, the Court interprets the words ‘because of’ in the ADEA ‘as colloquial shorthand for “but-for” causation.’” (citations omitted)).

³⁷ See *id.* at 185-86 (Stevens, J., dissenting) (explaining that *Price Waterhouse* is the appropriate fallback position).

³⁸ For a longer discussion of the implications of *Gross*, see Henry L. Chambers, Jr., *The Wild West of Supreme Court Employment Discrimination Jurisprudence*, 61 S.C. L. REV. 577, 588-91 (2010).

same approach in refusing to expand the Title VII motivating factor test's application to Title VII retaliation cases.

C. *University of Texas Southwestern Medical Center v. Nassar: Rejecting the Motivating Factor Test in Title VII Retaliation Cases*

In *University of Texas Southwestern Medical Center v. Nassar*,³⁹ the Supreme Court ruled that Title VII's motivating factor test does not apply to Title VII retaliation cases.⁴⁰ In that case, the plaintiff brought a Title VII substantive discrimination action against his employer, while also alleging that the university retaliated against him for complaining about the alleged harassment.⁴¹ Plaintiff was a staff physician at Parkland Memorial Hospital and a professor at the University of Texas Southwestern Medical Center ("UT").⁴² He eventually resigned from his teaching position at UT after exploring whether he could work solely as a physician at Parkland.⁴³ That arrangement would have violated the hospital's agreement with the university that required Parkland to offer vacant staff positions to UT medical professors.⁴⁴ Plaintiff claimed that an administrator at UT sabotaged his agreement with Parkland, partly in retaliation for plaintiff's complaint about the alleged harassment.⁴⁵ Consequently, the Court had to determine whether the motivating factor test defined causation in a Title VII retaliation case.⁴⁶ The Court took a path similar to, but more troubling than, its path in *Gross*.

The *Nassar* Court began its causation analysis by suggesting that causation links wrongful conduct to the right to compensation and noting that but-for causation is normally required for recovery.⁴⁷ It then noted that Congress's installation of the motivating factor test in Title VII triggered the possibility that the motivating factor test could apply to Title VII retaliation claims.⁴⁸ However, the Court determined that the motivating factor test could not be applied to retaliation claims because the motivating factor test was embedded in the Title VII section addressing substantive discrimination claims and not retaliation claims.⁴⁹ The Court also determined—as it did in *Gross*—that the

³⁹ 133 S. Ct. 2517 (2013).

⁴⁰ *See id.* at 2534 ("The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under § 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.").

⁴¹ *See id.* at 2524.

⁴² *Id.* at 2523-24.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See id.* ("This case requires the Court to define the proper standard of causation for Title VII retaliation claims.").

⁴⁷ *See id.* at 2524-25.

⁴⁸ *See id.*

⁴⁹ *See id.* at 2529 ("When Congress wrote the motivating-factor provision in 1991, it

Price Waterhouse plurality did not provide the appropriate causation test because the motivating factor test was meant to repudiate *Price Waterhouse*.⁵⁰ Consequently, the Court held that the only appropriate causation standard for Title VII retaliation claims is the but-for causation test that the Court used in *Gross*.⁵¹

The Court has interpreted the scope of the motivating factor test narrowly. Its hostility to the motivating factor test is clear. The Court has described the test as a lesser form of causation and has treated it as a deviation from true causation.⁵² Rather than consider the test a reflection of Congress's substantive view that discrimination exists whenever an illegitimate factor helps motivate an employment decision, the Court has rejected the test as congressional opinion regarding causation that need not extend past the context in which it clearly must apply—Title VII substantive discrimination.⁵³

In cases such as *Nassar* and *Gross*, the Court rejected expanding the application of the motivating factor test in circumstances where the test could sensibly have been used. The Court may not like the motivating factor test because it was passed in the wake of the Court's decision in *Price Waterhouse*. However, given that the Court repudiated the *Price Waterhouse* plurality far more directly in *Nassar* and *Gross* than Congress did—the motivating factor test is closer to the mixed motives causation rule derived from the *Price Waterhouse* plurality and concurrences than but-for causation is—it is more likely that the Court substantively disagrees with the test. Regardless of precisely why the Court has rejected the motivating factor test, the Court appears determined to read the motivating factor test narrowly and stop its expansion outside of the tight confines of Title VII's disparate treatment cause of action.

Part II considers how the Court addresses an entire cause of action it does not appear to like.

chose to insert it as a subsection within § 2000e-2, which contains Title VII's ban on status-based discrimination, § 2000e-2(a) to (d), (l), and says nothing about retaliation.”).

⁵⁰ See *id.* at 2534 (“Given the careful balance of lessened causation and reduced remedies Congress struck in the 1991 Act, there is no reason to think that the different balance articulated by *Price Waterhouse* somehow survived that legislation's passage.”).

⁵¹ See *id.* at 2528 (“Given the lack of any meaningful textual difference between the [retaliation clause] in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action.”). However, the dissent noted that but-for causation is not a universal causation standard—even in normal tort areas, let alone employment discrimination areas—and rejected “sole cause” as a part of original Title VII jurisprudence. See *id.* at 2546 (Ginsburg, J., dissenting) (“[T]he word ‘because’ does not inevitably demand but-for causation to the exclusion of all other causation formulations.”).

⁵² See *supra* note 7 and accompanying text.

⁵³ For additional discussion of *Nassar*, see Henry L. Chambers, Jr., *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?*, 74 LA. L. REV. 1161 (2014).

II. DISPARATE IMPACT: READING CAUSES OF ACTION NARROWLY

The disparate impact (unintentional discrimination) cause of action has been a part of Title VII since the Supreme Court's 1971 decision in *Griggs v. Duke Power Company*.⁵⁴ The *Griggs* Court defined the disparate impact cause of action when it held that an employer's use of a facially nondiscriminatory rule could be actionable if the rule both caused a disproportionate negative impact on members of a group that shared a demographic relevant to Title VII, such as sex or race, and could not be justified as necessary to the operation of the employer's business.⁵⁵ However, the disparate impact claim was not codified until Congress passed the Civil Rights Act of 1991 in the wake of *Wards Cove Packing Co., Inc. v. Atonio*,⁵⁶ in which the Court narrowed the disparate impact claim.⁵⁷ The disparate impact claim is an important part of Title VII.⁵⁸ However, the Court has recently narrowed the claim's effect and scope, treating the claim as hostile to rather than complementary to Title VII's disparate treatment (intentional discrimination) claim and treating the disparate impact claim as anything but an integral part of Title VII's anti-discrimination structure.

The 1991 Act clarified the content of the disparate impact claim.⁵⁹ Pursuant to the 1991 Act, a disparate impact claim can proceed in two ways. First, the plaintiff proves that its employer's employment practice has caused a disparate impact.⁶⁰ In response, the employer must prove that the employment practice is "job related" and "consistent with business necessity."⁶¹ If the employer does so, it wins; if it fails to do so, it loses. Second, after the employee proves that

⁵⁴ 401 U.S. 424 (1971). Arguably, the Court merely recognized the cause of action. *See id.* at 431 ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."). However, the Court in *Ricci v. DeStefano* suggested that Title VII as passed did not include a disparate impact cause of action. *See Ricci v. DeStefano*, 557 U.S. at 577 ("As enacted in 1964, Title VII's principal nondiscrimination provision held employers liable only for disparate treatment.").

⁵⁵ The disparate impact cause of action contrasts with the disparate treatment cause of action, which requires intentional discrimination. Some have argued that disparate impact could be considered an attempt to uncover latent intentional discrimination. *See, e.g.,* George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1299 (1987) ("Because of the difficulty of proving the defendant's intent directly . . . the theory of disparate impact constitutes a justifiable extension of the statute's prohibitions against discrimination." (footnote omitted)). However, neither Supreme Court doctrine nor the 1991 Act has fully embraced that vision.

⁵⁶ 490 U.S. 642 (1989).

⁵⁷ *See id.* at 656-57 (holding that a plaintiff's showing of racial imbalance is not enough to show disparate impact).

⁵⁸ *See* 42 U.S.C. § 2000e-2(k) (2012).

⁵⁹ *See id.* § 2000e-2(k)(1) (clarifying the burden-shifting scheme in disparate impact cases).

⁶⁰ *See id.* § 2000e-2(k)(1)(A)(i).

⁶¹ *See id.*

the employment practice has caused a disproportionate impact and the employer proves that the practice was job-related and consistent with business necessity, the employee can prove that the employer refused to use an alternative employment practice that was just as effective as the employment practice the employer used and would have had a less discriminatory effect than the employment practice the employer used.⁶² In either circumstance, proof of the disproportionate impact is proof of discrimination, and the employer has the burden of proving that the employment practice is job-related and consistent with business necessity with fairly strong evidence.⁶³ The 1991 Act made clear that the disparate impact claim focuses on the employer's use of an unnecessary employment practice that effectively discriminates against a group because of that group's race, sex, or other characteristic noted in Title VII.

Clarification of the disparate impact claim was necessary because the *Wards Cove* Court misunderstood the nature of disparate impact discrimination. The Court had treated proof of disparate impact as circumstantial evidence of discrimination that could be rebutted with a mere assertion by the employer that the employment practice at issue was supported by business necessity, rather than as proof of discrimination that the employer had to affirmatively justify.⁶⁴ The *Wards Cove* Court required that the plaintiff disprove the employer's assertion that its employment practice was supported by "business necessity" because the Court believed that proof of disproportionate impact was not enough to prove that unlawful discrimination had occurred and assumed that the burden of persuasion remained on the plaintiff to further prove that discrimination had occurred. Congress clarified the nature of disparate impact and the law regarding disparate impact through the 1991 Act.⁶⁵

⁶² See *id.* § 2000e-2(k)(1)(A)(ii).

⁶³ The "business necessity" defense is like the bona fide occupational qualification defense to proven intentional discrimination. See *id.* § 2000e-2(e)(1) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .").

⁶⁴ The structure the *Wards Cove* Court provided for the disparate impact claim was similar to the three-part test the Court created in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), to address disparate treatment cases in which the plaintiff has no direct evidence of intentional discrimination. For a full discussion of the McDonnell Douglas test, see Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 8-11 (1996).

⁶⁵ For additional discussion of the relationship between *Wards Cove* and the 1991 Act, see Melissa Hart, *From Wards Cove to Ricci: Struggling Against the "Built-in Headwinds" of a Skeptical Court*, 46 WAKE FOREST L. REV. 261, 265-69 (2011) ("[T]he Court reversed twenty years of disparate impact law and concluded that an employer seeking to explain racial disparity with a 'business necessity' will not have to demonstrate that the practice in

The disparate impact claim installed in the 1991 Act was structured in part specifically to return the disparate impact cause of action to its pre-*Wards Cove* form.⁶⁶ One section of the Act noted that it was returning the law to its content on the day before *Wards Cove* was decided.⁶⁷ Another section of the Act noted that the only document to be treated as legislative history applicable to the Act was an interpretive memo noting that the law on several points would return to the doctrine as it existed before *Wards Cove*.⁶⁸ These statements are about as specific as Congress could be in voicing its disapproval of a particular Supreme Court decision and in attempting to eliminate any effect that the decision could have in the future. However, Congress's attempt to repudiate the *Wards Cove* Court's decision may ultimately fail. In the wake of the 1991 Act, the Court has read the disparate impact claim relatively narrowly.

The Court's decision in *Ricci v. DeStefano*⁶⁹ redefines and narrows the disparate impact cause of action. At issue in *Ricci* was whether the City of New Haven, Connecticut violated Title VII when it declined to certify and use the results from tests that had been developed to determine which firefighters would be eligible for promotion to lieutenant or captain in the city's fire department.⁷⁰ When combined with New Haven's other employment rules, the use of the exam results guaranteed that very few minority firefighters would be eligible for promotion.⁷¹ Though some minority firefighters had passed the test, given where they were on the promotion list, their prospects for promotion

question is 'essential' or 'indispensible.'").

⁶⁶ See 42 U.S.C. §2000e-2; see also Michael J. Songer, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247, 253 (2005) ("In response to the Supreme Court's restrictive interpretation of disparate impact claims, Congress reversed parts of the *Wards Cove* framework by passing the 1991 Civil Rights Act.").

⁶⁷ See 42 U.S.C. § 2000e-2(k)(1)(C) ("The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'").

⁶⁸ See Civil Rights Act of 1991, Pub. L. 102-166, § 105(b), 105 Stat. 1071, 1075 (1991) ("No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S. 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to *Wards Cove*—Business necessity/cumulation/alternative business practice.").

⁶⁹ 557 U.S. 557 (2009).

⁷⁰ See *id.* at 562-63 ("The suit alleges that, by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964 . . . and the Equal Protection Clause of the Fourteenth Amendment.").

⁷¹ See *id.* at 566 (describing that of the thirty-four candidates that passed, only six were black and three Hispanic, and that the top ten candidates who were eligible, all of whom were white, were selected).

were low.⁷² Simply, the tests had a disproportionate impact on the minority firefighters.⁷³ New Haven had to determine whether to certify the results.⁷⁴ New Haven declined to certify the results based on its concern about the potential for a disparate impact claim by the minority firefighters, its concern for the racial makeup of its command officers, and its lack of confidence in the test results.⁷⁵ In response, the firefighters who would have been eligible for promotion had the test results been used sued claiming disparate treatment discrimination by New Haven.⁷⁶

The Supreme Court analyzed the plaintiffs' disparate treatment claim and the putative disparate impact claim that would have been filed by minority firefighters had New Haven certified the results.⁷⁷ The Court determined that the City had intentionally discriminated against the predominantly white plaintiff firefighters on the basis of race.⁷⁸ It found that New Haven's refusal to certify the test results because those who would lose would be predominantly minority meant that New Haven's refusal to certify the results occurred because those who would win were predominantly white.⁷⁹ The Court noted, however, that the intentional discrimination could have been justified if the City had faced a legitimate Title VII disparate impact claim from the minority firefighters.⁸⁰

The Court then considered whether New Haven would have violated the disparate impact provisions of Title VII had it certified and used the test results.⁸¹ Unfortunately, it improperly analyzed the minority firefighters' putative disparate impact claim. Rather than consider whether New Haven had sufficient evidence to support using test results that would have triggered a disparate impact, the Court focused on how much evidence the minority firefighters who would have brought suit would have had to challenge New Haven's use of the test results.⁸² The Court's analysis was backward. Discrimination would have been proven once the minority firefighters proved that a disparate impact existed. The burden would then shift to New Haven to prove that the employment practices at issue were required by business necessity.⁸³ New Haven would have needed evidence to prove that the tests

⁷² *See id.*

⁷³ *See id.* at 567.

⁷⁴ *See id.* at 567-74.

⁷⁵ *See id.* at 562, 572, 574.

⁷⁶ *See id.* at 562-63.

⁷⁷ *See id.* at 578-88.

⁷⁸ *See id.* at 592.

⁷⁹ *See id.* at 579-84.

⁸⁰ *See id.* at 563, 593.

⁸¹ *See id.* at 583-92.

⁸² *See id.*

⁸³ *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012) (stating respondent must then "demonstrate that the challenged practice is job related for the position in question and

were job-related. Nonetheless, rather than focus on the quality of the evidence New Haven would or would not have had, the *Ricci* Court suggested that New Haven lacked evidence that the tests were valid only because New Haven had not sought to have the test results validated.⁸⁴ Notwithstanding that New Haven may not have had the evidence to prove that the tests could meet the business necessity requirement, the Court implicitly found that use of the test results was supported by business necessity and explicitly determined that the minority firefighters' putative disparate impact claim would have clearly lost.⁸⁵

The *Ricci* Court essentially treated the putative disparate impact claim as if it were to be analyzed under the *Wards Cove* disparate impact standard rather than under the 1991 Act's disparate impact standard. That approach narrows the disparate impact cause of action and arguably destroys the effect of the 1991 Act. In addition to narrowing the disparate impact cause of action, the *Ricci* Court's analysis puts the cause of action at odds with Title VII's disparate treatment cause of action by suggesting that the awareness of race, which occurs whenever an employer realizes that a disproportionate impact exists, may trigger disparate treatment liability if the employer acts on the knowledge of the disproportionate impact.⁸⁶ That interpretation of disparate impact is narrow and troubling and may be a prelude to further narrowing of the disparate impact cause of action.

A broad reading of the disparate impact claim suggests that it has always been a part of Title VII and works hand-in-glove with disparate treatment. A narrow reading of disparate impact suggests that it has been added to Title VII and is essentially at war with disparate treatment. The Court has begun to take the latter path even though the former path better fits with the Court's own disparate impact jurisprudence. Part III considers the Court's approach to Title VII's reasonable accommodation of religion requirement.

III. RELIGION: READING REASONABLE ACCOMMODATION NARROWLY

Title VII has barred religious discrimination in employment since its inception.⁸⁷ However, since 1972, Title VII has defined religious discrimination to include an employer's refusal to reasonably accommodate an employee's religion unless such accommodation is an "undue hardship on the conduct of an employer's business."⁸⁸ That reasonable accommodation

consistent with business necessity").

⁸⁴ See *Ricci*, 557 U.S. at 589.

⁸⁵ See *id.* at 592.

⁸⁶ Of course, disparate impact need not be read in this manner. See *id.* at 608-09 (Ginsburg, J., dissenting) (explaining that many reasons exist that would allow the City to question the value of the merit assessment process without engaging in intentional discrimination).

⁸⁷ See 42 U.S.C. § 2000e-2(a).

⁸⁸ *Id.* § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably

provision was installed in Title VII to specify the employer's duty under Title VII.⁸⁹ Soon after Title VII was enacted, the Equal Employment Opportunity Commission ("EEOC") interpreted Title VII to require that employers reasonably accommodate employees' religion.⁹⁰ Congress codified the EEOC's interpretation in its 1972 amendments to Title VII, in the wake of the Supreme Court's decision in *Dewey v. Reynolds Metals*.⁹¹ In *Dewey*, the Supreme Court affirmed, without opinion, a Sixth Circuit case involving an employee who refused to work on Sunday or find a replacement employee to work in his stead as allowed by the employer.⁹² The Sixth Circuit had ruled that firing the employee was not religious discrimination under Title VII because the employer's practice was a reasonable accommodation of the employee's religion.⁹³ Partly in response to *Dewey*, Congress redefined religion and installed the reasonable accommodation requirement in Title VII.⁹⁴ The Court has since read the reasonable accommodation requirement narrowly, determining that a relatively minor justification—any accommodation that requires more than *de minimis* cost is a qualifying justification—may allow the employer to decline to provide the reasonable accommodation.⁹⁵ Of course, if the employer provides no reason at all for its

accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

⁸⁹ See Henry Earle III & James R. McPherson, *Religious Discrimination in Employment: Employer's Duty to Accommodate Employee's Refusal to Work Scheduled Hours*, 1987 DET. C.L. REV. 765, 765-66 (1987) [hereinafter Earle & McPherson, *Religious Discrimination*] ("Congress attempted to provide employers with guidance by amending Title 7 in 1972 by adding section 701(j), which provides that employers shall reasonably accommodate an employee's religious observance, practice, and belief, unless such accommodation cannot be accomplished without undue hardship on the conduct of the employer's business.").

⁹⁰ Soon after Title VII's passage, the EEOC issued guidelines that interpreted the statute's ban on religious discrimination as requiring that employers accommodate the religious needs of its employees. See *Trans World Airlines v. Hardison*, 432 U.S. 63, 72 (1977). In 1967, the EEOC restyled its guidelines to require that employers provide reasonable accommodation for an employee's religion unless such accommodation caused an undue burden on the conduct of the employer's business. See *id.* at 72-73 (describing the 1967 EEOC regulation).

⁹¹ 402 U.S. 689 (1971).

⁹² See *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 328 (6th Cir. 1970). The employee in the case joined the Faith Reformed Church years after beginning work with the employer. See *id.* at 329. After the employee joined the church, he refused to work on Sundays. See *id.* He also refused to find replacements to work for him on Sundays. See *id.* at 327-29.

⁹³ See *Dewey*, 429 F.2d at 331.

⁹⁴ See Earle & McPherson, *Religious Discrimination*, *supra* note 89, at 765-66.

⁹⁵ See *Hardison*, 432 U.S. at 84-85.

refusal to reasonably accommodate, the refusal is an unlawful employment practice.⁹⁶

The Court interpreted the reasonable accommodation requirement in *Trans World Airlines v. Hardison*.⁹⁷ The facts in *Hardison* were similar to those in *Dewey*. After plaintiff Hardison was hired, he began studying the Worldwide Church of God faith and adopted its tenet that the faithful could not work on the Sabbath, from sundown Friday to sundown Saturday.⁹⁸ Trans World Airlines (“TWA”) had a seniority system that determined shifts and work hours.⁹⁹ Hardison bid for and received a transfer to another department, where his shift options were limited by his lack of seniority in his new department.¹⁰⁰ In his new position, plaintiff was required to work Saturdays because of his lack of seniority.¹⁰¹ TWA’s options to accommodate Hardison were to pay premium (overtime) wages to another employee to cover Hardison’s shift from Friday sundown to Saturday sundown, to leave another area undermanned on days when plaintiff could not work, or to ignore the seniority system in the collective bargaining agreement and let plaintiff bid for a job that would allow him to not work on the Sabbath and other church holidays.¹⁰² None of the options appear to have been seriously considered by TWA, and plaintiff was fired when he refused to work Saturdays.¹⁰³ Nonetheless, the Court ruled that TWA’s refusal to accommodate was lawful under Title VII.¹⁰⁴

The Court noted that Title VII requires that TWA reasonably accommodate the employee, but focused on the supposed unfairness in the workplace that would have been created had the reasonable accommodation provision required that TWA adopt any of the available accommodations. The Court deemed a requirement that the employer ignore the collective bargaining agreement to provide the employee with his Sabbath day off unfair if it required that a senior employee be disadvantaged.¹⁰⁵ It noted that allocating days off based on religious belief would be unfair¹⁰⁶ and that requiring TWA to spend money to provide the employee his Sabbath would also be unfair.¹⁰⁷

⁹⁶ See 42 U.S.C. § 2000e(j) (2012).

⁹⁷ See *Hardison*, 432 U.S. at 75.

⁹⁸ *Id.* at 67-68.

⁹⁹ *Id.* at 67.

¹⁰⁰ *Id.* at 68.

¹⁰¹ *Id.*

¹⁰² See *id.* at 68-69.

¹⁰³ See *id.* at 69.

¹⁰⁴ See *id.* at 83.

¹⁰⁵ See *id.* at 80.

¹⁰⁶ See *id.* at 84-85. Indeed, the Court suggested that specially providing for an employee’s Sabbath would discriminate against others who might be affected by such accommodation. See *id.* at 85.

¹⁰⁷ See *id.* at 84 (“To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship.”).

However, the Court did not consider other arguments that may have suggested that providing the accommodation might be fair. It ignored that plaintiff may not have been similarly situated with respect to some of his co-workers regarding Sabbath. For example, the Court did not consider that some of Hardison's co-workers may not observe Sabbath and that forcing those workers to work on a day off is quite different than requiring Hardison to work on the Sabbath, particularly in a Title VII regime that is supposed to protect the religious beliefs of employees. In addition, the Court did not seem concerned that Hardison could not exercise his full seniority rights under TWA's rules because of TWA's refusal to accommodate him more fully.¹⁰⁸ Instead, the Court ruled that an employer need not do much to discharge its duty to accommodate and need not do much to demonstrate that the hardship accompanying its reasonable accommodation would have been undue.

The narrowness of the Court's interpretation of the reasonable accommodation requirement is surprising. The requirement arguably focuses on the employee's religious rights.¹⁰⁹ It requires that religious rights be accommodated unless doing so would cause a significant problem for the employer.¹¹⁰ Indeed, the reasonable accommodation requirement suggests that the employer may be required to endure hardship to accommodate the employee's religion, so long as the hardship is not undue.¹¹¹ However, the Court has indicated that any required accommodation must be virtually costless, even though costless accommodation is little more than what was required in *Dewey*.¹¹² Why any accommodation that yields more than *de minimis* cost should qualify as an undue hardship on the conduct of the employer's business is not readily apparent. To be clear, it is not that requiring a reasonable accommodation that comes with some cost necessarily butts up against the First Amendment's Establishment Clause.¹¹³ The Court did not

¹⁰⁸ Ironically, the Court has been very solicitous of the free exercise rights of employers, even as the expansion of those rights affects statutory protections for employees. *See, e.g., Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (expanding Title VII's religious employer exemption).

¹⁰⁹ Of course, the reasonable accommodation process is not completely driven by the employee. *See Philbrook v. Ansonia*, 479 U.S. 60, 68-69 (1986) (indicating that the employer is under no obligation to accept employee's proposed accommodation).

¹¹⁰ *See* 42 U.S.C. § 2000e(j) (2012) (stating that employer must demonstrate "that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship").

¹¹¹ *See id.*

¹¹² Even costless accommodation may not be sufficient, as plaintiff Hardison offered to work to make up the cost of paying overtime for his Sabbath hours. *See Hardison*, 432 U.S. at 95 (Marshall, J., dissenting) ("[O]ne accommodation Hardison suggested . . . requir[ed] Hardison to work overtime when needed at regular pay.").

¹¹³ Of course, at some point, government requirements may trigger Establishment Clause concerns. *See Estate of Thornton v. Calder*, 472 U.S. 703, 708-09 (1985) (deeming state statute that required that workers have right to not work on worker's Sabbath to be violation

indicate that providing a non-costless reasonable accommodation to employee would be unconstitutional, only that such an accommodation would favor religious employees.¹¹⁴

The Court's approach to the reasonable accommodation requirement may reflect its opinion regarding how a refusal to accommodate an employee relates to an employer's discriminatory motivation. Title VII bars discrimination against an employee because of the employee's religion.¹¹⁵ The reasonable accommodation requirement provides an additional factor, but arguably does not alter the requirement that religious discrimination occur. The Court may assume that the refusal to grant a reasonable accommodation when the employer has no reason to refuse the accommodation is proof of religious discrimination. In addition, the Court may assume that an employer that refuses to accommodate an employee because there is more than a *de minimis* cost associated with an accommodation should not necessarily be deemed to be motivated by religious discrimination because the cost of the accommodation may explain the refusal to accommodate. Consequently, the refusal to grant a reasonable accommodation that comes with more than *de minimis* cost could be considered insufficient proof of an employer's religious discrimination. Of course, other proof of religious discrimination could be used to prove unlawful discrimination. There may be some inherent logic in this position. However, Title VII's definition of religion incorporates a reasonable accommodation requirement that appears to demand that an employer grant a reasonable accommodation when that accommodation does not cause undue hardship to the operation of the employer's business.¹¹⁶ Consequently, a reading of the requirement which allows for almost any burden to be considered undue is a narrow one.

Some may argue that the narrowness of the Court's interpretation of the reasonable accommodation requirement stems from a lack of clarity regarding the definition of undue hardship.¹¹⁷ A more robust or complete definition of undue hardship, like the definition of undue burden in the ADA, may have led

of Establishment Clause, in part, because it had no reasonable accommodation provision like Title VII). In other circumstances, they may trigger employer "free exercise" concerns. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."); *Amos*, 483 U.S. at 345 ("[T]his prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity.").

¹¹⁴ *See Hardison*, 432 U.S. at 84-85 ("[T]he privilege of having Saturdays off would be allocated according to religious beliefs.").

¹¹⁵ *See* 42 U.S.C. § 2000e-2 (2012).

¹¹⁶ *See id.* § 2000e(j).

¹¹⁷ Indeed, the Court indicated such. *See Hardison*, 432 U.S. at 75 (suggesting that neither the EEOC nor Congress had indicated precisely what was required under the reasonable accommodation provision).

to a broader accommodation requirement.¹¹⁸ If so, the Court's narrow reading may be in response to Congress's imperfect draftsmanship and would be partially Congress's fault. Nonetheless, Congress probably ought to assume that the Court will narrowly interpret expansions of Title VII even when Congress is clear. Consequently, definitions of key statutory terms should be written as broadly as possible, so that if the Court narrows those definitions, the ultimate coverage will not be too narrow.

Part IV considers how the Court has interpreted the Pregnancy Discrimination Act, another explicit expansion of Title VII coverage.

IV. PREGNANCY DISCRIMINATION:

SEIZING THE LATITUDE TO INTERPRET SEX DISCRIMINATION NARROWLY

Sex discrimination has been prohibited by Title VII since the statute's inception.¹¹⁹ However, pregnancy discrimination has been explicitly prohibited under Title VII only since Congress passed the Pregnancy Discrimination Act of 1978 ("PDA"), a statutory redefinition in Title VII that explicitly deems pregnancy discrimination to be sex discrimination.¹²⁰ The PDA was necessary in the wake of *General Electric Co. v. Gilbert*,¹²¹ where the Court ruled that pregnancy discrimination was not necessarily sex discrimination under Title VII.¹²² Though the Supreme Court had been willing to interpret sex discrimination to include more than discrimination based solely on sex,¹²³ the

¹¹⁸ However, there has been disagreement regarding how the Court should interpret the reasonable accommodation requirement under the ADA. *See* *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (discussing the content of the reasonable accommodation test and the undue hardship test and how the tests interact). Of course, had Congress installed the ADA's undue burden test into the religious accommodation arena, the scope of Title VII's religious accommodation requirement would be much broader than it is currently, barring constitutional problems. *See* Keith S. Blair, *Better Disabled Than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 *ARK. L. REV.* 515, 537 (2010) ("Had the ADA standard been applied in *Hardison*, the result would almost certainly have been different. Had TWA accommodated *Hardison* in his preferred way, it would have incurred a cost of \$150 per month for three months.").

¹¹⁹ *See supra* note 4 and accompanying text.

¹²⁰ As a result of the PDA, "because of sex" includes "because of pregnancy." *See* 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . .").

¹²¹ 429 U.S. 125 (1976).

¹²² *See id.* at 136 ("Since it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under § 703(a)(1), *Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all.").

¹²³ *See* *Phillips v. Martin Marietta*, 400 U.S. 542, 544 (1971) (prohibiting rule that barred mothers with preschool-aged children from being employed by employer, but allowing other

Gilbert Court declined to treat pregnancy discrimination as sex discrimination when it approved the employer's exclusion of pregnancy from the maladies covered under its disability benefits plan.¹²⁴ Congress replied with the PDA.¹²⁵ The Court's interpretation of the PDA has not been consistently narrow. However, the Court's decisions suggest a willingness to read the statute narrowly when the Court desires.

Congress intended that the PDA help pregnant women in the workplace.¹²⁶ However, how the PDA should do so is subject to debate. Whether the PDA should protect pregnant women by treating them exactly the same as non-pregnant workers or by making sure that the conditions for pregnant women are conducive for their work even if that allows for additional protection for pregnant employees is a question.¹²⁷ The PDA's interpretive issues may stem from the statute's structure. One part of the PDA declares that pregnancy discrimination is sex discrimination.¹²⁸ The other part requires that pregnant employees be treated the same as other employees whose work is similarly affected by their physical condition.¹²⁹ The statute may require that pregnancy, like sex, be barred from consideration when employment policies or decisions are made.¹³⁰ Conversely, if the point of the statute is to eliminate and reverse the headwinds that pregnant women have faced in the workplace, because those headwinds amount to sex discrimination, the statute may require that

women to be employed). Since the passage of the PDA, the Court has expanded sex discrimination to include sex stereotyping, *see* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-53 (1989), and sexual harassment, *see, e.g., Burlington Indus. v. Ellerth*, 524 U.S. 742, 751-54 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-09 (1998); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

¹²⁴ *See* *Gilbert*, 429 U.S. at 145-46.

¹²⁵ *See* *Calif. Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 284 (1987) (asserting that the PDA was passed in response to *Gilbert*).

¹²⁶ *See* H.R. Rep. No. 95-948, at 3 (1978), *reprinted in* U.S.C.C.A.N. 4749, 4751 ("As testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs.").

¹²⁷ The issue is not new. For a brief discussion of the debate, *see* Shannon E. Liss, *The Constitutionality of Pregnancy Discrimination: The Lingering Effects of Geduldig and Suggestions for Forcing Its Reversal*, 23 N.Y.U. REV. L. & SOC. CHANGE 59, 67 n.35 (1997).

¹²⁸ *See* 42 U.S.C. § 2000e(k) (2012).

¹²⁹ *See id.* § 2000e(k) ("[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title [§ 703(h)] shall be interpreted to permit otherwise . . .").

¹³⁰ *See, e.g., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991) (stating that employer's policy that allows fertile men but not fertile women to choose to work in high-lead jobs is sex-based discrimination).

latitude be given to make sure that pregnant workers can work whenever possible. That could be thought to allow some latitude to give slightly better working conditions to pregnant employees. The Court has taken both positions.

In *Newport News Shipbuilding and Dry Dock Co. v. EEOC*,¹³¹ the Court interpreted the PDA to limit how employers can provide differentiated pregnancy benefits when such differentiation harms male employees.¹³² In *Newport News Shipbuilding*, the employer's health benefits plan provided coverage for an employee's pregnancy-related conditions on the same basis as other health-related conditions.¹³³ However, the plan provided less favorable health benefits for the spouses of male employees than it provided for the male spouses of female employees because the plan covered the pregnancies of the female spouses of male employees less favorably than it covered the maladies of male spouses of female employees.¹³⁴ Given that, the Court deemed married male employees to be treated differently and more poorly than married female employees.¹³⁵ Consequently, the Court determined that the employer had violated Title VII.¹³⁶

The *Newport News Shipbuilding* Court's interpretation of the PDA reflects the pure equality model; the decision was not particularly surprising. Indeed, the EEOC's interpretive guidelines—also focused on the pure equality model—made clear that the employer's approach to pregnancy benefits qualified as treatment detrimental to male employees that should be considered sex discrimination.¹³⁷ Simply, pregnancy discrimination that harms only male employees is sex discrimination. Ironically, had that thinking been recognized in *Gilbert*, the PDA would not have been necessary because the pregnancy discrimination at issue in *Gilbert* would have been considered sex discrimination against women. Though the pure equality model tracks Title VII's ban on sex discrimination, the pure equality approach also has the potential to limit an employer's or a state's ability to help pregnant women thrive in the workplace.

The Court revisited the PDA in *California Federal Savings and Loan Association v. Guerra*,¹³⁸ concluding that the PDA allows states to mandate benefits for pregnant employees that might lead employers to treat pregnant

¹³¹ 462 U.S. 669 (1983).

¹³² *See id.* at 685.

¹³³ *See id.* at 672.

¹³⁴ *See id.*

¹³⁵ The Court's key language is: "[S]ince 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." *Id.* at 684. Of course, in the era of same-sex marriage, this analysis becomes incomplete or inaccurate.

¹³⁶ *See id.* at 685 ("The pregnancy limitation in this case violates Title VII by discriminating against male employees.").

¹³⁷ *Id.* at 673-74.

¹³⁸ 479 U.S. 272 (1987).

employees better than non-pregnant employees.¹³⁹ At issue in *Guerra* was a California statute that required that certain employers provide pregnant workers a qualified right to reinstatement on return from pregnancy-related leave.¹⁴⁰ The statute did not require that all workers get similar benefits or bar employers from providing such benefits to non-pregnant workers.¹⁴¹ Nonetheless, employers argued that the requirement violated or was preempted by the PDA.¹⁴² The Court disagreed, ruling that the California law was not inconsistent with the PDA or its purposes and did not require that employers violate Title VII.¹⁴³

Read together, *Newport News Shipbuilding* and *Guerra* appear to suggest that the PDA may afford some amount of latitude to employers to provide marginal extra benefits to pregnant employees when a statute so requires, but appears to allow little latitude for private employers to give extra benefits to pregnant workers voluntarily if such benefits effectively help or harm employees of a single sex. Pregnancy discrimination could be likened to affirmative action, with the bar on pregnancy discrimination and sex discrimination existing to help pregnant women.¹⁴⁴ A small lean in the direction of helping pregnant women is not repugnant to the statute. However, when the lean is not justified or is too strong, the overarching concern about sex discrimination trumps the concern with helping pregnant women.¹⁴⁵ Precisely where the line should be drawn is unclear.¹⁴⁶ The Supreme Court

¹³⁹ See *id.* at 292 (“The statute is not pre-empted by Title VII, as amended by the PDA, because it is not inconsistent with the purposes of the federal statute, nor does it require the doing of an act which is unlawful under Title VII.”).

¹⁴⁰ See *id.* at 277.

¹⁴¹ See *id.* at 276.

¹⁴² See *id.* at 284.

¹⁴³ See *id.* at 292.

¹⁴⁴ See *supra* note 126 and accompanying text.

¹⁴⁵ See *Guerra*, 479 U.S. at 292-93 (Stevens, J., concurring) (“I believe that the PDA’s posture as part of Title VII compels rejection of his argument that the PDA mandates complete neutrality and forbids all beneficial treatment of pregnancy.”).

¹⁴⁶ The Court has already suggested that the PDA’s effect may be narrow. In *AT&T Corp. v. Hulteen*, the Court ruled that the employer’s use of old time-of-service (“TOS”) rules that discriminated against pregnant persons as part of the employer’s determination of time-of-service for current pension payments is lawful. See *AT&T Corp. v. Hulteen*, 556 U.S. 701, 716 (2009) (finding that employer’s seniority system was bona fide and did not improperly discriminate). The old TOS rules were made unlawful by the PDA. See *id.* at 705 (“On April 29, 1979, the effective date of the PDA, AT&T adopted its Anticipated Disability Plan which replaced the MPP and provided service credit for pregnancy leave on the same basis as leave taken for other temporary disabilities.”). However, the Court concluded that because the discriminatory time-of-service rules were lawful at the time they were used, continuing to use them to calculate current pension payments does not violate Title VII. See *id.* at 707 (holding that “reliance on a pre-PDA differential accrual rule to determine pension benefits does not constitute a current violation of Title VII”).

declined to clarify the issue when it decided *Young v. United Parcel Service, Inc.*,¹⁴⁷ very recently.¹⁴⁸

The Court's treatment of pregnancy discrimination has not been consistently narrow or broad. However, the Court has provided itself significant latitude to define the scope of pregnancy discrimination. That allows the court to view pregnancy discrimination as broadly or as narrowly as it wishes. The implications for protections under ENDA are fairly clear. Expanding Title VII's coverage to sexual orientation and gender identity is somewhat similar to expanding sex discrimination to cover pregnancy discrimination. Title VII's ban on sex discrimination could have been interpreted to cover sexual orientation and gender identity discrimination in the first instance, but as with pregnancy discrimination, it was not.¹⁴⁹ Similarly, as with pregnancy discrimination, the addition of sexual orientation and gender identity to Title VII would protect groups that have been treated poorly in the workplace. Without clear statutory guidance, how to protect those groups would be a question with the pure equality versus additional benefits issue arising in the sexual orientation and gender identity discrimination areas. Congress ought to draft ENDA to guarantee that the issue is resolved on the face of the statute and is not left to interpretation.

CONCLUSION

When given the choice of a broad reading or a narrow reading of explicit expansions of Title VII, the Court has often chosen the narrow reading. Whether the Court's choice is based on hostility to the expansion or interpretive license or inelegant drafting by Congress, the Court appears poised

¹⁴⁷ 2015 WL 1310745 (U.S. Sup. Ct. March 25, 2015).

¹⁴⁸ In *Young*, the plaintiff, a delivery driver for UPS, sued after UPS declined to provide her an accommodation after her doctor advised her that she should not lift packages over a certain weight during the remainder of her pregnancy. *See id.* at *4. UPS argued that it only accommodated three types of workers: those injured on the job, those who had a disability under the Americans with Disabilities Act, and those who had lost their Department of Transportation certification. *See id.* at *5 (specifying workers who had been accommodated). The employer argued that it treated pregnant employees like employees who had been injured while off the job and therefore did not violate the PDA because it provided equal treatment to pregnant workers. *See id.* at *10. The plaintiff argued that UPS accommodated some employees who were similarly situated to her regarding their inability to work and that therefore the employer had violated the PDA. *See id.* Rather than clarifying how broadly or narrowly the PDA ought to be interpreted by directly evaluating UPS' policy, the Court decided that the case would be resolved as any other disparate treatment case would be resolved, with the plaintiff required to prove that the employer's refusal to accommodate plaintiff was intentionally discriminatory. *See id.* at *15-16.

¹⁴⁹ For a brief discussion of the intersection of sex discrimination and sexual orientation discrimination, see Henry L. Chambers, Jr., *Discrimination, Plain and Simple*, 36 TULSA L. J. 557, 575-77 (2001) ("While sex discrimination is actionable, sexual orientation discrimination has not been.").

to narrow any statutory language it wishes to narrow by any means necessary. The Supreme Court's approach makes an attempt to graft a mere expansion of the bases on which employers are prohibited from discriminating possibly insufficient. If Congress wants its intentions honored, it may need to be explicit about precisely how the expansion of Title VII is to be interpreted. In the alternative, Congress may need to draft language that is broader than necessary in order to guarantee that the core of the discrimination it wishes to ban will actually be banned if the Court narrowly interprets the expansion.

There are lessons for ENDA. The current version of ENDA is fairly robust and relatively detailed. It should stay that way. If ENDA is eventually whittled to a simple expansion of the definition of sex discrimination to include sexual orientation and gender identity or to a simple new section of Title VII that adds coverage for sexual orientation and gender identity, the supporters of ENDA may have to fight a losing battle against a Court that has shown that it is willing to read explicit expansions of Title VII as narrowly as possible. If that occurs, the fault will arguably be with ENDA's drafters. The Court has made its proclivities clear. ENDA's drafters need to take the interpretive power out of the Court's hands by making as clear as possible precisely how and how broadly ENDA is supposed to protect sexual orientation and gender identity.