

# Reasonably Accommodating Employment Discrimination Law

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## ABSTRACT

Federal employment discrimination laws requiring reasonable accommodations changed and expanded significantly in 2023. The Pregnant Workers' Fairness Act ("PWFA") became effective in June 2023, requiring employers to make reasonable accommodations for pregnancy, childbirth, and related medical conditions. Just two days later, the Supreme Court rendered a decision in *Groff v. DeJoy*, which expanded employers' duty under Title VII of the Civil Rights Act of 1964 to make reasonable accommodations for religious practices. Federal employment discrimination law now has three statutes imposing substantial duties of reasonable accommodation—the Americans with Disabilities Act (disabilities), Title VII (religion), and the PWFA (pregnancy, childbirth, and related medical conditions). The most significant problem regarding this expanded subset of federal employment discrimination law is that these duties are created by three separate statutes that have significant asymmetries among them. In this way, the law requiring reasonable accommodations has become a microcosm of the whole of federal employment discrimination law. The asymmetries in the law of reasonable accommodations produce a body of law that is almost inscrutable—both challenging to apply and difficult to justify. Congress should address this significant problem in the law of reasonable accommodations and employment discrimination law generally by repealing the existing employment discrimination statutes and replacing them with a single statute. In doing so, Congress could retain or create any intended asymmetries within that single statute and eliminate the unintended ones, rather than leaving such asymmetries to be resolved by the cumbersome back-and-forth process in which Congress and the Supreme Court have engaged for six decades.

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#### I. THE ACCOMMODATING YEARS: 2015 AND 2023

In 2015, the United States Supreme Court decided two cases addressing employers’ duties to make reasonable accommodations under federal employment discrimination laws. In *Young v. United Parcel Service, Inc.*, the Court held that pregnant employees may prevail on claims alleging that their employers violated Title VII by failing to make reasonable accommodations for limitations associated with pregnancy, childbirth, or related medical conditions, but only in limited circumstances.<sup>1</sup> A couple of months later the Court rendered its decision in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, holding that a plaintiff need not prove that an employer actually knew that an applicant’s (or employee’s) religious-based practice

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1. See *Young v. UPS, Inc.*, 575 U.S. 206, 230 (2015).

conflicting with a workplace requirement was based on the applicant's religious beliefs; rather, all that is required is that the plaintiff prove that the need for an accommodation is a motivating factor in the employer's adverse decision.<sup>2</sup> These decisions addressed the employers' duties for providing reasonable accommodations for two distinct protected characteristics covered under Title VII: pregnancy and religion. Moreover, the two decisions interpreted Congressional amendments of Title VII.<sup>3</sup> In 1972, Congress added a section to define "religion" to include "all aspects of religious observance and practice."<sup>4</sup> In 1978, Congress added another statutory section to clarify that Title VII's "on the basis of sex" language includes "on the basis of pregnancy, childbirth, or related medical conditions."<sup>5</sup> These amendments changed the law articulated in\* Supreme Court decisions.<sup>6</sup>

Because *Young* and *Abercrombie & Fitch* both addressed how an employer must accommodate an employee or applicant, legal scholars were quick to make comparisons between the two decisions.<sup>7</sup> The holdings in the two decisions were generally seen as victories for plaintiffs because they represented expansions of employee rights under Title VII, but some commentators criticized the Court's explanations of employment discrimination law.<sup>8</sup> Most scathing was Professor Harper's critique of the decisions, explaining that the Court had difficulty distinguishing between

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2. See EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 772 (2015).

3. See 42 U.S.C. §§ 2000e-2000e-17.

4. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j)).

5. See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

6. Congress included reasonable accommodations within the definition of "religion" with the intention of changing the result in *Dewey v. Reynolds Metal Co.*, in which an evenly divided Court affirmed a circuit court decision, holding that an employer did not discriminate based on religion if the employer failed to accommodate an employee's practice based on religious beliefs. See H.R. REP. 101-644(I), 101st Cong., 2d Sess. 1990, 1990 WL 259280 (Legis. Hist.) (citing *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971)). The Pregnancy Discrimination Act was also intended to change the law from the Court's holding in *General Electric v. Gilbert* that discrimination based on pregnancy is not sex discrimination covered by Title VII. See H.R. REP. No. 27(I), 117th Cong., 1st Sess. 2021, 2021 WL 1940249 (Legis. Hist.) (citing *General Elec. Co. v. Gilbert*, 429 U.S. 125, 135-36 (1976)).

7. See generally, e.g., Michael C. Harper, *Confusion on the Court: Distinguishing Disparate Treatment from Disparate Impact in Young v. UPS and EEOC v. Abercrombie & Fitch, Inc.*, 96 B.U. L. REV. 543 (2016); Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1092-93 (2017); Meghan Boone, *The Autonomy Hierarchy*, 22 TEX. L. CIV. LIBERTIES & CIV. RTS. 1 (2016); Elizabeth C. Tippet, *Opportunity Discrimination: A Hidden Liability Employers Can Fix*, 23 EMP. RTS & EMP. POL'Y J. 165, 182-83 (2019); William R. Corbett, *Breaking Dichotomies at the Core of Employment Discrimination Law*, 45 FLA. ST. U. L. REV. 763, 765-66 (2018) [hereinafter Corbett, *Breaking Dichotomies*].

8. See generally Harper, *supra* note 7; Boone, *supra* note 7.

the theories of discrimination that it created—disparate treatment and disparate impact.<sup>9</sup>

In 2023, déjà vu occurred at the Supreme Court when addressing the employer’s duty to reasonably accommodate in employment discrimination law. Unlike in 2015, Congress joined the Supreme Court in revisiting and revising the duties of reasonable accommodation. Congress addressed the issue of reasonable accommodations for pregnancies, childbirth, and related medical conditions (“pregnancy discrimination”) in the Pregnant Workers Fairness Act (“PWFA”).<sup>10</sup> President Biden signed the PWFA into law on December 29, 2022,<sup>11</sup> and the law went into effect on June 27, 2023.<sup>12</sup> The PWFA provides that employers must make reasonable accommodations for limitations encountered by pregnant employees and applicants.<sup>13</sup> On June 29, 2023, the Supreme Court again addressed reasonable accommodations for religious practices,<sup>14</sup> rendering its decision in *Groff v. DeJoy*.<sup>15</sup> That decision clarified the “undue hardship” standard that limits employers’ duty to make reasonable accommodations for employees’ and applicants’ religious practices.<sup>16</sup>

Both the PWFA and *Groff*, like the 2015 Court decisions, seemingly expand the duties of employers to make reasonable accommodations for protected characteristics under Title VII. While the expansion of these duties may be celebrated by advocates and supporters of employment

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9. See generally Harper, *supra* note 7.

10. See Consolidated Appropriations Act 2023 Div. KK, Pub. L. No. 117-328, 136 Stat. 4459 (2023) (codified at 42 U.S.C. §§ 2000gg–2000gg-6).

11. See *id.*; see also J. Edward Moreno, *Accommodating Pregnant Workers: New Workplace Law Explained*, BLOOMBERG LAW: DAILY LAB. REP. (Jan. 3, 2023, 10:30 AM), <https://perma.cc/Z9QU-J8DB>. On the same day, President Biden also signed the Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act, which amends the Fair Labor Standards Act by imposing obligations on employers to provide a time and a place for nursing mothers to express milk. See Consolidated Appropriations Act 2023, Pub. L. No. 117-148, 136 Stat. 4459 (2023). Both laws expand legal protections for women.

12. See Alisha Haridasani Gupta, *A New Law Aims to Stop Pregnancy Discrimination at Work*, N.Y. TIMES (June 27, 2023), <https://perma.cc/R9VU-52CU>; see also *What You Should Know About the Pregnant Workers Fairness Act*, EEOC, <https://perma.cc/R7FS-BU85> (last visited Oct. 6, 2023).

13. See 42 U.S.C. § 2000gg-1.

14. The Court had not addressed the issue since its 2015 decision in *EEOC v. Abercrombie & Fitch*. Since 2015, it became clear that the Court was moving toward reconsideration of the duty of reasonable accommodations. There seemed to be good prospects in 2021 that the Supreme Court would grant certiorari in a pair of cases to decide whether to revisit and overturn the precedents holding that the Title VII duty to make reasonable accommodations for religion is merely *de minimis*. However, the court denied certiorari in those cases: *Dalberiste v. GLE Assocs., Inc.*, 814 Fed. Appx. 495 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2463 (2021); *Small v. Memphis Light, Gas & Water*, 952 F.3d 821 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1227 (2021). In *Small*, Justices Gorsuch and Alito, in a strongly worded opinion, dissented from the denial of certiorari.

15. *Groff v. DeJoy*, 600 U.S. 447 (2023).

16. *Id.* at 468.

discrimination law, the purpose of this Article is not to praise them, but to offer them as the most recent exemplars of significant problems in federal employment discrimination law. Professor Harper argued that the 2015 Supreme Court accommodations decisions, *Young* and *Abercrombie & Fitch*, demonstrated the Court's misunderstanding of its self-created theories of discrimination.<sup>17</sup> Now, the PWFAs and the Supreme Court decision in *Groff* further demonstrate the largely dysfunctional, piecemeal approach that Congress and the Supreme Court have followed for over half a century in revising and updating employment discrimination law.

The piecemeal approach follows a general pattern: (1) the Supreme Court interprets language from one of the employment discrimination statutes,<sup>18</sup> which each have different language and different analytical structures; (2) Congress sometimes disagrees with the Court's decisions and enacts amendments that legislatively overturn or change the result of the decision (essentially "patches" to repair the law in the aftermath of the Court decision); and (3) the Court then interprets the new law. Over decades, this pattern has produced a body of law spanning several employment discrimination statutes for various protected characteristics with too many distinctions or asymmetries in the law among the separate statutes and the various protected characteristics.<sup>19</sup> Although some asymmetry is intended and may be appropriate,<sup>20</sup> some is not.<sup>21</sup> The back-and-forth between Congress and the Supreme Court has created an

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17. See generally Harper, *supra* note 7.

18. The four most significant statutes under which claims are asserted are the following: the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-15); the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634); the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12117); and § 1981, 42 U.S.C. § 1981. Congress also enacted the Genetic Information Nondiscrimination Act in 2008, see Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended in scattered sections of 26, 29, and 42 U.S.C.), but the volume of charges filed under the Act has been small, and there are few reported cases discussing the Act. See *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2022*, EEOC, <https://perma.cc/X7EU-P8C7> (last visited Oct. 6, 2023) (stating that in 2022, only 444 charges, 0.6% of all charges filed, alleged genetic information discrimination). The Rehabilitation Act of 1973 mandates nondiscrimination under federal grants and programs but is not included as a main discrimination statute because it does not create a cause of action for private sector employees. See Pub. L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394 (codified as amended at 29 U.S.C.A. §§ 701-796).

19. See, e.g., *infra* Part IV.

20. Consider, for example, Title VII's creation of a bona fide occupational qualification for discrimination based on sex, national origin, and religion, but its exclusion of discrimination based on race and color. See 42 U.S.C. §2000-e-2(e).

21. An example is the Court's holding that the mixed-motives analytical framework is not available under the Age Discrimination in Employment Act although it is applicable under Title VII. See *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 180 (2009).

unnecessarily complex and almost incomprehensible body of law. A different approach is needed.

Part II of this Article describes the Supreme Court's decisions regarding the law of reasonable accommodations in *Young* and *Abercrombie & Fitch*. Part III discusses the PWFA and the Court's decision in *Groff*. Part IV examines the pervasive asymmetries in employment discrimination law, and Part V considers and critiques the asymmetries in the law of reasonable accommodations. Finally, Part VI proposes a solution that is superior to the back-and-forth development of the law by Congress and the Supreme Court—the enactment of one comprehensive employment discrimination statute.

## II. THE SUPREME COURT'S ACCOMMODATIONS DECISIONS IN 2015

### A. *Young v. United Parcel Service, Inc.: Accommodating Pregnancy*

The Supreme Court's decision in 2015 planted the seed for Congress's enactment of the PWFA in 2022.<sup>22</sup> In *Young v. United Parcel Service, Inc.*, the employer had refused to provide an accommodation for a pregnant employee who requested relief from the employer's requirement that drivers must be able to lift packages of a specified weight.<sup>23</sup> The Court addressed the issue of whether the Pregnancy Discrimination Act of 1978 ("PDA") imposes a duty on employers to reasonably accommodate pregnancy, childbirth, or related medical conditions.<sup>24</sup> Notably, the 1978 PDA was Congress's means of overturning a Supreme Court decision holding that pregnancy discrimination was not sex discrimination.<sup>25</sup>

Rather than amend section 703(a) of Title VII, which enumerates the statute's "unlawful employment practice[s],"<sup>26</sup> Congress, in the PDA, amended section 701, the definition section of Title VII.<sup>27</sup> Congress's

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22. See H.R. REP. NO. 117-27(I), at 14–16 (2021), reprinted in 2021 WL 1940249 (Legis. Hist.) (explaining that *Young v. UPS* does not guarantee pregnant workers a reasonable accommodation and improperly forces plaintiffs to identify a comparator—an "oftentimes insurmountable hurdle"). Regarding comparators, the Court in *Young* held that a plaintiff might create a genuine issue of material fact on the issue of failure to accommodate by producing evidence that the employer accommodates most nonpregnant employees with lifting limitations while refusing to accommodate pregnant employees with such limitations. See *Young v. UPS*, 575 U.S. 206, 229–30 (2015).

23. See *Young*, 575 U.S. at 211.

24. See *id.* at 210.

25. See sources cited *supra* note 6.

26. 42 U.S.C. § 2000e-2(a). In contrast, in the Americans with Disabilities Act, "not making reasonable accommodations" is listed as a type of prohibited discrimination. See 42 U.S.C. § 12112(b)(5).

27. See 42 U.S.C. § 2000e(k).

decision to amend the definition section created uncertainty regarding whether the PDA created a duty of reasonable accommodation and uncertainty concerning the relationship between the two clauses of the PDA.<sup>28</sup> As amended, the statutory language did not expressly create a duty of reasonable accommodations, in contrast with the Americans with Disabilities Act (ADA).<sup>29</sup> However, Congress's 1972 Title VII amendment regarding religion also amended the definition section.<sup>30</sup> Unlike the PDA, the religion amendment expressly stated that "religion" includes a duty to reasonably accommodate religious observances or practices.<sup>31</sup>

The Court rejected two extreme positions for which the parties advocated in *Young*<sup>32</sup> and, instead, adopted a middle-ground position. The

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28. The two clauses are separated by a semicolon:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k). The first clause seemingly treats pregnancy discrimination as nothing more than a subset of sex discrimination, which would not encompass a duty on the part of the employer to make reasonable accommodations for pregnant employees. The second clause, on the other hand, seemingly requires something more than nondiscrimination on the basis of sex. The second clause can be interpreted as imposing a duty of reasonable accommodation because it states that pregnant employees are to be accorded the same treatment as a group of nonpregnant employees who have abilities and disabilities similar to those of pregnant employees.

29. As used in subsection (a) of the American with Disabilities Act, the term "discriminate against a qualified individual on the basis of disability" includes:

not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C. § 12112 (a)(5)(A).

30. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (codified at 42 U.S.C. § 2000e(j)).

31. See *id.* The Act amended Title VII to provide as follows:

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

*Id.*

32. The plaintiff's interpretation would have required employers in some circumstances to provide reasonable accommodations to pregnant employees if they provide reasonable accommodations to similarly situated nonpregnant comparators. The employer's interpretation would have treated pregnancy as merely a subset of sex discrimination and would not have required employers to provide reasonable

Court inserted a limited and unusual duty to accommodate into the undisputed champion of individual disparate treatment analysis—the *McDonnell Douglas* pretext analysis.<sup>33</sup> Essentially, the Court held that a plaintiff *may* prevail on a failure-to-accommodate claim by producing sufficient evidence that the employer’s legitimate, nondiscriminatory reason for not providing an accommodation is pretextual.<sup>34</sup> A plaintiff could prove pretext, the Court explained, by demonstrating that the employer’s policies impose a significant burden on pregnant women and that these policies are not justified by the employer’s legitimate, nondiscriminatory reason.<sup>35</sup> A significant burden can be satisfied by showing that the employer provides accommodations to a large percentage of nonpregnant workers but does not do so for a large percentage of pregnant workers.<sup>36</sup> Most surprisingly, in *Young*, the Court grafted a disparate impact analysis onto the disparate treatment analysis.<sup>37</sup> Justice Scalia’s dissenting opinion was quick to highlight this previously unpardonable sin.<sup>38</sup> Prior to *Young*, the Court had always insisted that the two theories of discrimination were distinct and could never be blended.<sup>39</sup>

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accommodations, regardless of the employer’s accommodation of other similarly disabled nonpregnant employees. *See Young v. UPS*, 575 U.S. 206, 220 (2015).

33. Under the *McDonnell Douglas* framework, a plaintiff bears the initial burden of production to establish a prima facie case by proving: (1) that he belongs to a protected class; (2) that he applied for and was qualified for the job; (3) that despite his qualifications, he was rejected; and (4) that the position remained open, and the employer continued to seek applicants having the plaintiff’s qualifications. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973). The Court noted in *McDonnell Douglas* that the elements of a prima facie case will vary with different factual situations. If the plaintiff satisfies the burden of a prima facie case, the burden of production shifts to the defendant-employer to present a legitimate, nondiscriminatory reason for its actions. If the employer satisfies its burden at the second stage, the burden of production then shifts back to the plaintiff to prove that the employer’s proffered reason for not hiring is a pretext for discrimination. *See id.* The *McDonnell Douglas* pretext analysis is pervasive in the disparate treatment analysis. *See generally* SANDRA F. SPERINO, *MCDONNELL DOUGLAS: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW* (2018).

34. *See Young*, 575 U.S. at 229–30.

35. *See id.*

36. *See id.* at 230.

37. *See, e.g.,* Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 *GEO. L.J.* 559, 584 (2017). The Court’s incorporation of an adverse effect analysis into the third stage of the pretext analysis is a grafting of the disparate impact analysis onto the disparate treatment analysis. As Professor Brake expresses the point, “[t]his move rips the seams out of the traditional understanding of what separates impact from treatment claims.” *Id.*

38. *See Young*, 575 U.S. at 249 (Scalia, J., dissenting) (stating that the decision “allow[s] claims that belong under Title VII’s disparate-impact provisions to be brought under its disparate-treatment provisions instead”).

39. *See, e.g., Raytheon Co. v. Hernandez*, 540 U.S. 44, 52–53 (2003) (explaining that the Court consistently has recognized a distinction between disparate treatment and disparate impact claims); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609–10 (1993) (explaining differences between disparate treatment discrimination and disparate impact discrimination); *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 197–



Of course, the *Young* majority did not acknowledge that it was blending these two theories and thereby treading on previously forbidden ground.<sup>40</sup>

The analysis cobbled together by the Court in *Young* is among the most unusual and garbled analyses ever articulated by the Court. The Court implicitly recognized a duty to reasonably accommodate pregnancy if a specific case could cram the evidence into the *McDonnell Douglas* three-part burden-shifting analysis. The Court's majority seemed shy about this strange analysis, explaining that it would not likely be needed much in the future.<sup>41</sup> Most failure-to-accommodate pregnancy claims, the Court explained, would be asserted under the ADA in light of the enactment of the ADA Amendments Act of 2008.<sup>42</sup>

The ineffective back-and-forth process between the Supreme Court and Congress is illustrated by the two Supreme Court decisions which resulted in the PDA, which, in turn, produced *Young*. After *Young*, the Court was not done for the term with considering duties of reasonable accommodations in employment discrimination law. Next up was the duty of religious accommodations.

#### B. EEOC v. Abercrombie & Fitch: *Accommodating Religious Practices*

Unlike *Young*'s effect on the PWFA, the Court's 2015 decision in *EEOC v. Abercrombie & Fitch* was not the direct impetus for its 2023 decision in *Groff v. DeJoy*. However, *Abercrombie & Fitch* and *Groff* share the common theme of the Court's expansion of the duty of reasonable accommodations for religious practices.

Common threads exist between *Abercrombie & Fitch* and *Young*. In *Abercrombie & Fitch*, reminiscent of *Young*, the Court was interpreting a 1972 amendment of Title VII.<sup>43</sup> That amendment was intended to overturn

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98(1991) (stating that business necessity is a defense to a disparate impact claim, but not to a disparate treatment claim; bona fide occupational qualification is the analogous defense to a disparate treatment claim).

40. The original text of Title VII did not designate these two distinct theories of discrimination. It was not until 1977 that the Supreme Court would clearly delineate and explain these two theories in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

41. The Court explained that Congress's enactment of the ADA Amendments Act of 2008 might limit the future significance of the *Young* decision and the analysis developed therein. See *Young*, 575 U.S. at 219–20.

42. See Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (2008) (codified as amended at 42 U.S.C. § 12101 *et seq.*). In order for an impairment to constitute a disability under the ADA, it must “substantially limit” a “major life activity.” See 42 U.S.C. § 12102. In the ADA Amendments Act of 2008, Congress amended the definition “major life activities” to include “walking, standing, lifting, bending.” See, e.g., Jeanette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 444 (2012).

43. See Pub. L. 92-261, § 2(7), 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j)).

a Supreme Court decision affirming a lower court decision holding that employers were not required to accommodate religious practices.<sup>44</sup> Another similarity is that in *Abercrombie & Fitch*, as in *Young*, the Court was interpreting an amendment not of Title VII's section 703 but of section 701, its definition section.<sup>45</sup>

In *Abercrombie & Fitch*, the Court considered a case in which an employer did not hire an applicant who wore a head covering to her interview because it would have violated the employer's dress code.<sup>46</sup> The employer claimed that it did not know that the applicant needed an accommodation regarding the head covering for religious reasons.<sup>47</sup> The Court in *Abercrombie & Fitch* held that an applicant (or employee) is not required to prove the employer's actual knowledge that the applicant's religious practice conflicting with a work requirement was linked to the applicant's religion.<sup>48</sup> Rather, looking to the language of Title VII, as amended by the Civil Rights Act of 1991 ("CRA"),<sup>49</sup> the Court held that a plaintiff is required to prove only that an employer's desire not to provide a religious accommodation is a motivating factor in the employer's adverse decision.<sup>50</sup>

The *Abercrombie & Fitch* majority began its analysis by declaring that there are only two causes of action for discrimination under Title VII—disparate treatment and disparate impact.<sup>51</sup> Before that declaration, many courts and commentators considered a failure-to-accommodate claim as a distinct cause of action with its own elements and analysis.<sup>52</sup> The majority opinion explained why failure to accommodate is not a

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44. See *Groff v. DeJoy*, 600 U.S. 447, 458 (2023) (citing *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971), *aff'g by an equally divided Court*, 429 F.2d 324 (6th Cir. 1970)); see also sources cited, *supra* note 6.

45. See 42 U.S.C. § 2000e(j). Congress's decision to place the duties of reasonable accommodation in the definition section of Title VII leaves unclear whether a failure to accommodate is a separate cause of action for discrimination under Title VII. In contrast, failure to accommodate is a separate cause of action for discrimination under the ADA.

46. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 770 (2015).

47. See *id.* at 772.

48. See *id.* at 774.

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

50. See 42 U.S.C. § 2000e-2(m). The Court relied on the fact that the statutory language requires a plaintiff to prove only that the protected characteristic was a motivating factor for its adverse employment action. *Abercrombie & Fitch*, 575 U.S. at 772–73.

51. See *Abercrombie & Fitch*, 575 U.S. at 771–72.

52. See, e.g., *Reed v. Great Lakes Cos.*, 330 F.3d 931 (7th Cir. 2003); *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337 (8th Cir. 1995); Roberto L. Corrada, *Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases*, 77 U. CIN. L. REV. 1411, 1411 (2009); David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 936 (1993); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1361 (2009).

separate and distinct cause of action: as enacted in 1964, section 703 of Title VII prohibits just two enumerated practices.<sup>53</sup> Congress's 1972 amendment of Title VII placed the religious accommodation requirement in the definition section, section 701,<sup>54</sup> not in the section regarding the prohibition of unlawful employment practices in section 703. Justice Thomas's concurring opinion agreed with the majority on only one point—there are only two causes of action for discrimination under Title VII.<sup>55</sup> However, Justice Thomas explained that the majority was inserting the statutory definition of religion into section 703(a) by basing its decision on the standard of causation.<sup>56</sup> Justice Thomas was correct, and the insertion of religion into section 703(a) enabled the majority to make the failure-to-accommodate claim part of disparate treatment in section 703(a)(1).<sup>57</sup> Concomitantly, the Court invoked the “motivating factor” standard in section 703(m),<sup>58</sup> which was the key to the majority's holding. By incorporating the “motivating factor” standard into the non-accommodation analysis and by refusing to recognize a separate cause of action for failure to accommodate, the Court in *Abercrombie & Fitch* created asymmetry among the three protected characteristics for which federal employment discrimination law recognizes a duty of reasonable accommodations—religion, pregnancy, and disability.

First, the Court's invocation of the “motivating factor” standard imported one of the most significant asymmetries within the federal employment discrimination statutes into the failure-to-accommodate analysis.<sup>59</sup> In the CRA, Congress inserted the “motivating factor” standard into section 703 of Title VII but failed to include the standard in the Age Discrimination in Employment Act (“ADEA”) and the ADA.<sup>60</sup> Moreover, the Supreme Court held in *Gross* and *Nassar* that because the CRA amended only Title VII's section 703, but-for causation is required to

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53. See *Abercrombie & Fitch*, 575 U.S. at 771 (“These two proscriptions, often referred to as the ‘disparate treatment’ (or ‘intentional discrimination’) provision and the ‘disparate impact’ provision, are the only causes of action under Title VII.”).

54. See Act of Mar. 24, 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (1972) (codified at 42 U.S.C. § 2000e(j)).

55. See *Abercrombie & Fitch*, 575 U.S. at 780–81 (Thomas, J., concurring in part and dissenting in part).

56. See *id.* at 783 (“[I]nserting the statutory definition of religion into § 2000e-2(a) does not answer the question whether *Abercrombie*'s refusal to hire [plaintiff] was ‘because of her religious practice.’”).

57. Justice Thomas would have situated the claim under § 703(a)(2) disparate impact. See *id.* at 788.

58. See 42 U.S.C. § 2000e-2(m).

59. See *Abercrombie & Fitch*, 575 U.S. at 772–73 (majority opinion).

60. See Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–634a); see also Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12117).

prove claims under the ADEA and the anti-retaliation provision of Title VII.<sup>61</sup> Although the Court has not yet decided the issue, it seems likely that but-for causation will also be required for claims under the ADA, based on the rulings of several circuit courts.<sup>62</sup> Furthermore, although section 1981 of the Civil Rights Act of 1866 (“section 1981”) has no language regarding a causation standard,<sup>63</sup> the Supreme Court has applied its default standard of but-for causation to claims under that statute.<sup>64</sup>

Second, in *Abercrombie & Fitch*, the Court declared that there is no failure-to-accommodate cause of action under Title VII.<sup>65</sup> In contrast to Title VII, the ADA establishes a distinct cause of action for failure to accommodate because the ADA expressly lists the failure to make reasonable accommodations as one type of discrimination.<sup>66</sup> The rationale of *Abercrombie & Fitch*, that failure to accommodate is not a separate cause of action, must also have applied to the *Young*-based claim for non-accommodation of pregnancy, childbirth, and related medical conditions. The rationale was applicable because, as with religion, the PDA added pregnancy as a protected characteristic by amending section 701, the

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61. See generally *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009); see also *Univ. of Tex. Sw. Med. Ctr v. Nassar*, 570 U.S. 338 (2013).

62. See, e.g., *Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 234 (4th Cir. 2016) (joining the 6th and 7th circuits in applying but-for causation to the ADA); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 321 (6th Cir. 2012) (holding mixed-motives analysis is not applicable to the ADA based on *Gross*); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 963–64 (7th Cir. 2010) (same). But see *Hoffman v. Baylor Health Care Sys.*, 597 F. Appx 231, 237 (5th Cir. 2015) (stating that the standard of causation under the ADA is a “motivating factor” standard), *cert. denied*, 136 S. Ct. 45 (2015); *Siring v. Or. State Bd. of Higher Educ.*, 977 F. Supp. 2d 1058, 1063 (D. Or. 2013) (same). If the ADA used the language “because of,” the result would seem certain based on *Gross* and *Nassar* because the Court interpreted “because of” in each of those cases to mean “but for.” However, the ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (codified as amended at 42 U.S.C. § 12101 *et seq.*), changed the language from “because of” to “on the basis of.” See 42 U.S.C. § 12112(a). That change injects some uncertainty into the issue, but it seems likely the Court will interpret “on the basis of” the same as “because of.”

63. See 42 U.S.C. § 1981. “Sections 1981 and 1983 are parts of the Civil Rights Acts that were enacted after the Civil War to ‘give force and effect to the newly ratified Thirteenth, Fourteenth, and Fifteenth Amendments.’” Kelly Koenig Levi, *Allowing a Title VII Punitive Damage Award Without an Accompanying Compensatory or Nominal Award: Further Unifying the Federal Civil Rights Law*, 89 Ky. L.J. 581, 589 (2001) (quoting BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 668 (2d ed. 1983)); see also Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 185–88 (2006) (discussing the history of § 1981).

64. See generally *Comcast Corp. v. Nat’l Ass’n of African American-Owned Media*, 140 S. Ct. 1009 (2020).

65. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 771–72 (2015) (stating that disparate treatment and disparate impact are the only causes of action under Title VII).

66. See 42 U.S.C. § 12112 (b)(5).

definitional section of Title VII,<sup>67</sup> rather than the unlawful practices section. The Court in *Young* implicitly adopted that rationale by holding that a failure-to-accommodate pregnancy claim could be established under the pretext proof framework applicable to disparate treatment.

Thus, *Abercrombie & Fitch* exacerbated the asymmetry and incoherence of federal employment discrimination law in the realm of accommodations law by making distinctions between failure-to-accommodate claims under Title VII on the one hand and those under the ADA on the other hand. The decision also set the stage for further asymmetry caused by Congress and the Supreme Court in 2022-23.

### III. CONGRESS AND THE SUPREME COURT REVISE AND REPAIR ACCOMMODATIONS LAW IN 2023

#### A. *The PWFA: Congress Again Cleans Up After the Court in Pregnancy Discrimination*

The PWFA has been introduced in every session of Congress since 2012.<sup>68</sup> Congress finally enacted the PWFA in December 2022, and it was later signed into law by President Biden.<sup>69</sup> The law imposes a duty on employers to make reasonable accommodations for an employee's or applicant's known limitations related to pregnancy, childbirth, or related medical conditions.<sup>70</sup> Through the enactment of the PWFA, pregnancy became the third protected characteristic under federal employment discrimination law for which there is an express statutory duty for employers to make reasonable accommodations.<sup>71</sup> Rather than amending the definition section of Title VII, as the PDA did, the PWFA enumerates several unlawful practices.<sup>72</sup> The first unlawful practice is an employer failing to make a reasonable accommodation unless making such an accommodation would impose an undue hardship on the employer.<sup>73</sup> The second is requiring an employee to accept an accommodation other than a reasonable accommodation determined through the interactive process.<sup>74</sup>

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67. See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

68. See H.R. REP. NO. 117-27(I), at 8–11; see also Erin Jackson & Eliza Horne, *The Birth of New Rights for Pregnant, Postpartum, and Nursing Employees*, 97 FLA. B.J. 44, 44 (May/June 2023).

69. See *supra* text accompanying notes 10–11.

70. See 42 U.S.C. §2000gg-1.

71. See Consolidated Appropriations Act 2023, Pub. L. No. 117-328, 136 Stat. 4459, Div. KK § 103.

72. See *id.*

73. See *id.* § 103(1).

74. See *id.* § 103(2). “Interactive process” is included in the definitions of “reasonable accommodation” and “undue hardship,” and all those terms have meanings derived from the Americans with Disabilities Act. *Id.* §102(7).

The third is denying employment opportunities based on the need to make reasonable accommodations.<sup>75</sup> The fourth is to require a qualified employee to take paid or unpaid leave if another reasonable accommodation can be provided.<sup>76</sup> Finally, as with all federal employment discrimination laws, the PWFA includes an anti-retaliation provision.<sup>77</sup>

Although the PWFA incorporates the powers, remedies, and procedures of Title VII,<sup>78</sup> the terminology and concepts of the duty of an employer to provide reasonable accommodations are based on those in the ADA.<sup>79</sup> The decision to adopt concepts from the ADA is logical, given the purpose of the statute, because the law regarding the duty to accommodate is far more developed and far more favorable to employees under the ADA than under Title VII.<sup>80</sup> Employees and applicants are covered by the PWFA if they are “qualified employees,” meaning they can perform the essential functions of the job, with or without reasonable accommodations.<sup>81</sup> Similar to the ADA, which requires reasonable accommodation of “known physical or mental limitations of an otherwise qualified individual with a disability,”<sup>82</sup> the PWFA requires employers to make reasonable accommodations “to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee.”<sup>83</sup> The PWFA adopts, as a method of determining reasonable accommodations, the “interactive process,”<sup>84</sup> which is also required by the ADA.<sup>85</sup> The PWFA also limits the employers’ duty to provide reasonable accommodations—by creating an affirmative defense—if providing the accommodation would impose an “undue hardship on the operation of the

75. *See id.* § 103(3).

76. *See id.* § 103(4).

77. *See id.* § 103(5).

78. *See id.* § 104(a).

79. *See* H.R. REP. NO. 117-27(I), at 14–16 (2021), reprinted in 2021 WL 1940249 (Legis. Hist.) at \*26–27.

80. Until *Groff* was decided, the *de minimis* standard for “undue hardship” meant that employers did not have to make accommodations for religion in most cases under Title VII.

81. *See* Consolidated Appropriations Act § 102(6) (codified at 42 U.S.C. §2000gg).

82. 42 U.S.C. § 12112(b)(5)(A).

83. Consolidated Appropriations Act § 103(1) (codified at 42 U.S.C. §2000gg-1).

84. *Id.* §§ 102(7) and 103(2).

85. The term “interactive process” is used not in the statutory language of the ADA or the ADA Amendments Act, but in the ADA regulations. *See* 29 C.F.R. § 1630.2(o)(3). The regulation states:

To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

*Id.*

business,”<sup>86</sup> similar to the ADA.<sup>87</sup> Thus, the PWFA marks a significant change in pregnancy accommodation claims from the type articulated by the Court in *Young*; rather than being forced into the disparate treatment proof framework as was done in *Young*, the PWFA failure-to-accommodate claim is modeled on the more plaintiff-friendly ADA failure-to-accommodate claim.

*B. Groff: The Court Once Again Revises and Repairs Accommodations Law*

The Court rendered its decision in *Groff v. DeJoy* on June 29, 2023—just two days after the effective date of the PWFA. The Court said it was “clarifying” the standard for the statutory “undue hardship” limitation on employers’ duty to reasonably accommodate religious practices.<sup>88</sup>

In *Groff*, the plaintiff, an employee of the U.S. Postal Service (USPS), was an Evangelical Christian and held a religious belief that Sunday is a day for rest and worship.<sup>89</sup> He informed his employer that he was unable to work on Sundays.<sup>90</sup> The employer tried to cover the plaintiff’s Sunday shifts by re-allocating the work to other employees.<sup>91</sup> The plaintiff did not work his Sunday shifts and was disciplined, later quitting his job.<sup>92</sup> He sued USPS for failure to make a reasonable accommodation for his religious beliefs and practices.<sup>93</sup>

The district court granted summary judgment for the employer, and the Third Circuit affirmed.<sup>94</sup> The Third Circuit first held that the accommodation offered by the employer, shift swapping, was not a reasonable accommodation because no co-workers swapped shifts with the plaintiff; thus, the offered accommodation did not eliminate the conflict between the job requirement and the plaintiff’s religious practice.<sup>95</sup> The court then turned to the question of whether the plaintiff’s requested accommodation, exempting him from Sunday work, would impose an undue hardship on the employer. Applying what lower courts

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86. Consolidated Appropriations Act §§ 102(7), 103(1) (codified at 42 U.S.C. §§ 2000gg and 2000gg-1).

87. See 42 U.S.C. §§ 12111(10), 12112(b)(5).

88. *Groff v. DeJoy*, 600 U.S. 447, 471 (2023) (stating that much of the existing EEOC guidance on religious accommodations would “be unaffected by our clarifying decision”).

89. See *Groff*, 600 U.S. at 454.

90. See *id.* at 455.

91. See *id.*

92. See *id.*

93. See *id.* at 456.

94. See *Groff v. DeJoy*, 35 F.4th 162, 165, 176 (3d Cir. 2022).

95. See *id.* at 173. The court stated, “even though shift swapping can be a reasonable means of accommodating a conflicting religious practice, here it did not constitute an ‘accommodation’ as contemplated by Title VII because it did not successfully eliminate the conflict.” *Id.*

had understood for almost half a century as the Supreme Court's standard that more than a *de minimis* cost constitutes an undue hardship,<sup>96</sup> the Third Circuit reasoned that exempting the plaintiff from Sunday work would negatively affect co-workers, disrupt workflow, and diminish employee morale.<sup>97</sup> Thus, the court found that the plaintiff's requested accommodation would impose an undue hardship on the employer and affirmed the summary judgment.

The Supreme Court granted certiorari on two questions: (1) whether the Court should disapprove the more-than-*de-minimis*-cost test for refusing Title VII religious accommodations stated in *Trans World Airlines, Inc. v. Hardison*<sup>98</sup> and (2) whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employer's co-workers rather than the business itself.<sup>99</sup>

The Supreme Court first disapproved the *de minimis* cost standard derived from *Hardison*. The Court explained that the phrase in *Hardison* has been given more importance by the lower courts than the Court originally intended.<sup>100</sup> Drawing from the statutory language and a proper understanding of the entire *Hardison* opinion, the Court announced an appropriate standard for undue hardship: if an accommodation would impose a substantial burden in the overall context of the employer's business.<sup>101</sup>

The Court revisited *Hardison* and explained that a single sentence from *Hardison* had been wrenched out of context to become the authoritative interpretation of the statutory limitation of "undue hardship."<sup>102</sup> That sentence read as follows: "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."<sup>103</sup> Placing the *Hardison* decision in historical context, the *Groff* Court explained that the *Hardison* case was framed by the parties as a constitutional challenge under the Establishment Clause to the 1972 amendment of Title VII, which created the duty of reasonable accommodation for religious practices.<sup>104</sup> However, the *Hardison* Court did not address the constitutionality of the 1972 amendment. Instead, the Court focused on whether the Title VII duty of reasonable

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96. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

97. See *Groff*, 35 F.4th at 175.

98. See *Hardison*, 432 U.S. at 63.

99. *Groff v. DeJoy*, No. 21-1900 (*cert. granted* Jan. 13, 2023), <https://perma.cc/S693-JJGY>.

100. See *Groff v. DeJoy*, 600 U.S. 447, 465 (2023).

101. See *id.* at 468.

102. See *id.* at 467–68.

103. *Hardison*, 432 U.S. at 84.

104. See *Groff*, 600 U.S. at 459.



accommodations requires an employer and a union that are parties to a collective bargaining agreement with a seniority system to violate the seniority rights of an employee in order to accommodate a junior employee's religious practices.<sup>105</sup> The Court explained that *Hardison's* clear guidance is that employers are not required to violate such seniority rights. For accommodations other than seniority rights, however, *Hardison's* guidance is much less clear.<sup>106</sup> When considering accommodations that would have given the plaintiff his requested days of worship but imposed financial costs on the employer, the *Hardison* Court used different language—"substantial additional costs" and "substantial expenditures."<sup>107</sup> Considering that language and, of course, dictionary definitions of the words "hardship" and "undue,"<sup>108</sup> the Court held that the appropriate standard for undue hardship is that "the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."<sup>109</sup> The Court explained that all relevant factors must be considered, including the particular accommodations at issue and the size and operating cost of an employer.<sup>110</sup>

In fashioning the "clarified" standard for undue hardship, the Court rejected the Government's and the plaintiff's positions. The Court rejected the Government's argument that the Equal Employment Opportunity Commission's (EEOC) interpretation of *Hardison* has been correct.<sup>111</sup> The Court also rejected the plaintiff's argument that the statutory language of the ADA, "significant difficulty or expense,"<sup>112</sup> and case law interpreting the ADA should be adopted.<sup>113</sup> The Court explained that both arguments went too far. Regarding the Government's argument to use the EEOC's interpretation, the Court explained that much of the EEOC's guidance has been sensible and is unlikely to change based on the Court's newly

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105. *See id.*

106. *See id.* at 465.

107. *Id.* at 464.

108. In recent years, the Supreme Court has been compulsive in its use of dictionary definitions as a means of statutory interpretation. *See generally* Mark A. Lemley, *Chief Justice Webster*, 106 IOWA L. REV. 299, 299 (2020) (stating that "[t]he Court's obsession with dictionaries as the arbiter of statutory meaning is a recent phenomenon"); *see also* Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 66 (2018) (describing the "dictionary-obsessed monoculture" interpretive method of the Court).

109. *Groff*, 600 U.S. at 463 (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 83 (1977)).

110. *See id.* at 470–71.

111. *See id.* at 471. The regulation promulgated by the EEOC gave examples of accommodations that it may consider reasonable and, although using the *de minimis* language of *Hardison*, suggested that employers must bear some costs to satisfy the standard. *See* 42 C.F.R. § 1605.2 (explaining that the EEOC has sought to soften the impact of the "more than *de minimis* cost" standard).

112. 42 U.S.C. § 12111(10)(A).

113. *See Groff*, 600 U.S. at 471.

articulated standard.<sup>114</sup> For example, the regulation providing that no undue hardship is imposed by temporary costs, voluntary shift swapping, or administrative costs is likely to remain the same.<sup>115</sup> However, the Court noted that the EEOC's interpretation has been against the backdrop of lower courts' misinterpretation of *Hardison*.<sup>116</sup>

Turning to the second question on which the Court granted certiorari, the Court held that an employer does not necessarily satisfy the undue hardship test merely by showing that the accommodation would impose a burden on co-workers.<sup>117</sup> The language of the statute requires an undue hardship "on the conduct of the employer's business."<sup>118</sup> Thus, an accommodation's effect on other employees may impact the conduct of the employer's business, but a court is required to analyze that issue rather than assume it.<sup>119</sup> The Court then explained that adverse effects on co-workers do not necessarily constitute an undue hardship on the conduct of the business.<sup>120</sup> They may, or they may not. If the adverse effect is that the accommodation causes co-workers to feel animosity toward the particular religion or religion in general, that does not factor into the undue hardship analysis.<sup>121</sup> Moreover, an employer is required to assess not just a particular accommodation but also other options.<sup>122</sup> For example, in the case before the Court, the employer should not merely conclude that paying other employees to work overtime would be an undue hardship; it also should consider other possible accommodations, such as voluntary shift swaps.<sup>123</sup> Rather than applying the newly articulated standard for undue hardship to the facts of the case, the Court remanded to the lower court for application of the standard to the facts and consideration of whether further factual development was needed.<sup>124</sup>

Justice Sotomayor wrote a concurring opinion, joined by Justice Ketanji Brown Jackson. Justice Sotomayor's concurrence agreed that *Hardison* has been misconstrued as authority for the *de minimis* standard.<sup>125</sup> The concurrence praised the majority for not overruling *Hardison* and instituting in its place the "significant difficulty or expense" standard urged by the plaintiff, explaining that *stare decisis* is particularly

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114. *See id.*

115. *See id.* (citing 29 C.F.R. § 1605.2(d)).

116. *See id.* at 471–72.

117. *See id.* at 472.

118. 42 U.S.C. § 2000e(j).

119. *See Groff*, 600 U.S. at 472 (“[A] court cannot stop its analysis without examining whether that further logical step is shown in a particular case.”).

120. *See id.* at 472–73.

121. *See id.* at 472.

122. *See id.* at 473.

123. *See id.*

124. *See id.*

125. *See id.* at 474 (Sotomayor, J., concurring).

strong in statutory cases.<sup>126</sup> The concurrence noted that despite the introduction of numerous bills since *Hardison* was decided in 1972, and even though Congress has amended Title VII to displace other Supreme Court decisions, Congress has not enacted a statute to displace *Hardison*.<sup>127</sup> Regarding the second question on which certiorari was granted, the concurrence, although not disagreeing with the majority that adverse effects on co-workers do not always satisfy the undue hardship standard, emphasized that adverse impacts on other employees often affect the overall operation of the employer because of the pivotal role of labor in many businesses. Thus, “undue hardship on the conduct of a business may include undue hardship on the business’s employees.”<sup>128</sup>

The *Groff* decision was rendered two days after the PWFAs took effect. A clarified standard for religious accommodations and a new law regarding pregnancy accommodations have changed the landscape of federal employment discrimination law imposing duties of reasonable accommodations. Viewed against a large body of law under the ADA, which imposes a substantial duty of accommodations for disability, there are now three separate laws governing the law of reasonable accommodations. There is reason to be concerned with the asymmetries among the duties of reasonable accommodations.

#### IV. WHERE ARE WE NOW? TOO MANY STATUTES AND TOO MUCH ASYMMETRY

##### A. Federal Employment Discrimination Law Generally

Federal employment discrimination law has developed over 60 years through Congress’s passage of statutes and courts’ interpretation of those statutes and the development of doctrine under them. Additionally, the EEOC has issued regulations and various guidance documents interpreting the statutes. Since 1964, many of Congress’s laws other than the major statutes—the ADEA, the ADA, and the Genetic Information Nondiscrimination Act—have been reactions to Supreme Court decisions that Congress wishes to overturn.<sup>129</sup> The result of this reactive and

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126. *See id.*

127. *See id.* at 474–75.

128. *Id.* at 474 (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 at 79–81 (1977)).

129. The amendments reacting to Supreme Court precedents include: the Pregnancy Discrimination Act of 1978, amending Title VII, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)); the amendment to add the definition of religion to Title VII, including non-accommodation, Act of Mar. 24, 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j)); the Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.); the ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (codified as

piecemeal approach is a complex body of law filled with asymmetries across the separate statutes and the several protected characteristics. A failure to comprehensively rethink employment discrimination law has created an incoherent body of law that is difficult to understand and apply.

So, what's so bad about the state of employment discrimination law? Quite a lot! It is a very serious problem. This section offers a brief synopsis.<sup>130</sup> There are four major statutes under which most employment discrimination litigation arises: section 1981, Title VII, the ADEA, and the ADA. These statutes have significant differences that cause theoretical, analytical, and practical difficulties. Chief among those differences are the causes of action/theories of discrimination, causation standards, and proof frameworks. Thus, the law of reasonable accommodations has increasingly become a microcosm of this incoherent body of law.

### *B. The Law of Reasonable Accommodations*

Before 1972,<sup>131</sup> no federal employment discrimination statute imposed a duty on an employer to provide reasonable accommodations. The 1972 amendment of Title VII imposed such a duty for religious practices, but it did not do that by defining failure to accommodate as an unlawful discriminatory practice; instead, the amendment added a definition of religion to Title VII, thereby creating the duty to provide reasonable religious accommodations.<sup>132</sup> A year after the 1972 Title VII amendment, the Rehabilitation Act of 1973 imposed a duty to provide accommodations, but in the context of government contracts, federal employees, and federal grants.<sup>133</sup> The Rehabilitation Act's reasonable accommodations provision served as the model for the later-enacted ADA.<sup>134</sup>

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amended at 42 U.S.C. § 12101); and the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5 (codified in scattered sections of 29 & 42 U.S.C.).

130. The broken state of employment discrimination law has been discussed generally in other works. See, e.g., Corbett, *Breaking Dichotomies*, *supra* note 7, at 765–66; William R. Corbett, *Calling on Congress: Take a Page from Parliament's Playbook and Fix Employment Discrimination Law*, 66 VAND. L. REV. EN BANC 135, 136 (2013); William R. Corbett, *Cross-Statute Employment Discrimination Claims and the Need for a "Super Statute"*, 99 WASH. U. L. REV. 1773, 1775–76 (2022) [hereinafter Corbett, *Super Statute*]; William R. Corbett, *Intolerable Asymmetry and Uncertainty: Congress Should Right the Wrongs of the Civil Rights Act of 1991*, 73 OKLA. L. REV. 419, 420 (2021).

131. The first such duty was created by the Equal Employment Opportunity Act of 1972. Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j)).

132. See 42 U.S.C. § 2000e(j).

133. See 29 U.S.C. §§ 791–96; see also 29 U.S.C. § 794a(a)(1); see, e.g., Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans With Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both*, 57 WASH. & LEE L. REV. 1045, 1047 (2000).

134. See H.R. REP. NO. 101-485 (II), 101st Cong., 2d Sess. 1990, 1990 U.S.C.C.A.N. 303, 304.

When Congress enacted the PDA in 1978, it was unclear whether the PDA imposed a duty of reasonable accommodations on employers. In the PDA, Congress followed its playbook from the 1972 religion amendment and again amended the definition section of Title VII, adding a section providing that discrimination because of sex includes discrimination because of pregnancy, childbirth or related medical conditions.<sup>135</sup> In 2015, the Supreme Court's decision in *Young* interpreted the PDA's amendment of Title VII as creating a limited and ambiguous duty to provide reasonable accommodations for pregnancy, childbirth, and related medical conditions.<sup>136</sup> Then, in 2022, Congress clarified the ambiguous duty by enacting the PWFA, which expressly imposed a duty on employers to reasonably accommodate pregnancy, childbirth, and related medical conditions.<sup>137</sup> The PWFA largely follows the model of the ADA, enacted in 1990, which is the most carefully crafted reasonable accommodations statute.

Thus, in 2023, there are three protected characteristics—religion, pregnancy, and disability—in our federal employment discrimination law for which there is a statutory duty to make reasonable accommodations. The duties are stated in three different statutes. For religion and pregnancy, the law of reasonable accommodations has been created by an inefficient back-and-forth process between Congress and the Supreme Court.

So, what's so bad about the state of reasonable accommodations law? In short, it is bad for the same reasons as employment discrimination law generally. The problem is that there are three separate statutes and three protected characteristics with different causes of action/theories of recovery, different causation standards, and different proof frameworks. These distinctions create uncertainties and confusion for employers in determining their legal obligations and for lawyers, judges, and juries in resolving reasonable accommodations cases in litigation.

### 1. Causes of Action/Theories of Discrimination

The Court in *Abercrombie & Fitch* rejected the notion that failure to make a reasonable accommodation is a distinct cause of action.<sup>138</sup> The *Abercrombie & Fitch* Court stated that under Title VII there are only two causes of action—disparate treatment and disparate impact.<sup>139</sup> The Court so reasoned, hearkening back to the idea that section 703(a)(1)<sup>140</sup> describes

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135. See 42 U.S.C. § 2000e(k).

136. See *supra* Section II.A.

137. See *supra* Section III.A.

138. See Corbett, *Breaking Dichotomies*, *supra* note 7, at 807–14 (explaining the Court's use of different terms to describe disparate treatment and disparate impact—"causes of action," "theories," or ways of proving discrimination).

139. See *supra* Section II.B.

140. See 42 U.S.C. § 2000e-2(a)(1).

disparate treatment,<sup>141</sup> and section 703(a)(2)<sup>142</sup> embodies disparate impact.<sup>143</sup> As discussed above,<sup>144</sup> there was a reason for the Court's decisions to reject reasonable accommodation as a separate cause of action and to situate the duty to accommodate religious practices in section 703(a). Incorporating the duty of accommodation into section 703(a) gave the Court a basis to invoke the "motivating factor" standard in section 703(m), holding that an employer does not have to actually know of the applicant's or employee's religion-based need for an accommodation so long as the employer was motivated by a desire to avoid making an accommodation.<sup>145</sup> The Court's interpretive gymnastics over disparate treatment and disparate impact was inaccurate, unnecessary, and deleterious to the law of reasonable accommodations. First, the Court inaccurately described the state of employment discrimination law. A lot of water had passed under the bridge since the Court anchored disparate treatment and disparate impact in those specific statutory sections of Title VII.<sup>146</sup> Congress had amended Title VII several times, such as inserting a statutory proof framework for disparate impact.<sup>147</sup> While not expressly acknowledging it in *Abercrombie & Fitch*, the Court has, over the years, recognized what most commentators would call multiple theories of discrimination, causes of action, or theories of recovery.<sup>148</sup> For example, sexual harassment does not fit comfortably under disparate treatment because sexual harassment has a distinct set of elements that a plaintiff must prove to recover as compared with disparate treatment.<sup>149</sup>

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141. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

142. See 42 U.S.C. § 2000e-2(a)(2).

143. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 530–31 (2015). The Court in *Inclusive Communities* accepted the established doctrine that the Court in *Griggs* discerned Congress's intent to create disparate impact as a separate cause of action located in § 703(a)(2). See *id.* (citing *Griggs v. Duke Power*, 401 U.S. 424 (1971)).

144. See, *supra* text accompanying notes 65–67.

145. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 773–74 (2015).

146. The Court identified § 703(a)(1) as the statutory authorization for disparate treatment under Title VII.

147. See 42 U.S.C. § 2000e-2(k).

148. See, e.g., Corbett, *Breaking Dichotomies*, *supra* note 7, at 807–14.

149. See Brake, *supra* note 37, at 586 (stating that harassment claims, although categorized as disparate treatment, are "difficult to situate as simple disparate treatment"); Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV. 1591, 1593 (2000) (positing that sexual-harassment-hostile-environment claims do not fit well under disparate treatment and recommending the creation of a new cause of action combining hostile environment and disparate treatment); cf. Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1367 (2009) (positing that hostile environment claims do not invoke a distinct theory but are instead, "something else entirely: a form of harm").

Second, the Court's approach was unnecessary to reach its holding. The Court could have declared that a plaintiff is not required to prove that the employer has actual knowledge of the applicant's or employee's religious beliefs without invoking the "motivating factor" standard of section 703. Instead, the Court could have employed a constructive knowledge standard, which would have been satisfied under the facts of the case.<sup>150</sup> In his concurring opinion, Justice Alito explained that an employer must at least suspect that a practice is based on religious beliefs.<sup>151</sup> Although the majority stated that it would not address the question of whether an employer must know or suspect that the practice it refuses to accommodate is a religious practice,<sup>152</sup> Justice Alito retorted, stating that the answer is obvious—an employer must at least suspect it.<sup>153</sup> Thus, the Court's incorporation of the "motivating factor" standard into the reasonable accommodations analysis was both unnecessary and awkward.

Third, the Court's holding was deleterious to reasonable accommodations law. Articulating theories of discrimination that are coherent and cogent is crucial because providing reasonable accommodations is a theory of discrimination law that differs significantly from disparate treatment. Although the Court did not acknowledge this point in *Abercrombie & Fitch*, the requirement of providing reasonable accommodations is sometimes juxtaposed with antidiscrimination as a distinct concept.<sup>154</sup> Under that view, antidiscrimination requires a disregard for differences, equal treatment, and redistribution only to the extent necessary to produce such equal treatment.<sup>155</sup> On the other hand, providing reasonable accommodations requires a regard for differences, special treatment, and redistribution in the form of special costs and

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150. The employer suspected, based on store employees' observations and experience with the applicant, that she wore the scarf for a religious reason. See *Abercrombie & Fitch*, 575 U.S. at 770.

151. See *id.* at 777 n.2 (Alito, J., concurring).

152. See *id.* at 774 n.3 (majority opinion).

153. See *id.* at 777–78 (Alito, J., concurring).

154. See generally, e.g., Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307 (2001); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996); Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans With Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045 (2000); see also David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U.P.A.L. REV. 899, 937–44 (1993) (describing failure to accommodate as negligence based).

155. This is an accurate description of disparate treatment only, which the Supreme Court has described as "the most obvious evil Congress had in mind when it enacted Title VII." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

special treatment.<sup>156</sup> However, employment discrimination law is broad enough to include the law of accommodations, just as it does disparate impact,<sup>157</sup> as long as the requirement of reasonable accommodations is not considered a subset of disparate treatment. Unfortunately, that is precisely how the Court majority in *Abercrombie & Fitch* characterized it.

After *Abercrombie & Fitch*, the Court's declaration that there are only two causes of action for discrimination must apply equally to the Court's decision in *Young*, which recognized a duty of accommodations for pregnancy.<sup>158</sup> Like the duty of accommodation for religious practices, the employer's duty to reasonably accommodate pregnancy was provided for in an amendment of the definition section of Title VII.<sup>159</sup> In contrast, the *Abercrombie & Fitch* rationale should not apply to the duty to accommodate disabilities in the ADA, which is stated in a separate enumerated subparagraph of the discrimination provision of the ADA.<sup>160</sup> With the passage of the PWFA, however, modeled on the language of the ADA's duty of reasonable accommodations, there should now be a separate cause of action for failure to accommodate pregnancy. However, *Young* recognized failure to accommodate pregnancy as a cause of action for disparate treatment under Title VII, and the PWFA says nothing about displacing the Supreme Court decision in *Young*.<sup>161</sup> Thus, the causes of action for a failure to reasonably accommodate are likely structured as

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156. See Issacharoff & Nelson, *supra* note 154, at 350–55.

157. See, e.g., Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 653–66 (2001).

158. Notably, *Young v. UPS* did not even mention the “motivating factor” standard. However, the rationale of *Abercrombie & Fitch*, that the “motivating factor” standard applies to religious accommodation claims under Title VII, must also apply to pregnancy accommodation claims under Title VII. See *Abercrombie & Fitch*, 575 U.S. at 773–74 (2015).

159. See 42 U.S.C. § 2000e(k).

160. See 42 U.S.C. § 12112(b)(5); see also *Exby-Stolley v. Board of County Comm'rs*, 979 F.3d 784, 836 (10th Cir.) (en banc), *cert. denied*, 141 S. Ct. 2858 (2021) (McHugh, J., dissenting) (“The majority is correct that failure to accommodate under the ADA is a freestanding discrimination claim, while failure to accommodate under Title VII is not.”).

161. The Act itself does not mention *Young*. Indeed, one section declares that nothing in the Act “shall be construed to invalidate or limit the powers, remedies, and procedures under any Federal law . . . that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions.” 42 U.S.C. § 2000gg-5 (a)(1). The principal House Committee Report is critical of *Young*, calling the *Young* standard unworkable and stating that the purpose of the PWFA is to remedy the shortcomings of the PDA, as interpreted in *Young*. See H.R. REP. NO. 117-27(I), at 14–16 (2021), reprinted in 2021 WL 1940249 (Legis. Hist.) (explaining that *Young v. UPS* does not guarantee pregnant workers a reasonable accommodation and improperly forces plaintiffs to identify a comparator—an “oftentimes insurmountable hurdle”). The EEOC now lists three laws that protect pregnant applicants and employees against discrimination: Title VII (PDA), the PWFA, and the ADA. See *Pregnancy Discrimination and Pregnancy-Related Disability Discrimination*, EEOC, <https://perma.cc/3Z9D-UEQJ> (last visited Oct. 6, 2023).



follows: (1) for religion, a cause of action embedded in Title VII disparate treatment; (2) for disability, a cause of action for failure to accommodate stated in a separate provision of the ADA; and (3) for pregnancy, one cause of action set forth in the PWFA, one under Title VII embedded in disparate treatment, and, in some cases, a claim under the ADA for pregnancy-related conditions.

Lest someone suggest that no plaintiff would pursue a *Young*-based pregnancy non-accommodation claim under Title VII, plaintiffs tend to plead all available causes of action and theories of recovery because pleading in the alternative is permitted under the Federal Rules of Civil Procedure,<sup>162</sup> and prudent practice usually calls for pleading all potentially applicable theories or causes of action. Moreover, there may be different standards of causation applicable under the PWFA and Title VII, such that a plaintiff may benefit from the “motivating factor” standard of Title VII in a *Young*-based claim.

Within the current causes of action/theories of recovery, there is a chaotic mess in the law of accommodations, as in employment discrimination law generally.

## 2. Causation Standards and Associated Proof Frameworks

Similar to the causes of action/theories of recovery, the standards of causation are not uniform across the law of reasonable accommodations. After the changes in 2023, it is unclear just how confusing the maze of standards in accommodations law is, but there have already been some indications. As previously discussed,<sup>163</sup> because the CRA amended only section 703 of Title VII, the “motivating factor” standard of causation applies to only Title VII, and but-for causation is the applicable standard under all the following statutes: the ADEA,<sup>164</sup> the anti-retaliation provision of Title VII, section 1981, and, probably, the ADA. The Supreme Court has referred to “motivating factor” as a “relax[ed]” causation standard,<sup>165</sup> and, thus, plaintiffs would seemingly benefit from this standard.<sup>166</sup>

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162. See FED. R. CIV. PRO. 8(d)(2).

163. See *supra* text accompanying notes 59–63.

164. Except for the federal sector provision. See *Babb v. Wilkie*, 140 S. Ct. 1168, 1172–74 (2020).

165. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 773 (2015); see *Bostock v. Clayton Cty, Ga.*, 140 S. Ct. 1731, 1740 (2020) (referring to the “motivating factor” standard as a “more forgiving standard” than but-for causation); see also *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013) (explaining that section 703 permits a plaintiff to prove employment discrimination on a showing that the protected characteristic was “a motivating factor for—and not necessarily the but-for factor in—the challenged employment action”).

166. This may not have proven to be the case. See Charles A. Sullivan, *Making Too Much of Too Little?: Why “Motivating Factor” Liability Did Not Revolutionize Title VII*,

In drafting the PWFA, Congress likely did not think about the Supreme Court's precedents in *Gross*, *Nassar*, and *Comcast* interpreting employment discrimination statutes to incorporate the but-for causation standard when Congress does not expressly provide a causation standard.<sup>167</sup> Thus, the PWFA is likely to join all employment discrimination statutes other than Title VII in having the higher but-for causation standard.<sup>168</sup>

Just as the causation standards are asymmetrical across the employment discrimination statutes, they are asymmetrical across accommodations law. While the standard for an employer's providing reasonable accommodations was likely already different between Title VII and the ADA, the enactment of the PWFA only exacerbated the issue. Pregnancy and religious accommodations claims under Title VII are evaluated under a "motivating factor" standard,<sup>169</sup> but disability accommodations claims under the ADA, and now pregnancy accommodations claims under the PWFA, likely are evaluated under a but-for causation standard.<sup>170</sup> Even within a single protected characteristic, the asymmetry for causation standards probably exists because *Young*-type pregnancy discrimination claims under Title VII are likely evaluated under

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62 ARIZ. L. REV. 357, 400 (2020) (positing that the "motivating factor" standard has not made it easier for plaintiffs to win Title VII cases and terming it "a noble failure").

167. There is no mention of causation standards in the report of the House Committee on Education and Labor. H.R. REP. NO. 117-27(I), at 14–16 (2021), reprinted in 2021 WL 1940249 (Legis. Hist.). It may be argued that the PWFA is an additional protection of "pregnancy, childbirth, and related medical conditions," which is covered under Title VII, and thus "motivating factor" should be incorporated into the statute. 42 U.S.C. § 2000e(k). That argument seems doomed based on the Court's decision in *Gross* and even more so in *Nassar*. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 170 (2009); *Nassar*, 570 U.S. at 362–63; *Comcast Corp. v. National Ass'n of African-American-Owned Media*, 140 S. Ct. 1009, 1014–18 (2020).

168. Not all cases of non-accommodation will raise issues of causation, but some will. The PWFA provides, in relevant part, as follows:

It shall be an unlawful employment practice for a covered entity to— . . .

(3) deny employment opportunities to a qualified employee if such denial is *based on* the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee; . . .

(5) take adverse action in terms, conditions, or privileges of employment against a qualified employee *on account of* the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

42 U.S.C. § 2000gg-1 (emphasis added).

169. The motivating factor standard was added to Title VII by the Civil Rights Act of 1991. See 42 U.S.C. § 2000e-2(k) (1)(A)(i).

170. There is some uncertainty about the causation standard under the ADA. See *supra* note 62.

a “motivating factor” standard,<sup>171</sup> and accommodations claims under the PWFA are likely evaluated under a but-for standard.<sup>172</sup>

Causation standards are associated with proof frameworks. Generally, determining a “motivating factor” is the first stage of the statutory mixed-motives framework,<sup>173</sup> and but-for causation has been aligned with the *McDonnell Douglas* pretext framework.<sup>174</sup> The alignment creates yet another asymmetry. If the Supreme Court determines that but-for causation applies to claims under the PWFA, then the mixed-motives framework of Title VII will not apply to those claims. Congress could not have intended such a result in a statute designed to expand the rights of pregnant workers.

For both causation standards and proof frameworks, some claims under the PWFA may be appropriately analyzed under a but-for causation standard and the related *McDonnell Douglas* pretext framework. For example, both a claim that an employer denied an applicant a job “based on the need . . . to make reasonable accommodations,”<sup>175</sup> and a claim that an employer took adverse action “on account of the employee requesting

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171. The Court’s analysis in *Abercrombie & Fitch* makes this seem certain as both pregnancy and religion are covered under Title VII, and *Abercrombie & Fitch* applied the “motivating factor” standard to religious accommodation. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 772 (2015). However, the Court in *Young* fit a failure-to-accommodate claim into the *McDonnell Douglas* pretext framework. See *supra* Section II.A. Commentators, and a plurality of the Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), have suggested that the *McDonnell Douglas* analysis measures but-for causation. See, e.g., Corbett, *Breaking Dichotomies*, *supra* note 7, at 817–18. A Court majority was equivocal on this point in *Comcast*. See *Comcast*, 140 S. Ct. at 1019 (stating that “[b]ecause *McDonnell Douglas* arose in a context where but-for causation was the undisputed test, it did not address causation standards”).

172. A similar asymmetry exists for race claims asserted under Title VII and section 1981 after the Court’s decision in *Comcast*. See Corbett, *Super Statute*, *supra* note 130, at 1790–94.

173. The mixed motives analysis was developed in the Title VII context in *Price Waterhouse*, but Congress enacted a modified statutory version of it in Title VII via the Civil Rights Act of 1991. See 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). In the statutory version, the plaintiff has the burden of proving that the protected characteristic was a “motivating factor” in the employer’s decision. *Id.* § 2000e-2(m). If the plaintiff satisfies that burden, the employer is liable for discrimination. However, the employer may limit the remedies available by proving, as an affirmative defense, that it would have made the same decision even in the absence of the impermissible factor. *Id.* § 2000e-5(g)(2)(B).

174. Notably, the Supreme Court was equivocal in *Comcast* about the alignment of but-for causation with the *McDonnell Douglas* pretext proof framework. After declaring that but-for is the standard of causation required by section 1981, the *Comcast* Court rejected an argument based on the *McDonnell Douglas* analysis, saying that “[w]hether or not *McDonnell Douglas* has some useful role to play in [section] 1981 cases, it does not mention the motivating factor test.” *Comcast*, 140 S. Ct. at 1019. The suggestion that the *McDonnell Douglas* framework may or may not be relevant to but-for causation was surprising.

175. See 42 U.S.C. § 2000gg-1(3).

or using a reasonable accommodation” raises questions of causation.<sup>176</sup> However, other failure-to-accommodate claims do not seem to involve questions of causation, and the pretext framework does not seem to be the appropriate analysis.<sup>177</sup> As the Tenth Circuit explained, under the ADA, disparate treatment claims require proof of intent paired with affirmative acts by an employer, whereas failure-to-accommodate claims entail failures to act.<sup>178</sup> The principal issue in many failure-to-accommodate claims, thus, is not the employer’s intent, but whether the employer failed to satisfy a legally imposed duty to reasonably accommodate.<sup>179</sup> Thus, the Tenth Circuit juxtaposed the elements of disparate treatment claims under the ADA with non-accommodation claims and held that the first two steps are the same: “(1) [the plaintiff] is disabled within the meaning of the ADA [and] (2) . . . [the plaintiff] can perform, either with or without reasonable accommodation, the essential functions of the desired job.”<sup>180</sup> However, the third element changes from “(3) [the defendant] terminated him because of his disability” in a disparate treatment claim to “[3] an employer [did not] take reasonable steps to [accommodate the employee]” for non-accommodation claims.<sup>181</sup> Some courts, including the Eleventh Circuit, require proof of an additional element for failure-to-accommodate claims—that the plaintiff was subjected to an adverse employment action.<sup>182</sup> The Tenth Circuit, consistent with the EEOC’s guidance, rejected that additional element.<sup>183</sup> Because the PWFA uses the same language as the ADA for the employer’s duty to reasonably accommodate, the elements of a non-accommodation claim under the PWFA should be analyzed under the same framework as the ADA.

While the proof framework and causation standard should be the same for the ADA and the PWFA, *Abercrombie & Fitch* requires failure-to-accommodate claims for religion under Title VII to be analyzed under a different proof framework and causation standard than disability and pregnancy claims. Before *Abercrombie & Fitch*, courts often stated the elements of a failure-to-accommodate religion claim as follows: (1) the employee has a religious belief that conflicts with an employment requirement; (2) the employer was informed of the belief or was aware of

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176. *See id.* § 2000gg-1(5).

177. Reasonable accommodation theories and claims do not fit comfortably within disparate treatment. *See supra* notes 155–57 and accompanying text.

178. *See Exby-Stolley v. Bd. of Cty. Comm’rs*, 979 F.3d 784, 797 (10th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 2858 (2021).

179. *See id.*

180. *See id.* at 794.

181. *See id.*

182. *See, e.g., Beasley v. O’Reilly Auto Parts*, 69 F.4th 744, 746 (11th Cir. 2023). *See generally* Megan I. Brennan, *Need I Prove More: Why an Adverse Employment Action Prong has no Place in a Failure to Accommodate Claim*, 36 *HAMLIN L. REV.* 497 (2013).

183. *See Brennan, supra* note 182, at 505–06; *Exby-Stolley*, 979 F.3d at 803–04.

it; and (3) the employee suffered adverse action because the employee failed to comply with an employment requirement.<sup>184</sup> A federal district court explained that the Court's decision in *Abercrombie & Fitch* requires a reworking of that framework.<sup>185</sup> Thus, a plaintiff now establishes a prima facie case by proving that "(1) she had a *bona fide* religious belief that conflicted with an employment requirement; and (2) her need for an accommodation was a motivating factor in the employer's decision to take an adverse employment action against her."<sup>186</sup> The burden then shifts to the employer to "(1) conclusively rebut one or more elements of the plaintiff's *prima facie* case, (2) show that it offered a reasonable accommodation, or (3) show that it was unable to accommodate the employee's religious needs reasonably without undue hardship."<sup>187</sup>

In addition to the different proof frameworks between pregnancy/disability and religious accommodations claims, there are other differences in claim requirements. For example, there is a requirement under the ADA and the PWFA that an employer engage in an "interactive process" with an employee to determine a reasonable accommodation.<sup>188</sup> Although the ADA's statutory language does not include the "interactive process," the EEOC provides for it in the regulations.<sup>189</sup> In contrast, the PWFA's statutory language provides for the "interactive process."<sup>190</sup> However, for religious accommodations, neither the statutory language of Title VII nor the regulations mention the interactive process.<sup>191</sup> Nonetheless, some courts have discussed an employer's duty to engage in such a process for religious accommodations.<sup>192</sup>

Although it certainly seems reasonable that if the interactive process is a good means of determining reasonable accommodations for pregnancy and disability, the interactive process should be a good means for religion as well.<sup>193</sup> However, unlike disability and pregnancy, proving a failure-to-accommodate claim for religion does not require an employer to know of

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184. See *EEOC v. Jet Stream Ground Servs., Inc.*, 134 F. Supp. 3d 1298, 1318 (D. Colo. 2015).

185. See *id.*

186. *Id.* (citing *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 772 (2015)).

187. *Id.*

188. See 42 U.S.C. § 2000gg-1(2).

189. See 29 C.F.R. § 1630.2(o)(3).

190. See 42 U.S.C. §§ 2000gg(7) and 2000gg-1(2).

191. See *EEOC v. Jetstream Ground Servs., Inc.*, No. 13-cv-02340-CMA-KMT, 2016 WL 879625, at \*4 n.4 (D. Colo. Mar. 8, 2016), *denying reconsideration of* 134 F. Supp. 3d 1298 (D. Colo. 2015).

192. See *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000); *Together Emps. v. Mass Gen. Brigham Inc.*, 573 F. Supp. 3d 412, 442 (D. Mass. 2021); see generally Dallan F. Flake, *Interactive Religious Accommodations*, 71 ALA. L. REV. 67 (2019).

193. See sources cited, *supra* note 192.

an employee's or applicant's religious belief, as the Court held in *Abercrombie & Fitch*.<sup>194</sup> Therefore, if the employee does not inform the employer or the employer does not otherwise know of a religious belief that needs to be accommodated, then "triggering" a duty to engage in the interactive process would not make sense. Casting more uncertainty on whether the interactive process applies to religious accommodation claims, the Supreme Court in *Groff* rejected the plaintiff's argument that the Court should instruct lower courts to draw on ADA case law in determining whether an accommodation would impose an undue hardship on an employer.<sup>195</sup>

In sum, considerable uncertainty and asymmetry exist regarding causation standards and proof frameworks across the causes of action for reasonable accommodations, as exist in employment law generally. Now, we turn to the question of whether uncertainty and asymmetry in the law of reasonable accommodations and employment discrimination law generally is a problem. If it is, what should be done about it?

#### V. PROBLEMS CAUSED BY THE ASYMMETRY IN EMPLOYMENT DISCRIMINATION LAW AND ACCOMMODATIONS LAW

Employment discrimination is filled with asymmetry among the various statutes and protected characteristics.<sup>196</sup> The theory of failure to accommodate has become littered with these asymmetries. This section addresses how Congress and the Supreme Court have created asymmetries relating to the theory of failure to accommodate. The section then explains why general, but not complete, symmetry in employment discrimination law is desirable and why unjustified and unnecessary asymmetry creates fundamental problems in the law of accommodations and in employment discrimination law generally.

##### A. *How Has Asymmetry Developed?*

The law need not be completely symmetrical across the several employment discrimination statutes and the various protected characteristics. Generally, there may be reasons to create a body of race discrimination law and sex discrimination law under Title VII that is more protective of employees than the body of age discrimination law under the ADEA. Indeed, the Supreme Court has fashioned such asymmetrical employment discrimination law, rendering age discrimination law far weaker than the law protecting race, color, sex, religion, and national

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194. See *supra* text accompanying notes 48–50.

195. See *Groff v. DeJoy*, 600 U.S. 447, 471 (2023).

196. See *supra* Section IV.A.

origin under Title VII.<sup>197</sup> The Supreme Court has discussed some differences between age discrimination and the types of discrimination covered by Title VII, justifying asymmetry.<sup>198</sup>

Specifically, there may be reasons why concepts or provisions in one part of employment discrimination law are not made applicable to another part. For example, the bona fide occupational qualification (“BFOQ”) defense applies to age in the ADEA and sex, national, origin, and religion in Title VII but not to two of the protected characteristics in Title VII, race and color.<sup>199</sup> In excluding race and color from the BFOQ defense, Congress understood that making the BFOQ defense applicable to these two characteristics could essentially nullify the principal goal of Title VII—to make race discrimination in employment unlawful.<sup>200</sup>

Some specific asymmetries are required by the statutory language, including the BFOQ defense and the remedies under the ADEA (incorporated from the Fair Labor Standards Act),<sup>201</sup> that are different from those under Title VII and the ADA. On the other hand, some asymmetries are not necessarily required by the statutory language, but the courts may infer such distinctions from differences in the statutory language. For example, the Supreme Court has interpreted the mixed-motives analysis as applicable to only Title VII disparate treatment claims and not to Title VII retaliation claims.<sup>202</sup> The Court also has interpreted mixed-motives as not applicable to disparate treatment claims under the ADEA.<sup>203</sup> Those interpretations result from the CRA, which added the “motivating factor” standard to only Title VII. Further, some asymmetries

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197. *See generally, e.g.,* Gross v. FBL Fin. Servs., 557 U.S. 167 (2009) (adopting different standards of causation); Smith v. City of Jackson, 544 U.S. 228 (2005) (adopting a different disparate impact analysis); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004) (rejecting the viability of a claim for reverse age discrimination); Hazen Paper Co. v. Biggins, 507 U.S. 604, 610-11(1993) (explaining a difference between age discrimination and discrimination covered by Title VII).

198. *See* EEOC v. Wyoming, 460 U.S. 226, 230-33 (1983). The Court explained that age discrimination seldom is based on animus or hatred, as race discrimination sometimes is; rather, age discrimination usually is based on stereotypes about older employees or applicants. *Id.*

199. The “BFOQ” defense permits the employer’s consideration of sex, religion, national origin, or age when that characteristic is “reasonably necessary to” the normal operation of the business. 42 U.S.C. § 2000e-2(e) (BFOQ under Title VII for sex, national origin, and religion); 29 U.S.C. § 623(f)(1) (BFOQ under the ADEA for age).

200. The BFOQ provision in Title VII does not include race and color. *See* 42 U.S.C. § 2000e-2(e). Congress rejected the Williams amendment that would have included race. *See* 110 CONG. REC. 2550-2563 (1964) (documenting debate and votes on the Williams amendment); *see also* William R. Bryant, Note, *Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Qualification Defense for Race Discrimination*, 33 GA. L. REV. 211, 217 (1998).

201. *See* 29 U.S.C. § 626(b).

202. *See generally* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338(2013).

203. *See generally* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009).

are not required or even inferable from statutory language but are determined by courts on other bases, such as the Court's understanding of Congressional purpose.<sup>204</sup> For example, the Supreme Court held that Congress did not intend for reverse discrimination claims to be actionable under the ADEA,<sup>205</sup> although the Court has held that such claims are cognizable under Title VII.<sup>206</sup>

If the Supreme Court and lower courts can infer asymmetry, why then do they choose not to infer symmetry? For example, why did the Court not infer in *Gross* and *Nassar* that Congress intended for some version of the mixed-motives framework to apply to the ADEA and the anti-retaliation provision of Title VII, respectively?<sup>207</sup> Some, but few, courts have inferred symmetry in accommodations law. Consider, for example, that some courts have inferred that the “interactive process” of the ADA should apply to religious accommodations, although neither Title VII nor the regulations so provide.<sup>208</sup>

Is any real problem created by pervasive and fundamental asymmetries across employment discrimination law and the subset of accommodations law? The short answer is “yes.”

#### B. *Uncertainty, Incomprehensibility, and Questionable Fairness*

Unnecessary asymmetry has rendered employment discrimination law far more complex than necessary and laced it with fundamental uncertainties.<sup>209</sup> This is bad for employment discrimination law. If even attorneys and judges find the law baffling,<sup>210</sup> surely the public will find it more so. In an area of the law as controversial as employment

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204. See, e.g., Stephen M. Rich, *A Matter of Perspective: Textualism, Stare Decisis, and Federal Employment Discrimination Law*, 87 SO. CAL. L. REV. 1197 (2014) (positing that the Court “interpret[s] virtually identical language occurring in separate but related statutes to have substantially different meanings, and to announce potentially insurmountable conflicts between basic statutory provisions never previously thought to have been in conflict”).

205. See generally *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004).

206. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 n.6, 287 (1976).

207. The Court rejected the idea that the mixed-motives framework developed in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), should apply to the ADEA. See *Gross*, 557 U.S. at 179. The Court held the same for the anti-retaliation provision of Title VII. See *Nassar*, 570 U.S. at 360.

208. See *supra* note 192.

209. For example, which proof framework applies to evaluate a motion for summary judgment on an individual disparate treatment claim? See, e.g., Corbett, *Breaking Dichotomies*, *supra* note 7, at 780–82.

210. Consider, for example, the statement of attorney Carter Phillips during oral argument in *Gross v. FBL Fin. Servs., Inc.*: “I will say in 25 years of advocacy before this Court I have not seen one area of the law that seems to me as difficult to sort out as this particular one is.” Transcript of Oral Argument at 29, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) (No. 08–441), 2009 LEXIS 28, transcript available at <https://perma.cc/3DWU-JZZM>.



discrimination, incomprehensibility threatens its legitimacy. Asymmetries among protected characteristics are fraught in an area of the law that most understand to be about equal treatment. For example, consider the negative reaction to the *Gross* decision, which held that plaintiffs asserting age discrimination claims under the ADEA must prove but-for causation—the more demanding standard of causation—but plaintiffs asserting race, color, sex, religion, and national origin discrimination claims under Title VII need prove only the relaxed causation standard—that the protected characteristic was a motivating factor in the employer’s adverse decision.<sup>211</sup>

The theory of reasonable accommodation differs in significant ways from disparate treatment,<sup>212</sup> which is the theory of discrimination that the Supreme Court has called the “most easily understood type of discrimination.”<sup>213</sup> The asymmetries raise questions about why there are differences among the duties of accommodations. Why does a plaintiff not have to prove the employer knew of the plaintiff’s religion under Title VII, but the duties of accommodations for pregnancy and disability require knowledge of the limitations under the PWFPA and the ADA, respectively? Why are there different standards of causation among protected characteristics? Perhaps the most basic question: Why does the duty to accommodate not apply to other protected characteristics beyond the three for which the statutes currently provide? Although reasonable accommodations will not always apply to all situations involving a particular protected characteristic and a particular job, there must be cases in which race, national origin, sex (other than pregnancy), and age entail some limitations on job performance that could be accommodated.

## VI. THE SOLUTION: ONE COMPREHENSIVE EMPLOYMENT DISCRIMINATION STATUTE

In *Groff*, the Supreme Court made progress by closing the gap between the duty to accommodate religion and the duties to accommodate disability and pregnancy.<sup>214</sup> Nonetheless, the Court maintained different standards for undue hardship among these protected characteristics.

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211. See, e.g., Kenneth Terrell, *AARP Urges Congress to Strengthen Age Discrimination Laws*, AARP (May 21, 2019), <https://perma.cc/4KTP-XQZ7>; Colette Thayer, *Protecting Older Workers Against Discrimination Act (POWADA): Public Opinion Report*, AARP (June 2012), <https://perma.cc/EF53-BNG8>; Patricia Barnes, *Finally, U.S. House Will Address Disastrous U.S. Supreme Court Ruling on Age Discrimination*, FORBES (Jan. 13, 2020, 1:16 PM), <https://perma.cc/K7Z3-YBZW>; Editorial, *Age Discrimination*, N.Y. TIMES (July 6, 2009), <https://perma.cc/2V2H-3CVS> (calling for Congress to overturn *Gross*).

212. See *supra* note 154 and accompanying text.

213. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335–36 n.15 (1977).

214. See *Groff v. DeJoy*, 600 U.S. 447, 468 (2023).

Although rejecting the *de minimis* standard,<sup>215</sup> the Court in *Groff* recognized that there was not a strong basis for adopting caselaw and regulations under the ADA to further explain what the duty of religious accommodation requires and how such a duty is limited by undue hardship.<sup>216</sup> Rather, the Court explained that *Hardison* had been misinterpreted and gleaned the “clarified” standard from that case. Justice Sotomayor’s concurring opinion, joined by Justice Ketanji Brown Jackson, praised the majority for working within the parameters of *stare decisis*, pointing out that Congress has amended Title VII but none of those amendments changed the result of *Hardison*.<sup>217</sup> The concurrence thus could be read as a vague invitation to Congress to again enact another piece of “patch” legislation. The *Groff* majority and concurrence are the latest example of the patchwork of employment discrimination law. The back-and-forth between Congress and the Court for six decades has created a chaotic body of law, and the law of reasonable accommodations provides the latest example. Congress’s approach of repeatedly enacting new statutes to correct Supreme Court decisions usually injects more uncertainty and asymmetry into the law, as shown with the CRA and the PWFA.

To create a coherent body of law with only intended and reasonable asymmetries, Congress must comprehensively revise employment discrimination law. We have six decades of experience and learning that could be brought to bear on that undertaking. For an adequate revision of employment discrimination law, Congress must repeal the existing separate statutes and enact one employment discrimination law.<sup>218</sup> Congress took a step in the wrong direction by enacting yet another separate employment discrimination law, the PWFA. Employment discrimination law deserves better, as does the law of reasonable accommodations. The time is long past due for Congress to reasonably accommodate employment discrimination law by enacting one comprehensive employment discrimination law.

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215. See generally *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

216. See *Groff*, 600 U.S. at 471.

217. See *id.* at 474–75 (Sotomayor, J., concurring).

218. See Corbett, *Super Statute*, *supra* note 130, at 1805–06.