Transgender Pregnancies and the PDA

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I. INTRODUCTION

While pregnancy is a condition that is extremely important to the continuation of the human race, it was almost entirely left out of employment law until the 1970s. Until the birth of the women's liberation movement and the influx of people who could give birth entering the work force, there was seemingly no reason to protect workers from discrimination based on pregnancy. The Pregnancy Discrimination Act (PDA) was passed in 1978 to provide women protection from this pervasive form of employment discrimination.

The Pregnancy Discrimination Act of 1978 was passed in response to a Supreme Court decision ruling that pregnancy was not covered by Title VII of the Civil Rights Act of 1964.[1] In response, Congress passed the Pregnancy Discrimination Act.[2] The PDA protects against discrimination on the basis of pregnancy and includes this protection under the protection against discrimination on the basis of sex in Title VII.[3] However, the statute also explicitly states "*women* affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes[.]"[4]

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1. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 127-28 (1976).
2. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k).
3. 42 U.S.C. § 2000e(k).
4. *Id.*

We know that it is not just women who become pregnant. Men, non-binary, gender fluid, and other individuals also may have the capacity to become pregnant. "Sex" and "gender identity" are two wholly separate entities, and while they might interact at times, they often do not.[5] "Sex" is what we think of as "biological sex," though even that term does not belie the true extent of the concept of "sex."[6] "Sex" is considered the "biological differences" between men and women, such as secondary sex characteristics, reproductive organs, and hormones.[7] "Gender" is how an individual identifies. "Gender refers to the socially constructed characteristics of women and men, such as norms, roles, and relationships of and between groups of women and men. It varies from society to society and can be changed."[8]

In the summer of 2020, the Supreme Court issued a ruling in *Bostock v. Clayton County, Georgia*, including discrimination on the basis of gender identity, sexual orientation, etc. under the umbrella of discrimination "on the basis of sex" under Title VII.[9] This raises a multitude of questions. Since "on the basis of sex" is now expanded to include protection from discrimination because of gender identity or gender expression—thereby protecting all transgender, non-binary, gender-fluid, and gender-queer people—and the PDA derives its power from under the same umbrella, does the PDA now protect all people who may become pregnant? Does the specification of "women" in the statute actually limit our application of it, excluding transgender men, non-binary, gender-fluid, and gender-queer people? If so, did *Bostock* change that limitation? Or is it just a sign of the times and ignorance left over from the time of its conception, not an actual limitation to its application?

This Comment discusses how, throughout the promulgation of the PDA, many people who can give birth have been left seemingly unprotected. Part II discusses the creation of the Pregnancy Discrimination Act, as well as the case law preceding and following its inception. Part III discusses current case law that dictates the application of the PDA. Part IV provides a background for Transgender Rights under Title VII. Finally, Part V discusses our ability to apply the PDA to transgender and non-binary pregnancies and concludes this Comment.

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5. Tim Newman, *Sex and Gender: What is the Difference?*, MED. NEWS TODAY, (May 11, 2021), https://www.medicalnewstoday.com/articles/232363.

6. *Id.*

7. J. Brad Reich, *A (Not So) Simple Question: Does Title IX Encompass "Gender"?*, 51 J. MARSHALL L. REV. 225, 227, 232 n. 45 (2018).

8. Newman, *supra* note 5.

9. Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1731 (2020).

II. INTRODUCTION TO THE PREGNANCY DISCRIMINATION ACT

Pregnancy discrimination was an issue for feminists and women's rights advocates long before the Pregnancy Discrimination Act was enacted.[10] In early pregnancy discrimination cases, plaintiffs anticipated success by bringing pregnancy discrimination cases under the Equal Protection Clause of the Fourteenth Amendment.[11] In *Cleveland Board of Education v. LaFleur*, public school teachers were mandated to take leave when they reached the fifth month of their pregnancy.[12] The Court of Appeals for the Sixth Circuit held that the policy violated the Equal Protection Clause, because it discriminated against pregnant women with no constitutional justification.[13] The Supreme Court affirmed that this policy violated the Fourteenth Amendment, but based their decision on the Due Process Clause of the Fourteenth Amendment, not the Equal Protection Clause.[14] Previously, the Court had established a substantive due process right to privacy in *Griswold v. Connecticut* and *Roe v. Wade*.[15] In these two landmark cases, the Court stated that there is a long standing right to privacy, and the decision of *if* and *when* to have children is fundamental to that right.[16] The Court held that in *LaFleur*, the government was interfering with that decision with the five month policy.[17] By coercing women to essentially leave the work force, even temporarily, if they get pregnant, the government is unduly influencing the fundamental choice of having children.[18] The Court in *LaFleur* noticeably did not answer the question of whether pregnancy discrimination is sex discrimination under Title VII.[19] In the district and appellate courts, a consensus emerged that pregnancy-based classifications were, in fact, sex discrimination made unlawful by Title VII.[20]

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10. Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 YALE J.L. & FEMINISM 1, 2 (2009).

11. *Id.* at 6-7.

12. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 634 (1974).

13. *Id.* at 632.

14. *Id.* at 651.

15. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965); Roe v. Wade, 410 U.S. 113, 152 (1973).

16. *Id.*

17. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. at 640.

18. *Id.*

19. *See* Cleveland Bd. Of Educ. v. LaFleur, 414 U.S. 632 (1974) (the Court decided the issue of maternity regulation under the Due Process Clause of the Fourteenth Amendment and did not pursue the question under Title VII).

20. Pedriana, *supra* note 10, at 6.

In *Geduldig v. Aiello*, plaintiffs brought an action against California to challenge a policy where work loss from pregnancy was exempted from disability coverage.[21] The Court held that this policy did not violate the Equal Protection Clause of the Fourteenth Amendment because "[t]here is no risk from which men are protected and women are not[,] [likewise], there is no risk from which women are protected and men are not."[22] In *Geduldig*, the Court devised a test that would later be used in *General Electric Co. v. Gilbert*, stating "[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 . . . The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes."[23] Though *Geduldig* was not a case arising under Title VII, it did provide the conclusion that would later show up in *General Electric Co*., that pregnancy discrimination was not inherently sex discrimination.[24] Before *General Electric Co.*, the lower courts had come to the other conclusion, that pregnancy discrimination was sex discrimination prohibited under Title VII.[25] This dichotomy was changed by *General Electric Co*.[26]

In *General Electric Co. v. Gilbert*, female employees sued their employer, alleging that not covering disabilities arising from pregnancy in the employee health care plans was sex discrimination that violated Title VII.[27] The Court held that not covering pregnancy was not a pretext for discrimination against women under Title VII, essentially allowing for employers to not cover pregnancy related health conditions.[28] The Court said there was no sex discrimination because the insurance policy did not delineate between men and women, but rather pregnant people and non-pregnant people.[29] The dissenters in *General Electric Co*. argued that this policy was clearly sex discrimination since, as they stated, *only women* could become pregnant.[30]

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21. Geduldig v. Aiello, 417 U.S. 484, 486 (1974).
22. *Id.* at 496-97.
23. *Id.* at 496, n. 20.
24. *Id.*
25. Pedriana, *supra* note 10, at 8-9.
26. *Id.* at 10.
27. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 127-28 (1976).
28. *Id.*
29. *Id.* at 138-139.
30. "By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.* at 161-62 (Stevens, J., dissenting).

Feminists and women's rights advocates were outraged by the decision in *General Electric Co*.[31] A couple of days after the decision in *General Electric Co.,* the *New York Times* printed an article saying "'outraged women's rights advocates . . . labor and women's groups said yesterday that they were preparing legislation to counteract the decision and require that disability plans provide for the payment of wages to women out of work because of pregnancy.'"[32] The view that pregnancy discrimination was inherently sex discrimination against women was incredibly common among feminist activists, lawyers, union officials, politicians, and others working on drafting the legislation and directing the push for a protection for pregnancy discrimination.[33]

In response to *General Electric Co.*, Congress passed the Pregnancy Discrimination Act of 1978. The PDA amends Title VII to prohibit sex discrimination on the basis of pregnancy.[34] The PDA expands "because of sex" discrimination to include discrimination based on pregnancy.[35] The text of the PDA reads:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.
>
> This subsection 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: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.[36]

Women who became pregnant were now protected from discrimination on the basis of their pregnancy, and though the PDA did not fix every form of pregnancy discrimination, it was a much needed advancement in the law for people who may become pregnant. Protecting women from being terminated or demoted in their careers because of pregnancy was a radical change to say the least. This allowed women to be more fully incorporated

31. Pedriana, *supra* note 10, at 11.
32. *Id.*
33. *Id.* at 12.
34. 42 U.S.C. § 2000e(k).
35. *Id.*
36. *Id.*

in the work force.[37] By incorporating women more fully into the workforce, the PDA has subverted commonly held cultural norms relegating women to the home and private sphere.[38] The PDA has protected birth givers from discrimination based on pregnancy, but it also protects birth givers from discrimination on the basis of abortion.[39] The PDA has also been expanded to protect the spouses of pregnant employees.[40]

In *Newport News Shipbuilding and Dry Dock Company v. EEOC*, the Court interpreted the PDA for the first time. All three dissenters in *General Electric* (Justices Stevens, Marshall, and Brennan) joined the majority in *Newport News*, with the opinion delivered by Justice Stevens.[41] Male employees of Newport News filed suit alleging sex discrimination because female employees were given hospitalization benefits for pregnancy related conditions while the female spouses of the male employees were not given similar coverage.[42] The Court held that the PDA overturned *General Electric Co*.'s ruling that exclusion of disabilities caused by pregnancy in employee health-care plans is not sex discrimination.[43] The Court rejected the test used in *General Electric*, that the delineation was between non-pregnant people and pregnant people, and stated that the correct standard was "between persons who face a risk of pregnancy and those who do not," and *since only women could become pregnant*, the policy was indeed sex discrimination.[44]

Later, in *California Federal Sav. and Loan Ass'n v. Guerra*, the Court held that the PDA mandated that protections against pregnancy discrimination could not fall below the extent illustrated in the act, not that any further protections would be suspect, and that states could build upon the guidelines in the PDA.[45] Employers filed suit in an attempt to strike down a California statute mandating that employers had to provide leave and reinstatement for pregnant employees, claiming the statute was

37. *See* Saru M. Matambanadzo, *Reconstructing Pregnancy*, 69 SMU L. REV. 187, 205 (2016).
38. *Id.* at 205.
39. *Id.* at 206.
40. *Id.*; *See* Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 671-72 (1983).
41. Id. at 670; *see* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 160-62 (1976). (Stevens, J., dissenting) and 146-160 (Brennan & Marshall, JJ., dissenting).
42. *Newport News*, 462 U.S. at 674.
43. *Id.* at 676.
44. *Id.* at 678 (quoting Gen. Elec. Co., 429 U.S. at 161-62, n. 5) (Stevens, J., dissenting).
45. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 285 (1987).

preempted by Title VII.[46] The Court doubled down on the PDA's protection from pregnancy discrimination, at least during gestation, stating that protecting women from pregnancy discrimination and giving them these benefits creates an equal playing field so that women can participate in the work force fully.[47] In this case, we see both the congressional intent and the Court's intent to, at least at its base, protect against pregnancy discrimination and to expand upon that protection. *Guerra* has been an extremely important case in pregnancy discrimination jurisdiction.[48] The Supreme Court has determined that the PDA acts as "a floor not a ceiling," allowing further protections for pregnant women to be built on top of it.[49] Though federally the PDA has weak spots, which this Comment expands on later, the PDA "had a fundamental impact on the expansion of legal protections for women workers generally, and for pregnant workers specifically."[50]

III. CURRENT CASES

In *Young v. United Parcel Service*, an employee brought suit against the United Parcel Service (UPS) because it refused to accommodate the plaintiff's pregnancy by adopting lifting limitations recommended by the plaintiff's doctor.[51] Other employees had offered to help the plaintiff with lifting and UPS had acquiesced to lifting limitations because of other disabilities or ailments.[52] Because of UPS's failure to accommodate her pregnancy, the plaintiff had to stay home without pay during most of her pregnancy.[53] The plaintiff relied on the second clause of the PDA to claim disparate impact.[54] The Court held that a plaintiff can claim a disparate impact claim under the PDA using the *McDonnell Douglas* framework.[55] The *McDonnell Douglas* framework allows a plaintiff to prove disparate impact discrimination under Title VII by "showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a

46. *Id.* at 275-79.
47. *Id.* at 288-89.
48. Pedriana, *supra* note 10, at 9.
49. Matambanadzo *supra* note 37, at 237.
50. Pedriana, *supra* note 10, at 13.
51. Young v. United Parcel Serv., Inc., 575 U.S. 206 (2015).
52. *Id.*
53. *Id.*
54. *Id.* at 1345.
55. *Id.*

discriminatory criterion illegal under [Title VII].'"[56] The Court found in favor of the plaintiff.[57]

Though the PDA has many successes, it also has weak spots and failures. Recently, the PDA has been narrowed to primarily protect birth givers during the gestation of their pregnancies.[58] Birth givers are often not protected from discrimination based on conditions that arise from pregnancy, such as breast feeding or lactation.[59] Women are still denied adequate paid leave and many birth givers' partners are not given adequate leave to help with care responsibilities.[60] Furthermore, during the raising of the child, mothers especially are often discriminated against for their care obligations.[61] Also, because of recent Court decisions such as *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, establishing a "ministerial exception" for employment discrimination, the efficacy of the PDA has been severely restrained,[62] especially when it comes to transgender, non-binary, and gender-queer birth givers.

There has not been a wealth of recent litigation concerning transgender pregnancy and the PDA. However, there is a recent case that has been moved to federal court. In October, 2020, Shaun Simmons filed suit against Amazon, his employer.[63] Simmons is a transgender man who worked in an Amazon warehouse in New Jersey.[64] In 2019, Simmons informed his supervisors that he was pregnant.[65] Simmons started being harassed by other employees soon after.[66] Simmons's managers started criticizing his work performance in order to get Simmons demoted.[67] Simmons complained to Amazon's human resources department and was soon after placed on leave.[68] When Simmons returned, he was demoted to item picker, where he was forced to carry large and heavy items, which was detrimental to his pregnancy.[69] Simmons complained to HR about

56. Furnco Const. Corp. v. Waters, 438 U.S. 567, 576 (1978).
57. *Young*, 135 U.S. at 1344.
58. *See* Matambanadzo, *supra* note 37, at 187.
59. *Id.* at 207.
60. *Id.* at 207-08.
61. *Id.*
62. *Id.* at 208.
63. Dan Avery, *Transgender Man Files Pregnancy Discrimination Suit Against Amazon*, NBC NEWS, (Oct. 6, 2020, 3:15 PM), https://www.nbcnews.com/feature/nbc-out/transgender-man-files-pregnancy-discrimination-suit-against-amazon-n1242324.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

abdominal pain resulting from lifting while pregnant and HR yet again placed him on leave, stating he must have a doctor's note for pregnancy related accommodations.[70] Simmons claimed he provided the requisite doctor's notes but, yet again, was refused accommodations. Simmons was then placed on unpaid leave pending the birth of his child.[71]

Simmons filed a claim of sex discrimination and pregnancy discrimination against Amazon.[72] However, Simmons filed a suit under New Jersey's Law Against Discrimination, not a federal claim under Title VII or the PDA.[73] Regardless, the suit was moved to federal court, even though Simmons did not claim discrimination under Title VII.[74] Although not a suit under the PDA, the New Jersey statute is very similar to the PDA in that it "protects [an] employee who is a *woman* affected by pregnancy" against discrimination on the basis of pregnancy.[75] Thus, the same questions are raised: does this statute preclude Mr. Simmons from protection from discrimination on the basis of his pregnancy because he is not a woman? Or does the statute protect pregnancy, no matter what gender the parent, despite the inclusion of "woman" in its text?

IV. ANALOGOUS TOPICS—TRANSGENDER RIGHTS UNDER TITLE VII

Ulane v. Eastern Airlines is one of the first court cases where a transgender plaintiff sued their employer for sex discrimination under Title VII.[76] In *Ulane*, the plaintiff, who was a licensed pilot, was fired by the defendant, her employer, when she came out as transgender and began transitioning.[77] Although she was an accomplished pilot, the defendant employer fired her after learning of her status as a transgender woman.[78] Ulane alleged she was discriminated against because of sex as made impermissible by Title VII, both for her status as transgender and for her status as a woman, presenting the court with an interesting illustration of

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. N.J. Stat. Ann. § 10:5-12 (2020).
76. *See* Carolyn E. Coffey, *Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures*, 7 N.Y. CITY L. REV. 161, 173 (2004) (explaining that the Seventh Circuit decided Ulane, after the Ninth Circuit considered discrimination under Title VII as it pertained to transgender people in Holloway v. Arthur Anderson & Co., 566 F.2d 659 (9th Cir. 1977)).
77. Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1082 (7th Cir. 1984).
78. *Id.*

intersectionality.[79] The Court of Appeals for the Seventh Circuit denied that "sex" included gender identity and protection for transgender plaintiffs, and insisted that the term "sex" as used in Title VII described *just* "biological sex."[80] The Seventh Circuit reasoned "transition did not change her biological sex, in that it did not create a uterus and ovaries, or alter her male chromosomes . . . [t]herefore, since Ulane did not change her sex, the airline did not discriminate against her 'because of sex.'"[81]

The Supreme Court changed and expanded "sex discrimination" under Title VII just four years later in *Price Waterhouse v. Hopkins*. In *Price Waterhouse*, Hopkins alleged she had been discriminated against because of her sex because she did not fit into sex stereotypes of what a woman should be.[82] Hopkins was an accomplished senior accountant whose employer even described her as an "outstanding professional."[83] However, the defendant employer did not promote Hopkins to partner, as was customary, because she was too aggressive and one co-worker even went so far as to say she needed to go to "charm school."[84] The Court found in favor of Hopkins, formulating a new framework of sex discrimination: "mixed-motive" discrimination.[85] The Court also found that Hopkins was being punished and discriminated against for not fulfilling her co-worker's and employer's stereotypes of her sex, and termed this to be "sex stereotyping" discrimination.[86] Hopkins was not just being discriminated against as a woman, the Court said, but also because she failed to *act* like a woman.[87] The Court stated that discriminating against an individual based on sex stereotypes is impermissible sex discrimination under Title VII.[88]

Though not explicitly concerning transgender rights or having a transgender plaintiff, *Price Waterhouse* became a valuable tool for transgender plaintiffs to obtain protection under the sex discrimination provision of Title VII.[89] Before *Bostock*, transgender plaintiffs found

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79. *Id.*
80. *Id.* at 1086-87.
81. Erin E. Buzuvis, *"On the Basis of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J.L. GENDER & SOC. 219, 229 (2013) (discussing early Title VII cases defining discrimination based on sex).
82. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).
83. *Id.* at 234.
84. *Id.* at 234-35.
85. *Id.* at 252.
86. *Id.* at 251.
87. *Id.* at 258.
88. *Id.* at 250.
89. Buzuvis, *supra* note 81, at 230.

success when bringing claims of sex discrimination by asserting sex stereotype discrimination.[90] In *Smith v. City of Salem*, Smith was suspended with the intention to later terminate her employment by her employer, the fire department of the City of Salem, for being a transgender woman.[91] Smith filed a claim of sex discrimination under Title VII.[92]

Smith alleged that she was being discriminated against based on sex stereotypes pursuant to *Price Waterhouse*.[93] The Court of Appeals for the Sixth Circuit noted in their analysis of whether or not this was sex stereotype discrimination that "the term 'gender' is one borrowed from grammar to designate the sexes as viewed as social rather than biological classes."[94] The court even went so far as to say "[t]he Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination[.]"[95] The plaintiff argued that because she was assigned male at birth and now identifies as a woman, she was being punished because her mannerisms, style of dress, and general identity did not fit in with the sex stereotype of someone who was assigned male at birth.[96] The Court of Appeals for the Sixth Circuit, although altogether refusing to recognize Smith's gender identity and misgendering her throughout the entire opinion, found that Smith was being discriminated against because she was "expressing less masculine, and more feminine mannerisms and appearance."[97] Accordingly, the court ruled in favor of Smith and found that she was being discriminated against for failing to comply with sex stereotypes, and therefore was being discriminated against because of sex.[98]

In *Barnes v. City of Cincinnati*, Barnes was a transgender woman who worked for Cincinnati's police department.[99] The plaintiff lived as a man during work, but at night and on her off hours lived her life as a transgender woman.[100] When Barnes's employers found out, they demoted her after previously awarding her a promotion.[101] Barnes employed the

90. *Id.* (discussing that transgender plaintiffs have prevailed in court by claiming the sex stereotype discrimination formulated by *Price Waterhouse*, 490 U.S., at 235).
91. Smith v. City of Salem, Ohio, 378 F.3d 566, 568 (6th Cir. 2004).
92. *Id.*
93. *Id.* at 571.
94. *Id.* at 572 (internal quotation marks omitted).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 575.
99. Barnes v. City of Cincinnati, 401 F.3d 729, 733 (6th Cir. 2005).
100. *Id.*
101. *Id.* at 735.

same strategy that the plaintiff in *Smith* used.[102] Using the sex stereotype discrimination framework from *Price Waterhouse*, the plaintiff succeeded in establishing a sex discrimination claim for her discrimination as a transgender woman.[103]

However, the strategy of using the framework in *Price Waterhouse* to protect transgender plaintiffs from discrimination was not successful every time. In *Etsitty v. Utah Transit Authority*, Etsitty's employment as a bus driver was terminated after informing her employer that she was transgender and would be transitioning.[104] Etsitty utilized the sex stereotype discrimination framework pursuant to *Price Waterhouse* and filed a suit for unlawful sex discrimination under Title VII.[105] The Court of Appeals for the Tenth Circuit refused to consider the question of whether Etsitty was being discriminated against for failure to conform to sex stereotypes, holding that there was no pretext here and the defendant had a legitimate and non-discriminatory reason to terminate the plaintiff's employment.[106] The Utah Transit Authority (UTA) argued that because UTA drivers usually use public restrooms along their stops, and not UTA restrooms, the UTA did not want to open itself up to "liability."[107] The UTA claimed that when Etsitty used the women's public restrooms "while wearing a UTA uniform, despite the fact she still had male genitalia[,]" it could result in liability for the UTA, and thus is a legitimate reason for Etsitty's termination.[108] The Tenth Circuit agreed.[109] But, when *Bostock* was decided, it was a radical change of employment discrimination law.

In *Bostock v. Clayton County, Georgia*, one plaintiff, Gerald Bostock, was fired from his job as a child welfare advocate because he identified as gay.[110] Another plaintiff, Aimee Stephens, was terminated from her job at a funeral home because she presented as a man when she was first hired, but came out after six years at her job and began transitioning.[111] All plaintiffs alleged unlawful discrimination on the basis of sex under Title VII.[112] The Court began their analysis by stating that though the term "sex" "referred to status as either male or female [as] determined by reproductive

102. *Id.* at 737.
103. *Id.* at 741.
104. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1218-19 (10th Cir. 2007).
105. *Id.* at 1218.
106. *Id.* at 1224.
107. *Id.*
108. *Id.*
109. *Id.*
110. Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1737-38 (2020).
111. *Id.* at 1738.
112. *Id.*

biology" when the Civil Rights Act of 1964 was enacted, that did not limit the application of "sex" as in Title VII.[113] The term "sex" is just a starting point, and "[the] question isn't just what 'sex' meant, but what Title VII says about it."[114]

The Court stated that both Congress and the Court have in the past expanded the meaning of "because of sex," even allowing plaintiffs to prove sex discrimination when "sex" is just a motivating factor and not a but-for cause.[115] Someone is discriminated against for their sex when their employer "intentionally treats a person worse because of sex."[116] It does not matter if an employer treats one sex the same as another sex; if they mistreat *an individual*, at least in part because of their sex, that is unlawful discrimination because of sex.[117]

The Court concluded "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[118] The Court employed a hypothetical where an employer has two employees attracted to men, one is male and one is female.[119] If an employer would fire the male employee and not the female employee for being attracted to men, then such action is impermissible discrimination based on sex, because the sex of the employee is the only difference in the scenario.[120] Similarly, if an employer has two employees, one who was assigned male at birth but later identifies as a woman, and one who was assigned female at birth and identifies as a woman, and the employer terminates an employee because they are transgender, the employer is firing that person for traits and actions they permit in the other employee because of the sex they were assigned at birth.[121] This is impermissible discrimination based on sex.[122] *Bostock* finally protected transgender plaintiffs from employment discrimination based on their status as transgender.[123]

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113. Although, this is not true, as feminist and gender theory activists have been pondering the disconnect and fluidity of "sex" and "gender" since long before the 1960's. *Id.* at 1739 (internal quotation marks omitted).

114. *Id.*

115. *Id.* at 1739-40.

116. *Id.* at 1740.

117. *Id.* at 1741.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 1742.

123. *Id.* at 1743.

V. RECOMMENDATION/CONCLUSION

As discussed above, despite its successes, there are a large number of failures of the Pregnancy Discrimination Act.[124] One of these failures is its overlooking of birth givers who are not cis-gendered women.[125] The statute explicitly states "The terms 'because of sex' or 'on the basis of sex' *include, but are not limited to*, because of or on the basis of pregnancy, childbirth, or related medical conditions; and *women* affected by pregnancy."[126] Notice that the statute states *women* affected by pregnancy.[127] Due to the mainstream idea of pregnancy and who could become pregnant in 1978, it is hard to know if this was an intentional exclusion of birth givers or just a mistake borne out of ignorance and oversight.[128] However, Title VII, the statute which the PDA amends, states that it is unlawful for an employer to discriminate against any "*individual*" on account of race, color, religion, sex, or national origin.[129] Does the fact that the statute the PDA amends is gender neutral in its application matter?

In *Can Trans Reproductive Bodies Exist?*, author Chase Strangio discusses the pressing discrimination and stigma transgender bodies encounter in reproductive health spaces.[130] Strangio recounts an experience in a gynecologist's office where the doctor immediately asked him if he was there to discuss a hysterectomy.[131] This experience is not uncommon for transgender individuals seeking reproductive health care and sends two common messages: first, that transgender people only need reproductive medical care regarding their transition, and second, that transgender people have no desire to biologically reproduce.[132] These types of messages and experiences lead to inadequate health care for the transgender community and the coerced sterilization of the transgender community.[133] Past and current reproductive rights movements have been extremely transgender exclusionary, framing pregnancy and rights to abortion as inherently female.[134]

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124. *See* Matambanadzo, *supra* note 37, at 209.
125. Pregnancy Discrimination Act of 1978, *supra* note 34.
126. *Id.* (emphasis added).
127. *Id.*
128. David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309, 311-12 (2019).
129. 42 U.S.C. § 2000e-2.
130. Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223 (2016).
131. *Id.* at 223.
132. *Id.* at 223-24.
133. *Id.* at 224.
134. *Id.* at 224-25.

In recent years, there has been urging by a few prominent feminists to avoid "throwing away" womanhood by reframing reproductive rights as a "uterus owner's issue," and not exclusively a "woman's issue."[135] This is true; reproductive rights are women's rights, but they are also men's rights, non-binary's people's rights, gender-fluid's people's rights, and gender-queer people's rights.[136] Strangio challenges the discrimination society promulgates on transgender people for just existing in their bodies and pressure to medically change their body parts, saying "[a]s this narrative is collectivized through our desire for the recognition of the legitimacy of our transness as something real and politically cognizable and our 'need' for affirming care as something legitimate, we reinforce ideas about how sexed bodies look and operate within a binary."[137] The narrative disseminated by the popular feminist movement is that the inclusion of transgender and gender non-conforming people in the reproductive rights movement would somehow derail the movement.[138] This argument is inherently anti-transgender. "The decision to center cisgender women in the conversations about pregnancy and abortion access has been compelled by the Court's holdings in *Geduldig*, *Roe*, and *Casey* in which the Court has gone out of its way to obscure the concrete and measurable harms to those forced to carry an unwanted or unsafe pregnancy to term."[139]

The implication that only cisgender women can become pregnant, is extremely damaging for transgender individuals.[140] They are "literally killing trans[gender] people."[141] They have led to transgender and gender non-conforming individuals receiving woefully inadequate health care, and in the terms of pregnancy, prenatal care.[142] Some health-care companies do not cover gynecological care for people who are listed as "male" in their records.[143] In one case, a thirty-two-year-old transgender man had been rushed to the emergency room for abdominal pain by his

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135. *Id.* at 229.

136. *See Id.* at 229; Katha Pollitt, *Who Has Abortions?*, NATION (Mar. 13, 2015), http://www.thenation.com/article/who-has-abortions/ [https://perma/cc/UJ75-THK6].

137. *Id.* at 226.

138. *Id.* at 227.

139. *Id.* at 233.

140. *Id.* at 241.

141. *Id.*

142. *See* Jessica Clarke, *Pregnant People?*, 119 COLUM. L REV. 172, 180-181 (2019) (explaining how transgender men may not have necessary access to obstetric and gynecological care because of discrimination from health-care providers and insurance companies which leaves transgender men at a higher risk for death).

143. *Id.*

boyfriend and the nurse, although informed he had taken an at home pregnancy test which had come back positive, did not realize the issue until too late.[144] The nurse called for an emergency cesarean section after some time, but the baby was born stillborn.[145] Had the nurse not employed stigma about who can become pregnant and who cannot, the emergency cesarean may have gone differently.[146] For transgender and gender non-conforming people, pregnancy can be a series of trials.[147] Some individuals have severe gender dysphoria, leading one patient to say "I looked at it as something to endure to have a child."[148] Transgender and gender non-conforming people do not just experience these struggles at the hands of medical professionals, but also the larger world.[149] One man said he refused to go outside during his pregnancy, as he was so worried about the reactions of others and did not want to "invite trouble."[150]

While society has made a concerted effort of neutralizing the gender of child rearing and family planning, pregnancy and birth are still extremely sex and gender stigmatized.[151] In *Unsexing Pregnancy*, David Fontana and Naomi Schoenbaum argue that we need to remove the inherent sex stereotypes involved in pregnancy.[152] Fontana and Schoenbaum raise the same point raised by Strangio: that we have relegated pregnancy to being exclusively experienced by cisgender women.[153] Almost all sides of the sex discrimination debate consider pregnancy as a "biological sex difference."[154] Fontana and Schoenbaum argue that "unsex[ing] pregnancy" would also benefit all birth givers, as "[d]isaggregating sex from carework at the beginning is important because sex-based caregiving stereotypes—and the sex-discriminatory laws that enforce them—are at the root of so much sex inequality. Dismantling these sex stereotypes after birth is too little because it is too late."[155]

Fontana and Schoenbaum argue jurisprudence and legislation treats pregnancy as merely a physical condition for women and not something

144. *Id.* at 181.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 181-82.
149. *Id.* at 182.
150. *Id.*
151. Fontana & Schoenbaum, *supra* note 128, at 311-12.
152. *Id.* at 312-13.
153. *Id.* at 311-12; Strangio, *supra* note 130, at 224.
154. Fontana & Schoenbaum, *supra* note 128, at 312.
155. *Id.* at 313.

that their partners also partake in.[156] Equal protection principles have reinforced the breadwinner-homemaker stigma of pregnancy by comparing the "care- and market-work" of women and men.[157] To unsex pregnancy, we have to recognize the care work and responsibilities done by their partner.[158]

Fontana and Schoenbaum argue we can "unsex pregnancy" by applying heightened scrutiny to laws that classify by sex during pregnancy.[159] Applying a higher scrutiny to sex classifications in laws and policies regarding pregnancy would mandate courts "to distinguish between when sex classifications constitutionally regulate on the basis of physical sex differences and when they unconstitutionally regulate on the basis of sex stereotypes."[160]

It is important to recognize both care work that is tied to experiencing the physical condition of pregnancy and care work that is not.[161] But Fontana and Schoenbaum still center cisgender and heterosexual ideas and experiences of pregnancy. In my view, it is not the fact that we view pregnancy as a physical condition that is a detriment, but rather we attribute that physical condition exclusively to women. If we expand our views about who may experience the physical condition of pregnancy, I think we could also unsex pregnancy through our societal view. Pregnancy could become individualized, a physical condition experienced by a wide array of individuals, and not just a certain group.

Of course, the quickest way to protect transgender and gender non-conforming people from pregnancy discrimination is to have Congress amend the PDA to change the term "woman" to "individual."[162] But the jurisprudence for a gender-neutral application of the Pregnancy Discrimination Act may already exist.

In *General Electric Co.* and *Geduldig*, the Court explicitly states that it believes legislative classifications regarding pregnancy are not inherently a sex based classification, but rather a classification between pregnant persons and non-pregnant persons.[163] In *Geduldig*, the Court did

156. *Id.* at 331.
157. *Id.* at 333.
158. *Id.*
159. *Id.* at 355.
160. *Id.*
161. *Id.* at 343.
162. *See Id.* at 362-63 (suggesting that sex-neutral affirmative caregiving benefits will help achieve sex equality in pregnancy and child-rearing).
163. Geduldig v. Aiello, 417 U.S. at 496, n. 20; Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 134-35 (1976).

not hold that pregnancy discrimination could never be discrimination "on the basis of sex," just that the regulation under review in *Geduldig* was not discrimination based on sex.[164]

The Court said in *Newport News* that the PDA overturned *General Electric Co.*, "by amending Title VII of the Civil Rights Act of 1964 to 'prohibit sex discrimination on the basis of pregnancy.'"[165] But, again, in *General Electric Co.*, the Court did not say that there could never be sex discrimination on the basis of pregnancy, just that the policy in *General Electric Co.* was not sex discrimination.[166]

Even "on the basis of sex," the category that protects against pregnancy discrimination, has had gender-neutral application in the past, protecting all sexes from discrimination on the basis of sex.[167] The Pregnancy Discrimination Act itself has had arguably a gender-neutral application in the past with *Newport News*.[168] In *Newport News*, the Court extended the benefits of the PDA to male employees, by vesting it with their partners.[169] This expanded the scope of the PDA widely, not just protecting employees from pregnancy discrimination, but also the employee's spouses who became pregnant.[170]

Furthermore, *Bostock* just recently redefined "on the basis of sex" to include discrimination based on sexual orientation and gender identity.[171] Because "on the basis of sex" also includes pregnancy discrimination, there is a strong argument that pregnant people who are not cis women are, or should be, covered by the PDA. A pregnant lesbian could potentially suffer discrimination because of pregnancy *and* because of sexual orientation and would be able to receive protection from both by the sex discrimination clause in Title VII. A gay non-binary person may be discriminated against because of their sexual orientation and their gender identity, and also receive protection from sex discrimination by Title VII. Thus, if a pregnant transgender man was discriminated against because of his pregnancy and his gender identity, both forms of sex discrimination,

164. *See Geduldig*, 417 U.S. at 496, n. 20.

165. Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. at 670.

166. *Gen. Elec. Co.*, 429 U.S. at 134.

167. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that classifications based on sex are suspect, and that sex discrimination can be suffered by all sexes, as the victim of sex discrimination was the male spouse of a military employee).

168. *Newport News*, 462 U.S. at 685.

169. *Id.* at 683-84.

170. *Id.* at 684.

171. Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1731 (2020).

logic follows that Title VII would protect him from the intersection of his sex discrimination just as it would in the previous hypotheticals.

Outside of *Newport News*, the cases prior to the application of the Pregnancy Discrimination Act may offer guidance to our current application. Ironically, despite their infamous and inflammatory conclusions, the strategy of *General Electric Co*. and *Geduldig* are examples of a gender-neutral view of pregnancy.[172] In both cases, the Court viewed the distinction made by the policy as a classification and differentiation between those who are pregnant and those who are not.[173] The Court explicitly stated the differentiation was based on pregnancy, not male and female.[174] If the Court would use the reasoning built in *General Electric Co*. and *Geduldig*, it could construe pregnancy as a temporary physical condition experienced by men, women, and gender non-conforming people alike.

This would, obviously, protect transgender, non-binary, and gender-queer persons from pregnancy discrimination. But a construction of pregnancy as a temporary physical condition could help cis-gendered women as well, by alleviating gender stereotypes and sex differentiated care standards that so often accompany pregnancy.

The intent of the Pregnancy Discrimination Act, to protect individuals from discrimination on the basis of pregnancy, will only be served if the Court interprets the PDA as a broad statute, meant to protect all identities of individuals. With the expansion of discrimination "on the basis of sex" by *Bostock*, this seems like the next logical move. A failure to do so will not only neglect the impetus of the Pregnancy Discrimination Act, but Title VII as a whole.

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172. *See* Geduldig v. Aiello, 417 U.S. 484 (asserting that the state's insurance program did not protect men from risks where women remained unprotected or vice versa, hence the program did not discriminate against any definable class or group); *see also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (holding that a Title VII violation may be established if there is proof that an otherwise facially neutral classification is to discriminate against members of one class or another).

173. *Geduldig*, 417 U.S. at 496, n. 20; *Gen. Elec. Co.*, 429 U.S. at 135.

174. *Geduldig*, 417 U.S. at 496, n. 20 ("The program divides potential recipients into two groups—pregnant women and nonpregnant persons.").