COMMENT

SPECIAL DELIVERY: *YOUNG V. UNITED PARCEL SERVICE* REVIVES THE PREGNANCY DISCRIMINATION ACT WHILE DENYING LIFE TO EEOC GUIDANCE

SAM DEPRIMIO*

TABLE OF CONTENTS

Introduction 390
I. Background 394
A. The Courts and Administrative Deference 394
1. *Chevron* Deference 395
2. *Skidmore* Deference 396
3. Retroactivity of Administrative Interpretations 399
B. The Courts and Deference to EEOC Guidance 401
1. Instances of Courts Granting Deference to EEOC Guidance 402
2. Instances of Courts Denying Deference to EEOC Guidance 404
C. *Young v. United Parcel Service* 406
II. Argument 409

* J.D. Candidate, 2016, American University Washington College of Law; B.A., Political Science, 2010, California State University, Northridge. Many thanks to Sarah Brown, Ashley Bender, Michael Francel, and the staff of the *Administrative Law Review* for their feedback, editing, and assistance preparing my Comment for publication. I would especially like to thank my faculty advisor for his advice and editing throughout my writing process. Finally, thank you to my parents who have stood by my every endeavor with unwavering support.

A. The Deference Analysis in *Young* Was Flawed in Both Reasoning and Result 410
B. The Court Should Have Granted Deference and Established a Clear Standard for Analyzing EEOC Guidance 414
1. Why the Court Should Have Granted Deference 415
2. How the Court Could Have Reconciled With What It Saw as a Deficiency in the EEOC's Construction of the Statute 416
Conclusion 418

INTRODUCTION

Pregnancy is a unique biological condition that still presents many barriers to employment equality for women.[1] Title VII of the Civil Rights Act[2] protects employees from employment practices that discriminate based on an individual's "race, color, religion, sex, or national origin."[3] When Congress enacted Title VII, its intent was to remove "artificial, arbitrary, and unnecessary barriers to employment" that limited employment opportunities for all those who fell into a protected class.[4] Congress clarified the extent of Title VII protections after a Supreme Court ruling excluded discrimination based on pregnancy from the class of sex discrimination.[5] In *General Electric Co. v. Gilbert*,[6] the Court ruled that an employer did not discriminate against women under Title VII when it discriminated based on pregnancy.[7] Congress responded to this ruling with

1. *See generally* Joanna L. Grossman, *Hard Labor: New Pregnancy Discrimination Guidance From the EEOC*, JUSTIA (July 22, 2014), http://verdict.justia.com/2014/07/22/hard-labor-new-pregnancy-discrimination-guidance-eeoc (noting that pregnancy discrimination claims with the Equal Employment Opportunity Commission (EEOC) have increased at a faster rate than the rate at which women are entering the workforce).

2. 42 U.S.C. § 2000e (2012).

3. *Id.* § 2000e-2(a)(1)–(2).

4. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (finding that high school diploma and intelligence test requirements were one such impermissible barrier that disproportionately affected one racial group); *see also* H.R. REP. NO. 95–948, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750 (providing that the intent of the Pregnancy Discrimination Act (PDA) was to "clarify Congress' intent to include discrimination based on pregnancy, childbirth or related medical conditions in the prohibition against sex discrimination in employment").

5. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976) ("[A]n exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all.").

6. 429 U.S. 125.

7. *Id.* at 136, 145–46 (concluding that employer's decision not to cover pregnancy related conditions in its disability benefits plan was not discrimination based on sex unless

the Pregnancy Discrimination Act (PDA).[8] The PDA amended Title VII to clarify that discrimination on the basis of pregnancy is discrimination based on sex and to notify employers that they must treat pregnant employees in the same manner as other employees who are "not so affected but similar in their ability or inability to work."[9] Since the PDA was enacted, circuit courts have reached different conclusions as to whether employers must provide reasonable accommodations[10] for employees whose pregnancy has altered their physical abilities and who are as similar in their ability or inability to work as *any* other employees who receive reasonable accommodations.[11] The key issue in deciding whether an employer has discriminated under the PDA is how to identify the proper comparator for pregnant women.[12]

On July 1, 2014, the Supreme Court granted certiorari in *Young v. United Parcel Service, Inc.*[13] Just two weeks later, on July 14, 2014, the Equal Employment Opportunity Commission (EEOC) released its first new Enforcement Guidance on the PDA (the Guidance) in thirty-one years.[14]

---

the plaintiff could show that it was a "pretext for discriminating against women").

8. 42 U.S.C. § 2000e(k); *see also* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983) (declaring that the PDA rejected "both the holding and the reasoning" of *Gilbert*).

9. 42 U.S.C. § 2000e(k); *see also* Deborah L. Brake & Johanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67, 67 (2013) (stating that the PDA was enacted with the "specific purpose in mind" of invalidating the decision in *Gilbert*).

10. The courts and EEOC have both used the terms "light duty" and "temporary alternative work" when referring to a change in a pregnant employee's job duties due to her pregnancy. *See generally* Young v. United Parcel Serv., Inc., 707 F.3d 437 (4th Cir. 2013); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES (2014), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm [hereinafter PDA GUIDANCE]. This Comment will use "light duty" and "reasonable accommodations" interchangeably.

11. *Compare Young*, 707 F.3d at 449, 450–51 (finding that the United Parcel Service (UPS) policy "treat[ed] pregnant workers and nonpregnant workers alike" and therefore UPS was not required to provide reasonable accommodations for a pregnant employee who was similar in her ability to work as some employees who were injured on the job or disabled under the Americans with Disabilities Act (ADA)), *with* Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996) (holding that plaintiff established a prima facie case of pregnancy discrimination by showing her employer had treated other employees who were similar in their ability or inability to work more favorably than it had treated her).

12. *See* Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimating Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 243 (1998) (exploring the difficulty that employers and courts have when deciding which group of non-pregnant employees to compare pregnant women).

13. 707 F.3d 437 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 2898 (U.S. July 1, 2014). For further discussion of *Young*, see *infra* Part I.C.

14. *See generally* PDA GUIDANCE, *supra* note 10. The Guidance addresses a number of

In part, the Guidance clarified an employer's obligations when a pregnant employee has physical limitations due to her pregnancy and requests light duty or temporary accommodations.[15] According to the Guidance, an employer who provides light duty for an employee with a physical limitation similar to the physical limitation of a similarly positioned pregnant employee would be required to provide light duty for that pregnant employee.[16] Additionally, EEOC adopted the position that the proper comparator for pregnant women when establishing a prima facie case of pregnancy discrimination is a non-pregnant employee who was given accommodations for a physical limitation similar to that of the pregnant employee.[17]

EEOC's clarification of the PDA was applauded by some and met with hostility by others.[18] The Guidance essentially put employers on notice that pregnancy blind policies regarding the availability of light duty work will

---

PDA issues, including employer's knowledge of pregnancy, lactation, health insurance, disability status, and the Family and Medical Leave Act. *See generally id.* However, the scope of this Comment will focus primarily on §§ I.A.5 and I.C.1, which discuss "Persons Similar in Their Ability or Inability to Work" and "Light Duty." *See id.* §§ I.A.5, I.C.1; *see also* Steven Greenhouse, *Equal Opportunity Employment Officials Take New Aim at Pregnancy Bias*, N.Y. TIMES, July 14, 2014, http://www.nytimes.com/2014/07/15/business/equal-opportunity-employment-officials-take-new-aim-at-pregnancy-bias.html?_r=0 (stating that the Guidance was the first of its kind since 1983 due to the increase in PDA claims filed with EEOC over the past ten years).

15. *See* PDA GUIDANCE, *supra* note 10, § I.C.1.b.

16. *Id. Contra* Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1313 (11th Cir. 1999) (affirming employer's right to provide light duty only to employees with on-the-job injuries, and not to similarly impaired pregnant employees); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998) (declaring that employers only need to provide light duty to pregnant employees on the same basis as they do for employees with similar limitations due to an off-the-job injury).

17. *See* PDA GUIDANCE, *supra* note 10, § I.C.1; *see also id.* § I.A.5 ("[S]omeone who, because of a back impairment, has a 20-pound lifting restriction that lasts for several months would be an individual with a disability under the ADA entitled to reasonable accommodation . . . . The same individual would be an appropriate comparator for PDA purposes . . . .").

18. *Compare* Emily Werth, *Pushed Out of Work Because of Pregnancy? Not on Our Watch, Says EEOC*, NAT'L WOMEN'S LAW CTR. BLOG (July 15, 2014), http://www.nwlc.org/our-blog/pushed-out-work-because-pregnancy-not-our-watch-says-eeoc (declaring that the EEOC Guidance "sent a strong message" regarding employers' obligations to pregnant workers), *with* Paul Kehoe, *New Guidance From the EEOC Requires Employers to Provide Reasonable Accommodations Under the Pregnancy Discrimination Act*, EMP. L. LOOKOUT (July 15, 2014), http://www.laborandemploymentlawcounsel.com/2014/07/new-guidance-from-the-eeoc-requires-employers-to-provide-reasonable-accommodations-under-the-pregnancy-discrimination-act/ (cautioning that "it appears as if the EEOC adopted a position exceeding the statutory mandate that Congress bestowed upon it").

not always satisfy the PDA.[19] Such policies fail to uphold the intent of the PDA to equalize employment opportunities for women who become pregnant.[20] Clarification of the PDA is crucial to the litigation of pregnancy discrimination claims under Title VII, which often suffer at the prima facie stage due to the difficulty of finding the proper comparators for pregnant women.[21]

On March 25, 2015, the Court issued its decision in *Young*.[22] Though the Court did reject some aspects of the Guidance, its holding embraced the general premise that the second clause of the PDA does contemplate accommodations for pregnant employees.[23] Under *Young*, a pregnant employee may establish a prima facie case of discrimination by showing that she was a member of the protected class, asked for an accommodation, and was denied an accommodation provided to others "similar in their ability or inability to work."[24] The Court strengthened the PDA through its holding in *Young*;[25] however, the Court damaged the ability of EEOC to enforce the Act when it declined to grant deference to the Guidance.[26]

This Comment argues that the *Young* Court should have analyzed the Guidance under a two-step *Chevron* analysis and set a clear deference standard for all future EEOC guidance. That the Agency adopted the Guidance after the litigation had commenced should be of no concern. Part II of this Comment gives a brief history of how the courts have

---

19. *See* PDA GUIDANCE, *supra* note 10, § I.A.5 (describing a light duty policy that provides accommodations to employees based on the source of their limitation and excludes pregnancy).

20. *See infra* note 168 and accompanying text (discussing how the second clause of the PDA, which requires that pregnant employees be treated the same as persons who are not pregnant but who are similar in their ability or inability to work, imposes an additional mandate on the requirement that employers treat pregnant employees the same as non-pregnant employees).

21. *See* Greenberg, *supra* note 12, at 243–44 (analyzing the "unique burdens" of pregnancy that make it difficult to find a comparative group that was treated better. This often dooms pregnancy discrimination claims from the beginning—giving an example of a previously satisfactory employee who suddenly was significantly tardy to work in the morning (because of pregnancy), but that lateness could be expected to last for only a set period of time).

22. *See* Young v. United Parcel Serv., Inc., 575 U.S. __, No. 12-1226 (U.S. Mar. 25, 2015) (vacating the decision of the Fourth Circuit and remanding for further proceedings).

23. *See id.* at 20–21.

24. *Id.*

25. *See id.* at 19 (explaining that the second clause of the PDA must do something more than clarify that pregnancy discrimination is sex discrimination in order to overturn the holding of *Gilbert*, which allowed an employer to "distinguish[] between [employees] on a neutral ground—*i.e.*, it accommodated only sicknesses and accidents, and pregnancy was neither of those.").

26. *See id.* at 16–17.

determined the level of deference owed to administrative rules and interpretations of law, and how courts have treated EEOC's guidance and clarifications regarding Title VII. Part II concludes with a brief history of *Young* and a summary of the Court's recent ruling. Part III argues that (a) the Court's analysis of the EEOC Guidance in *Young* was flawed in both its reasoning and its result, and (b) going forward, the Court should firmly establish a single standard of deference such that, when EEOC guidance is considered, deference will be granted if the Agency's interpretation is a permissible construction of ambiguous language in the statute. Finally, Part IV concludes that a single standard of analysis for EEOC guidance will provide certainty and predictability for employers and legal counsel and allow them to form policies that bring greater equality to the workplace.

I. BACKGROUND

A. The Courts and Administrative Deference

Under the Administrative Procedure Act (APA), government agencies can exercise their rulemaking capacity in three ways.[27] The first two, formal and informal rulemaking processes, both have elements of public participation and the final rules are binding.[28] The third type of rulemaking, which the APA exempts from any formal process of review, takes the form of guidance documents, interpretations of law, or general policy statements.[29] Administrative agencies today are increasingly reliant on the third type of rulemaking due to both the cumbersome nature of the participatory rulemaking process and the ease with which information can be disseminated to the public through the Internet.[30] Generally, courts grant an administrative agency's interpretation of law one of two types of deference depending on the categorization of the administrative action in question.[31] If agency action amounts to informal rulemaking (a

27. *See* ANDREW F. POPPER ET AL., ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 66 (2d ed. 2010) (noting that some rulemaking, such as "hybridized rulemaking," varies from these three forms).

28. *Id.*

29. *Id.*

30. *See* Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 ECOLOGY L.Q. 657, 700 (2008) (examining the significant issues that arise when such documents are not considered binding, and therefore not subject to judicial review, yet become determinative in particular circumstances—linking together the issues of reviewability and judicial deference).

31. *See* United States v. Mead Corp., 533 U.S. 218, 231–35 (2001) (considering a classification ruling by U.S. Customs Service by weighing whether the ruling was subject to either *Chevron* or *Skidmore* analysis); De La Mota v. U.S. Dep't of Educ., 412 F.3d 71, 80 (2d Cir. 2005) (finding that informal agency guidelines did not warrant *Chevron* deference, but

participatory process with notice and comment), it is analyzed using a two-part test established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[32] If the agency action did not include an element of public participation, and therefore did not constitute informal rulemaking, courts use the factors established in *Skidmore v. Swift & Co.*[33] to determine if deference should be granted.[34]

1. Chevron *Deference*

The greatest level of deference that a court can give to an agency was established under *Chevron*, which created a two-step test that a court must apply to determine if deference should be granted to an administrative agency's rule or interpretation of a statute.[35] Step One requires the court to look to the language of the statute in question and the intent of Congress; if Congress has clearly established its intent with regard to the rights and obligations imposed by the statute, then the court must defer to Congress.[36] However, if the language is ambiguous and the intent of Congress cannot be clearly discerned, then the court will look to the interpretation of the agency responsible for administering the statute; if that interpretation is a "permissible construction," then the court must defer to the agency.[37] Following *Chevron*, the Court declared that "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."[38]

---

may be examined under the *Skidmore* standard); *see also* Barry Sullivan, *On the Borderlands of* Chevron*'s Empire: An Essay on Title VII, Agency Procedures and Priorities, and the Power of Judicial Review*, 62 LA. L. REV. 317, 319 (2002) (explaining that "[d]ifferent legal consequences may flow from the characterization of administrative action").

32. 467 U.S. 837 (1984).

33. 323 U.S. 134 (1944).

34. *See* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (holding that administrative actions which lack "the force of law" should be analyzed under *Skidmore*).

35. *See Chevron*, 467 U.S. at 842–43 (laying out the test for deference).

36. *Id.*

37. *Id.* at 843. Though there is still much controversy regarding what *Chevron* deference is, and what constitutes ambiguity and formal rulemaking, that debate is outside the scope of this Comment.

38. *Christensen*, 529 U.S. at 587; *see also* United States v. Mead Corp., 533 U.S. 218, 230–31, 234–35 (2001) (concluding that the agency decision in question was not the "fruit[]" of notice-and-comment rulemaking" and therefore fell outside of *Chevron*, but should be analyzed under *Skidmore*). *But see id.* at 239–41, 257 (Scalia, J., dissenting) (disagreeing with the majority's holding that primarily formal rulemaking is granted *Chevron* deference and all other rulemaking will be subject to *Skidmore* analysis, stating that "[a]ny resolution of the ambiguity by the administering agency that . . . represents the official position of the agency—must be accepted by the courts if it is reasonable").

2. Skidmore *Deference*

In those cases involving "policy statements, agency manuals, and enforcement guidelines,"[39] the Court will generally apply the deference analysis established in *Skidmore*.[40] In *Skidmore*, the Court stated that to determine the weight given to an agency interpretation of law, it would view the agency as a "body of experience and informed judgment" and consider factors such as "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[41]

Under this analysis, the Court considered whether to apply an "interpretive bulletin" released by the Administrator of the Fair Labor Standards Act (FLSA).[42] The bulletin spoke directly to the issue in the case: whether firemen who were on-call in the firehouse, but free to pursue their own activities within the firehouse, were on "working time" as defined by the FLSA.[43] The Court concluded that even though the administrative bulletin was not the product of "adversary proceedings" or "conclusions of law from findings of fact," as in administrative adjudications,[44] it may still be "entitled to respect."[45] Critical to this conclusion was the Court's acknowledgement that Congress intended that certain duties be left to the Administrator and that in the pursuit of those duties he had gained a specialized knowledge in the type of problems arising under the statute for which he was responsible.[46] The Court accepted the interpretation promoted by the Administrator, by reasoning that the Judicial Branch should only conflict with the administration when a compelling reason to do so existed, and that "[g]ood administration" of the FLSA depended

39. *Christensen*, 529 U.S. at 587.

40. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

41. *Id.*

42. *Id.* at 137–38 (differentiating the duties Congress imposed on the Administrator and on the courts).

43. *Id.* at 135–36, 138 (discussing the agreement as to working hours between the employer and the employee, and the specifications of the administrative bulletin).

44. *See generally* POPPER ET AL., *supra* note 27, at 531 (describing the administrative adjudicatory process and its purpose to "resolve disputes, enforce statutes and regulations, and grant or deny licenses or benefits").

45. *See Skidmore*, 323 U.S. at 139–40 (noting also that the Court had "long given considerable and in some cases decisive weight . . . to interpretative regulations . . . that were not of adversary origin").

46. *Id.* at 137–38 (finding also that such expertise made the guidelines released by the agency a good source for reasonable employers and employees to look to for how the act in question would be enforced by that agency).

upon this judicial deference.[47] Permitting the courts to give judicial deference to informal administrative action is critical to allowing administrative agencies to perform their executive functions.[48]

Nevertheless, the continuing validity of the *Skidmore* doctrine is a subject of some contention within the Court today.[49] Associate Justice Antonin Scalia is the primary proponent of the view that *Skidmore* deference is nothing but an "empty truism."[50] It may be argued that all *Skidmore* proclaims is what any reasonable mind should be able to conclude: that the specialized knowledge of experts should be a guide for the courts, and that the agencies charged with enforcement of a statute are the type of experts to whom a court should look.[51] However, if the Court were to established a single deference standard for administrative rules or interpretations of law, this would negate the often blurry distinction between informal and non-participatory administrative law.[52] When a statute is ambiguous, Congress intended for the agency responsible for that statute to clarify the ambiguities; the need for flexibility and effective governance should allow the agency to do so in a variety of ways—so long as they come to a permissible resolution of the ambiguity.[53]

The Court has failed to apply *Skidmore* with consistency or predictability.[54] *Reno v. Koray*[55] is one example of the Court applying a *Chevron* deference analysis to a fact pattern that warrants *Skidmore* deference.[56] The Court began its analysis of the Bureau of Prison's (BOP's)

---

47. *Id.* at 140.

48. *See* Kalen, *supra* note 30, at 716 (discussing Congress's ability to craft statutory language that explicitly allows for agencies to engage in informal rulemaking).

49. *Compare* United States v. Mead Corp., 533 U.S. 218, 235 (2001) (validating the applicability of *Skidmore* to informal administrative interpretations not warranting *Chevron* deference due to the ability of the Administrator to "bring the benefit of specialized experience"), *with id.* at 250 (Scalia, J., dissenting) (arguing that "*Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation").

50. *Id.* at 250 (Scalia, J., dissenting).

51. *Id.* (describing *Skidmore* deference as "a trifling statement of the obvious").

52. *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) (supporting deference to agency interpretation of law under "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows").

53. *See* Kalen, *supra* note 30, at 670–72.

54. *See generally* Reno v. Koray, 515 U.S. 50 (1995) (holding that an agency guideline issued by the Bureau of Prisons (BOP) was entitled to some deference because it was a permissible construction of the statute); UAW v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991) (applying EEOC guidance without any reference to *Skidmore*).

55. 515 U.S. 50.

56. *See id.* at 61 (considering a BOP internal guideline that constructed the term

guidance by stating that the administrative interpretation of law at issue came from an internal guidance document amounting to an "interpretive rule" not subject to notice and comment.[57] Normally, this statement of the issue as one dealing with non-participatory administrative action would result in a *Skidmore* analysis of the agency's interpretation.[58] However, the Court explained that BOP had arrived at a permissible construction of the statute,[59] and therefore its interpretation should be "entitled to some deference."[60] Two problems arise with *Koray*. First, "permissible construction" is language taken directly from a *Chevron* deference analysis.[61] Second, the Court does not elaborate on the term "some deference" and what it means as compared to *Chevron* or *Skidmore* deference.[62] This terminology implies that the Court essentially applied a *Chevron* analysis to agency guidance.[63]

In Justice Scalia's dissenting opinion in *United States v. Mead Corp.*,[64] he attempted to distinguish *Koray* by explaining that the Court's opinion in *Koray* should not be read as endorsing a *Chevron* analysis for the type of agency guidance at issue.[65] He claimed this is because the Court in that case would have come to the same conclusion as the BOP anyway and therefore had no reason to state decisively what level of deference it would grant to such a document.[66] However, as seen in *UAW v. Johnson Controls, Inc.* and *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, the Court may at

---

"official detention" to exclude any time spent by a parolee on a release order under "restrictive conditions").

57. *Id.*

58. *See supra* notes 38–40 and accompanying text (supporting how the rule of *Christensen* directs the Court to a *Skidmore* analysis when the case involves informal agency guidance).

59. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (applying the "permissible construction" analysis to agency rulemaking and declaring that a "court may not substitute its own construction of a statutory [provision] for a reasonable interpretation made by the administrator of an agency").

60. *Koray*, 515 U.S. at 61.

61. *Id. But see* United States v. Mead Corp., 533 U.S. 218, 234–35 (2001) (citing *Koray* as support for the proposition that an agency interpretation outside of the formal rulemaking process is not necessarily removed from the realm of *Chevron* deference).

62. *See Koray*, 515 U.S. at 61 (citing *Chevron* as authority for granting "some deference" to a "permissible construction of the statute," after explicitly stating that the agency action in question was not formal rulemaking subject to notice and comment).

63. *Cf. Mead*, 533 U.S. at 254–56 (Scalia, J., dissenting) (enumerating cases where agency action that did not have a participatory element was granted *Chevron* deference in contradiction with the majority's view of *Chevron* deference).

64. *Id.* at 239.

65. *See id.* at 254–55 (noting, however, that the Court does apply *Chevron* language in its decision).

66. *See id.*

times just avoid addressing the deference question altogether when it independently comes to the same conclusion as EEOC.[67] That the Court explicitly addressed the deference issue in *Koray* could imply that it intended to establish law on that point. As for the question of what "some deference" means, Justice Scalia's dissent considered this term of the opinion to be merely an "aside [that] is ultimately inconclusive."[68] These variances in deference to administrative guidance have created uncertainty about what deference analysis will be applied to any particular administrative action—even actions that seem to clearly fit into a particular category.[69]

3. Retroactivity of Administrative Interpretations

The Court should firmly establish that when agency interpretations of law are adopted in the middle of the litigation, the timing is of no significance as long as the interpretation meets other relevant qualifications for deference.[70] In *Motorola Inc. v. United States*,[71] the Federal Circuit concluded that *Chevron* deference, when otherwise applicable, was not prohibited simply because the agency, U.S. Customs and Border Protection (Customs), formally adopted an interpretation of the statute in question several years after the relevant events had taken place.[72] While the court emphasized that Custom's regulation was adopted pursuant to authority given to it by Congress, and through notice-and-comment rulemaking, the court also stressed that the timing was not a factor in deciding if deference was due, provided the position adopted by the agency was not a "post hoc rationalization . . . [of] past agency action" and the Administrator was able

67. *See infra* Part II.B.1 (discussing cases in which courts granted deference to the EEOC on Title VII).

68. *Mead*, 533 U.S. at 254–55 (Scalia, J., dissenting).

69. *See supra* note 62 and accompanying text (contrasting the Court's decisions regarding the application of either *Chevron* or *Skidmore* deference to documents outside of informal rulemaking).

70. *See* Motorola, Inc. v. United States, 436 F.3d 1357, 1366 (Fed. Cir. 2006) (granting *Chevron* deference to agency regulation adopted "after the controversy arose and after this litigation began"). *But see* De La Mota v. U.S. Dep't of Educ., 412 F.3d 71, 80 (2d Cir. 2005) (rejecting the notion that the Department of Education (DOE) could adopt the interpretation of a staff member as its own during the course of litigation because it lacked the thoroughness standard of *Skidmore*).

71. 436 F.3d 1357 (Fed. Cir. 2006).

72. *Id.* at 1366; *see also* Grapevine Imps., Ltd. v. United States, 636 F.3d 1368, 1383 (Fed. Cir. 2011) ("[T]he Supreme Court and this court have specifically affirmed the judiciary's obligation to defer to agency interpretations even when those regulations come midstream in litigation.") (citing Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996)).

to present support for that position.[73]

The Court took a similar approach in *Smiley v. Citibank (South Dakota), N.A.*[74] In *Smiley*, the Comptroller of the Currency adopted a regulation defining "interest" after the state supreme court had dismissed the petitioner's complaint and approximately three weeks after the Court granted certiorari to *Smiley*.[75] The petitioner's case, alleging that Citibank had charged excessive late fees on her credit card, depended on whether the term "interest," as used in the National Bank Act, included late fees.[76] The question for the Court was whether it should apply the Comptroller's definition of interest, which would weigh against the petitioner, to the petitioner's case now that the matter was before it.[77] The Court ultimately granted deference to the Comptroller's interpretation, noting it was acting with little hesitation and declaring it was of no concern "[t]hat it was [the] litigation which disclosed the need for the regulation."[78] When an agency adopts a reasonable interpretation of a statute, that interpretation may still be granted deference even when the interpretation was prompted by the litigation at hand.[79]

In contrast, the Second Circuit denied *Skidmore* deference to an interpretation of law that the Department of Education (DOE) adopted.[80] In *De La Mota v. U.S. Department of Education*,[81] a single DOE staffer wrote a letter to a university in response to its request for clarification on DOE loan forgiveness policies; the staffer's statement of DOE policy significantly limited the availability of loan forgiveness from what the plain language of

---

73. *Motorola*, 436 F.3d at 1366 (quoting Auer v. Robbins, 519 U.S. 452, 462 (1997)).

74. 517 U.S. 735 (1996).

75. *See id.* at 739–40 (citing the Comptroller's regulation as adopted February 9, 1996); *see also* Smiley v. Citibank (S.D.), N.A., 516 U.S. 1087 (granting writ of certiorari on January 19, 1996).

76. *See Smiley*, 517 U.S. at 737–41 (discussing how the petitioner specifically argued that the late fees Citibank charged to her account were "unconscionable" under California law (her home state) though allowed in South Dakota (the bank's home state); the inclusion of such late fees as "interest" under the National Banking Act would impose a rule that the bank was allowed to charge any interest legally allowed by the law of the bank's home state).

77. *See id.* at 739–41.

78. *Id.* at 741 (distinguishing between an agency interpretation of a statute adopted during litigation and a "litigating position[]" adopted by an agency lacking support in "regulations, rulings, or administrative practice").

79. *Id.*; *see also* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1335 (2011) (citation omitted) (deferring to agency interpretations because they "are reasonable. They are consistent with the Act. The length of time the agencies have held them suggests that they reflect careful consideration, not '*post hoc* rationalization[n]'").

80. *See generally* De La Mota v. U.S. Dep't of Educ., 412 F.3d 71 (2d Cir. 2005).

81. *Id.*

the relevant statute suggested.[82] In denying deference, the court reasoned that DOE's position lacked both the "thoroughness [of] consideration" and "validity" elements of the *Skidmore* analysis because it contradicted plain language and it was a single staffer who took the position, therefore lacking the "macro perspective" necessary for agency decisionmaking.[83]

The Second Circuit's analysis makes it clear that DOE's adopted position in this case was so significantly lacking in validity and power to persuade that it would not have been granted *Skidmore* deference whether it was adopted before or after the relevant events in the case.[84] Given that the agency action here would not have been worthy of deference regardless of the timeframe in which it was released, it should not be used as a guide for courts in considering an agency action that is worthy of deference under the relevant deference analysis.[85]

It is unclear what deference analysis would apply when an agency action that would usually be analyzed under *Skidmore* is a permissible construction of a statute but is adopted "after the controversy [arises] and after [the] litigation [begins]."[86] Given that the Court may grant *Chevron* deference to an agency interpretation of law that was adopted not only while litigation on the issue in question was pending, but also clearly in response to that pending litigation, the same principal should apply to agency actions not amounting to formal or informal rulemaking so long as they constitute a permissible construction of the statute. This will bring greater uniformity and predictability to the Court's deference analysis.

B. The Courts and Deference to EEOC Guidance

When deciding what level of deference is due to informal administrative interpretations of laws regulating the employer-employee relationship, the Court has taken a rather contradictory path, sometimes allowing for greater deference to EEOC under a *Chevron* analysis and sometimes limiting deference under *Skidmore*.[87] The continuing validity of the *Skidmore* analysis

82. *Id.* at 78.

83. *Id.* at 80.

84. *Id.* at 81–82 (finding that DOE interpretation "generates a result impossible to administer and at odds with Congress' goals" and that the DOE did not even "purport to speak authoritatively" on the issue).

85. *See id.* at 80 (implying that DOE's adoption of the interpretation "during the course of subsequent litigation" was one factor in denying *Skidmore* deference).

86. Motorola, Inc. v. United States, 436 F.3d 1357, 1366 (Fed. Cir. 2006).

87. *Compare* Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971) (concluding that EEOC's interpretation, as the enforcing agency of Title VII, was entitled to "great deference"), *with* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (opining that EEOC interpretation was entitled to some lesser degree of deference because Congress had not

is itself questionable,[88] and its application to EEOC guidance is equally questionable and certainly inconsistent.[89] This uncertainty concerning the force of EEOC's interpretations of the statutes the agency is responsible for administering weakens its ability to carry out its statutory duties. The Court should establish a single standard of analysis for EEOC's actions, clarifying to employers and employees that EEOC's judgments on the statutes it administers will be given deference by the Court as long as they are reasonable interpretations of clearly ambiguous language.[90]

1. Instances of Courts Granting Deference to EEOC Guidance on Title VII

In *Griggs v. Duke Power Co.*,[91] the Court granted deference to EEOC's guidelines that interpreted Title VII to prohibit employment tests that were not directly related to the job for which the candidate was applying.[92] Both guidance documents that the Court considered were released after the relevant events took place, and one was released after the *Griggs* litigation had commenced.[93] In assessing EEOC's authority on this topic, the Court stated that, as the agency responsible for enforcing Title VII, EEOC's interpretation was entitled to "great deference."[94] The Court then said that EEOC's interpretation should be read as "expressing the will of Congress" in light of the fact that the interpretation aligned with the legislative history of Title VII and the intent of Congress to ensure people were hired based on their qualifications alone.[95]

The Court again granted great deference to EEOC in *EEOC v.*

---

endowed it with rulemaking authority in relation to Title VII), *and* UAW v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991) (applying an EEOC enforcement policy released in response to the litigation at hand without any discussion of whether deference was due to an agency action of that kind). *See also* Gregory v. Ashcroft, 501 U.S. 452, 493–94 (1991) (Blackmun, J., dissenting) (arguing for *Chevron* deference to an EEOC interpretation that is a permissible construction of the Age Discrimination in Employment Act (ADEA)).

88. *See supra* Part I (exploring criticism of *Skidmore* deference).

89. *See infra* Part II.A–B.

90. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) ("Any resolution of the ambiguity by the administering agency that is authoritative—that represents the official position of the agency—must be accepted by the courts if it is reasonable.").

91. 401 U.S. 424 (1971).

92. *See id.* at 433–34 (finding also that EEOC's position was aligned with the legislative history and the intent of Congress with regard to employment testing).

93. *Id.* at 433 & n.9.

94. *Id.* at 433–34.

95. *See id.* at 434 (citing statements from the Senate debates over Title VII and the promotion of hiring qualifications based solely on ability to do the job rather than race).

Commercial Office Products Co.,[96] which concerned an EEOC interpretation of Title VII regarding what it meant for a state agency to "terminate" its proceedings.[97] In its analysis, the Court first considered dictionary definitions and common usages of the word "terminate."[98] Given that both the respondent and EEOC had put forth reasonable interpretations, the Court concluded that EEOC, as the agency responsible for enforcement of Title VII, was entitled to deference.[99] As in *Koray*, the Court seemed to apply a *Chevron* standard of analysis by concluding that the reasonable interpretation of the statute in the guidance deserved deference—not addressing the thoroughness, validity, and consistency inquiry of *Skidmore*.[100]

When the Court decides an issue on which EEOC has adopted a particular stance, it will sometimes avoid the question of deference altogether, yet still decide the case in line with EEOC guidance.[101] In *UAW v. Johnson Controls, Inc.*,[102] the Court concluded that it was a violation of Title VII for a company policy to prohibit all women who could potentially become pregnant from working in manufacturing jobs that exposed them to toxic chemicals.[103] The Court addressed EEOC's issuance of a Policy Guidance in response to the Seventh Circuit's ruling in *Johnson Controls*.[104] The Court declined to enter into a discussion of deference to EEOC and simply stated that EEOC policy "accords with [our] conclusion," and used the Policy Guidance as support for its final decision without explicitly deferring to it.[105] This decision left unclear the role such a Policy Guidance would have in a case where the Court does not easily come to the same conclusion as EEOC, making it difficult for employers to know when they should shape their policies in accordance with EEOC guidance.

Similarly, *Newport News Shipbuilding & Dry Dock Co. v. EEOC* was a

---

96. 486 U.S. 107 (1988).

97. *See id.* at 115 (finding an EEOC interpretation of a statute "need not be the best one by grammatical or any other standards" to be entitled to deference); *see also id.* at 126 (O'Connor, J., concurring) (agreeing with the result "solely due to the traditional deference accorded the EEOC in interpretation of [Title VII]").

98. *See id.* at 114–16 (majority opinion) (allowing that "terminate" could mean either "to end for all time" or a "cessation in time").

99. *See id.* (identifying that "statutory context" and "legislative history" provided ample support for granting deference to EEOC's interpretation).

100. *See supra* Part I.A.2. (discussing *Skidmore* and *Koray*).

101. *See generally* UAW v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

102. 499 U.S. 187 (1991).

103. *See id.* at 198–200 (reasoning that the finding of a violation of Title VII in this case was "bolstered by the Pregnancy Discrimination Act").

104. *Id.* at 200.

105. *Id.*

consolidation of two cases before the Court that addressed the PDA; one was brought by EEOC against Newport News claiming its medical coverage plan discriminated against male employees, and the other case brought by Newport News against EEOC challenging the enforceability of its interpretative guidelines that would plainly invalidate the medical coverage plan in question.[106] Similar to *Johnson Controls*, the Court aligned its holding with EEOC's position, yet did not discuss the weight it gave to EEOC's interpretation of the Act as the enforcing agency.[107] The Court's inconsistency regarding deference makes it difficult for employers, employees, and their litigants to predict when the Court will enforce EEOC guidelines.

2. Instances of Courts Denying Deference to EEOC Guidance

In the aforementioned cases, the Court adhered to EEOC guidance in both implicit and explicit ways. The Court's divergence from EEOC's interpretation of Title VII, however, is often laid out in far more explicit terms.[108] For example, the Court in *Gilbert* made clear that the powers Congress bestowed on EEOC did not grant formal rulemaking authority to the agency.[109] As a result of this determination, the Court applied the *Skidmore* analysis to determine what weight should be given to EEOC's guidance, which would have allowed for a claim of pregnancy discrimination under Title VII.[110] The Court's decision to rule against EEOC's enforcement guidance was based primarily on three factors: (1) it was not issued contemporaneously with the enactment of Title VII; (2) it conflicted with past agency interpretations of Title VII; and (3) it did not align with the legislative intent behind Title VII as the Court interpreted it.[111] Congress responded to the Court's rejection of pregnancy

106. *See id.* at 671–76 (describing the procedural history of the case and the content of the EEOC guidance).

107. *See id.* at 683–85 (affirming the position taken by EEOC through statutory interpretation). *But see* Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971) (upholding the guidelines released by EEOC and giving significant weight to EEOC as the agency responsible for Title VII enforcement).

108. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533–34 (2013) (laying out the reasons why the Court chose not to grant deference to EEOC's interpretation of Title VII); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256–58 (1991) (same); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 143–45 (1976) (same).

109. *See Gilbert*, 429 U.S. at 141.

110. *See id.* at 140–41 (quoting the EEOC guidelines at issue and declaring that *Skidmore* is the "most comprehensive statement of the role of interpretative rulings such as the EEOC guidelines").

111. *See id.* at 142–44.

discrimination as being cognizable under Title VII with the PDA.[112] The PDA confirmed, as EEOC had declared in policy statements, that the definition of discrimination based on sex included discrimination based on pregnancy.[113]

In *EEOC v. Arabian American Oil Co.*,[114] the Court heavily relied on the reasoning applied in *Gilbert*—approximately thirteen years after *Gilbert* had been overturned—when it declined to follow EEOC's position[115] that Title VII applied to American citizens working abroad for American companies.[116] The analysis of EEOC's position in this case was nearly identical to that in *Gilbert*.[117] Specifically, the Court concluded that the EEOC guidance was not contemporaneous, consistent, or in line with legislative intent.[118] Again, as with *Gilbert*, Congress quickly overturned the Court's decision in *Arabian American Oil*.[119] Only months after the decision, Congress passed the Civil Rights Act of 1991, which amended the definition of "employee" under Title VII to include American citizens working for an American company in a foreign country.[120]

Both *Arabian American Oil* and *Gilbert* courts erred in adhering to the "'legislative rules vs. other action' dichotomy" in its analysis of EEOC's position; it should have adhered to a more uniform standard of analysis.[121]

---

112. *See supra* note 9 and accompanying text (discussing how the PDA clarified that discrimination based on pregnancy is discrimination on the basis of sex, and notified employers that they must treat pregnant employees the same as other employees who are similar in their ability or inability to work).

113. *See* 42 U.S.C. § 2000e(k) (2012) (declaring that "[t]he 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"); *see also* Employment Policies Relating to Pregnancy and Childbirth, 29 C.F.R. § 1604.10(b) (1975) (stating the position of the EEOC that the *Gilbert* Court rejected).

114. 499 U.S. 244 (1991).

115. *See id.* at 256 (pointing out that EEOC's position was "first formally expressed in a statement issued after oral argument but before the Fifth Circuit's initial decision in this case").

116. *See id.* at 259 (finding that the petitioner had not proved that Congress intended for Title VII to apply to American citizens abroad). *But see* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983) ("When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision.").

117. *Arabian Am. Oil*, 499 U.S. at 257–58.

118. *Id.* at 257–59 ("The EEOC's interpretation of the statute here thus has been neither contemporaneous with its enactment nor consistent since the statute came into law. As discussed above, it also lacks support in the plain language of the statute.").

119. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (codified as amended at 42 U.S.C. § 2000e(f) (2012)).

120. *Id.*

121. *See Arabian Am. Oil*, 499 U.S. at 260 (Scalia, J., concurring) (proposing that it is

The controlling law on what deference is owed to EEOC's interpretation of Title VII should be *EEOC v. Commercial Office Products Co.*[122] Under the precedent of *Commercial Office Products*, EEOC should be accorded deference unless its position is unreasonable "in light of the principles of construction courts normally employ."[123] Significantly, the majority in *Arabian American Oil* did not overrule or address *Commercial Office Products*, which leaves an open question as to the deference the Court will grant to EEOC because it has now applied both *Chevron* and *Skidmore*.[124]

The Court should resolve this question in favor of a single deference analysis for EEOC when it is interpreting Title VII in the interest of both effective administration of the Act and adequate notice to regulated entities. A primary virtue of the agency is the expertise it brings to the area of law that it is charged with administering.[125] If EEOC is to effectively carry out the task of enforcing Title VII, it must be able to capable of using that expertise when notifying employers about how the agency interprets the statute. Without this power, ambiguity in Title VII will continue to be argued in litigation, draining resources across the board.

C. Young v. United Parcel Service

Peggy Young was employed by United Parcel Service (UPS) as an "air driver" when she became pregnant.[126] During the course of Young's pregnancy, both her doctor and midwife drafted notes to UPS stating that, for the safety of her pregnancy, Young "should not lift more than twenty pounds for the first twenty weeks of her pregnancy and not more than ten pounds thereafter."[127] When Young discussed her options with management at UPS, she was told that she neither qualified for light duty work nor would be allowed to continue in her current job due to her lifting restriction.[128] Because Young had used all of her leave under the Family

---

incorrect "to say that *Gilbert* held that the EEOC . . . is not entitled to deference").

122. *See id.* (arguing that *Commercial Office Products*, rather than *Gilbert*, is the controlling precedent on deference to EEOC).

123. *Id.*

124. *See id.* (concluding that "the state of the law regarding deference to the EEOC is left unsettled"). *Compare* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533–34 (2013) (where Justice Scalia joined the majority opinion, which once again applied the *Skidmore* analysis to discredit an EEOC interpretation of Title VII), *with Nassar*, 133 S. Ct. at 2540 (Ginsburg, J., dissenting) (finding the EEOC guidance to be "well-reasoned and longstanding").

125. *See* POPPER ET AL., *supra* note 27, at 9 (discussing specialization and expertise as factors in favor of agency governance).

126. Young v. United Parcel Serv., Inc., 707 F.3d 437, 440 (4th Cir. 2013).

127. *Id.*

128. *See id.* at 441. Young also alleged that she was told that she could "not come

and Medical Leave Act (FMLA), she was forced to take an extended leave of absence during which she received no income and lost her medical insurance.[129]

Young's pregnancy discrimination claim was based on her argument that UPS failed to abide by the standards of the PDA when it refused to provide her with reasonable accommodations on the same basis that it provided accommodations for employees similarly situated in their ability to work.[130] UPS's policy did provide accommodations for employees who were (a) disabled under the Americans with Disabilities Act (ADA), (b) injured on the job, or (c) unable to work due to the revocation of their commercial driver certification.[131] The Fourth Circuit reasoned that the PDA does not require an employer to provide reasonable accommodations for a pregnant employee when the employer's policy only allowed for accommodations for specific categories of employees on a gender-neutral basis.[132] The court concluded that because UPS's policy was "pregnancy blind," it did not violate the PDA.[133]

Two weeks later, on July 14, 2014, EEOC issued its Guidance on the enforcement of the PDA, which directly contradicted the Fourth Circuit's ruling in *Young* by requiring reasonable accommodations for pregnant employees in Young's situation.[134] In a surprising move, UPS issued a company-wide policy change on October 27, 2014—just over a month before the Court heard oral arguments in *Young*.[135] This new policy reversed UPS's restrictions on the availability of light duty assignments to pregnant employees, which was precisely the policy it defended before the Court.[136]

---

back . . . until [she] was no longer pregnant." *See* Brief for Petitioner at 13, Young v. United Parcel Serv., Inc., 575 U.S. __ (2015) (No. 12-1226), 2014 WL 4441528.

129. *Young*, 707 F.3d at 441.

130. *See* Brief for Petitioner at 18, Young v. United Parcel Serv., Inc., 575 U.S. __ (2015) (No. 12-1226), 2014 WL 4441528.

131. *See Young*, 707 F.3d at 439–40.

132. *Id.* at 450–51.

133. *See id.* (reasoning that limiting light duty to employees disabled under the ADA, injured on the job, or subject to a revocation of their commercial driver's licenses, was not discriminatory against pregnant employees).

134. *See supra* note 14 and accompanying text.

135. *See* Brigid Schulte, *With Supreme Court Case Pending, UPS Reverses Policy on Pregnant Workers*, WASH. POST, Oct. 29, 2014, http://www.washingtonpost.com/blogs/she-the-people/wp/2014/10/29/with-supreme-court-case-pending-ups-reverses-policy-on-pregnant-workers/ (discussing the reversal of the UPS policy).

136. *See id.* (explaining in a supplemental brief filed by UPS, that its policy change does not change its position toward Younger; USP claims its actions toward Younger's case was legal at the time).

On March 25, 2015, the Court released its opinion in *Young.*[137] The Court ruled that a pregnant employee may establish a prima facie case of pregnancy discrimination based on a denial of reasonable accommodations when that employee can establish the liability of the employer under a modified *McDonnell Douglas Corp. v. Green*[138] analysis.[139] Under this modified framework,

> [A] plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act's second clause may make out a prima facie case by showing, as in *McDonnell Douglas*, that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work."[140]

From there, the employer may assert a "legitimate nondiscriminatory reason" for refusing the requested accommodation; then, the plaintiff bears the ultimate burden, as in any Title VII disparate treatment case, to prove that discrimination on the basis of the protected category was the real reason for the denial.[141] The Court further explained that to establish an issue of fact for a jury on the question of pretext, a plaintiff can (a) provide evidence that the burden on pregnant women as a result of the employer's denial is significant and not outweighed by the burden the employer would experience in providing accommodations, and (b) raise an inference that providing accommodations for pregnant workers would not impose a significant burden on the employer by producing evidence that the employer already provides accommodations for a "large percentage" of employees not in the protected class.[142] Though the ultimate outcome of

---

137. *See* Young v. United Parcel Serv., Inc., 575 U.S. __, No. 12-1226, slip op. at 23–24 (2015) (vacating the Fourth Circuit's judgment and remanding for further proceedings).

138. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (setting the initial framework for establishing a prima facie case of discriminatory failure to hire under Title VII). Under *McDonnell Douglas*, a plaintiff has the initial burden of showing: "(i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.*

139. *See Young*, No. 12-1226, slip op. at 20–21 (laying out the proper analytical framework for PDA claims of failure to accommodate).

140. *Id.*

141. *See id.* at 21 (quoting *McDonnell Douglas*, 411 U.S. at 802) (internal quotation marks omitted) (explaining that the plaintiff would typically attempt to prove discrimination at the final step by demonstrating that the employer's proffered reason for the denial was simply a pretext for discrimination); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993) (establishing the principal that while the employer must meet its burden of production, the burden of persuasion ultimately rests on the plaintiff).

142. *See Young*, No. 12-1226, slip op. at 21 (exploring how a PDA claim based on a denial

Young is no longer relevant for current or future pregnant employees of UPS, the decision in this case will still have significant consequences for pregnant workers across America, as well as for EEOC in its mission to enforce Title VII.[143]

II. ARGUMENT

When deciding *Young*, the Court once again continued down a path of uncertainty as to how it views EEOC guidance documents. The deference analysis applied to EEOC interpretations of law has varied in the past, from implied *Chevron* to *Skidmore*, with no apparent explanation for the variance.[144] To eliminate confusion, the Court should establish an analysis of EEOC guidance based on the *Chevron* standard; under that standard, where ambiguity in a statute exists, EEOC, as the agency responsible for enforcement of that statute, will be entitled to deference as long as its interpretation is based on a permissible construction of that statute.[145] The Court could have easily afforded this deference in *Young*; it could have come to the same conclusion as it did regarding the proper interpretation of Title VII, yet applied a better standard that would have clarified past inconsistencies, aided EEOC in carrying out its mission, and guided the lower courts in deciding future cases where EEOC guidance is at issue.

Where the Court has granted deference to EEOC in the past, it has applied a standard much more akin to *Chevron* than *Skidmore*, using language such as "great deference" and "permissible construction" in its deference analysis.[146] Similarly, when the Court has denied deference to EEOC, it did so under a *Skidmore* framework and analyzed factors in its decision that could have just as easily led it to deny deference under a *Chevron* analysis.[147]

---

of accommodations should proceed).

143. *See* Dave Jamieson, *Meet the Working Mother Taking Her Pregnancy Discrimination Case to the Supreme Court*, HUFFINGTON POST (Oct. 31, 2014, 7:36 AM), http://www.huffingtonpost.com/2014/10/31/pregnancy-discrimination-supreme-court_n_6078416.html (noting that it is often low-wage working women who are most significantly impacted by the inability to get light-duty assignments while pregnant).

144. *See supra* Part I.B (reviewing past Court decisions that involved EEOC guidance).

145. *See* UAW v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991) (implying deference by deciding in accordance with EEOC guidance adopted during the course of the litigation); Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971) (asserting great deference due to EEOC when its construction finds support in legislative history of the Act).

146. *See supra* Part I.B.1 (exploring cases where Court granted deference to EEOC interpretations of law).

147. *See supra* Part I.B.2 (considering factors such as the EEOC interpretation being a significant departure from established legislative intent that could independently lead to denial of deference under *Chevron*).

This is precisely what occurred in *Young*.[148] Going forward, the Court should end the confusion and uncertainty surrounding the application of a particular deference analysis to EEOC guidance and firmly establish a single standard of analysis for EEOC guidance: granting deference when EEOC's interpretation meets the demands of *Chevron*, and denying deference when it does not.

Second, the Court should establish that as long as EEOC's interpretation of the statute is a permissible construction under *Chevron*, then the timing of the release of guidance does not affect the level of deference granted.[149] In both *Smiley* and *Motorola*, the retroactive application of agency guidance was not an issue because the guidance complied with the standards of *Chevron*.[150] Likewise, when the court refused to apply an agency interpretation of law in *De La Mota*, it did so because the interpretation would not have been worthy of deference, regardless of timing.[151]

A. The Deference Analysis in Young *Was Flawed in Both Reasoning and Result*

In its analysis of the Guidance at issue in *Young*, the Court generally agreed with the two fundamental contentions of that Guidance: (1) that the second clause of the PDA means that in litigating a PDA case, it is evidence of discrimination when an employer has a policy of denying accommodations to pregnant workers with a temporary physical impairment due to pregnancy, when other polices provide reasonable accommodations to non-pregnant workers with similar physical impairments, and (2) that the extent of accommodations available to pregnant workers should be determined by looking to comparable non-pregnant employees with similar temporary physical impairments who have received accommodations from the employer.[152] Instead of acknowledging this fundamental agreement, however, the Court concocted reasons to reach the conclusion that it would not follow EEOC's Guidance on Title

148. *See Young*, No. 12-1226, slip op. at 16 (applying the *Skidmore* factors to the EEOC Guidance).

149. *See supra* Part I.A.3 (examining instances where administrative guidance was applied retroactively because it was a permissible construction under *Chevron*).

150. *See id.* (analyzing *Smiley* and *Motorola*).

151. *See id.* (discussing the Second Circuit's decision in *De La Mota*).

152. *Compare* PDA GUIDANCE, *supra* note 10, § I.C.1 (setting forth the ways that a plaintiff alleging pregnancy discrimination can demonstrate that a denial of light duty was based on the employer's animus toward pregnant workers), *with Young*, No. 12-1226, slip op. at 20–22 (establishing that to rebut an employer's legitimate non-discriminatory reason for denying accommodations, the pregnant employee can show that the employer provided accommodations for "a large percentage of nonpregnant workers").

VII.[153] The analysis it applied in reaching this conclusion was flawed in two ways.

First, the Court should have found the Guidance to be a permissible construction of the statute and added clarification to the enforcement of the PDA only where necessary—specifically, how courts should *weigh* evidence that an employer provides workplace accommodations to one category of employees and does not extend those accommodations to pregnant workers.[154] Second, the Court should have established a clear standard, based on precedent, that the Guidance, as "[t]he administrative interpretation of the Act by the enforcing agency[,] is entitled to great deference."[155]

The Guidance, which required an employer to provide reasonable accommodations to employees impaired by pregnancy when it does so for other employees with similar impairments, is a reasonable construction of the PDA. First, where the proper meaning and application of a statute is in question, the Court will look to the plain language of the statute.[156] The words of the statute "'will be interpreted as taking their ordinary, contemporary, common meaning.'"[157] The relevant part of the PDA reads:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and *women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes*, including receipt of benefits under fringe benefit programs, *as other persons not so affected but similar in their ability or inability to work.*[158]

The Guidance interpreted this language to mean that employers must provide reasonable accommodations for employees with pregnancy-related

---

153. *See Young*, No. 12–1226, slip op. at 15–17 (criticizing EEOC for not clarifying in guidance issued soon after the passage of the PDA as to what an employer's obligations are when it does not treat all non-pregnancy related disabilities alike).

154. For example, the Court struggled with the question of how to apply the PDA when an employer provides accommodations for an injured driver with an extra hazardous route and does not provide similar accommodations to a similarly injured pregnant driver who does not have an extra hazardous route. *See infra* Part III.B.2 (discussing this question and how the Court could have reconciled this concern).

155. *See* Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971) (concluding that EEOC's construction of the Act was consistent with the text and the legislative history); *see also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279–80 (1976) (asserting that EEOC interpretations of Title VII "are entitled to great deference").

156. *See* Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1060 (9th Cir. 2003) (discussing "[c]anons of statutory construction").

157. *Id.* (quoting United States v. Smith, 155 F.3d 1051, 1057 (9th Cir. 1998)).

158. 42 U.S.C. § 2000e(k) (2012) (emphasis added).

impairments if the employer provides accommodations to non-pregnant employees who are similarly impaired.[159]

The Court agreed that it is important to read each clause of the PDA not in isolation, but as they interact.[160] The first clause of the PDA[161] establishes that an employer who treats pregnant employees unfavorably compared to non-pregnant employees commits sex discrimination under Title VII, just as if the employer had treated women as a class less favorably than men.[162] The first clause affirms that pregnancy is part of a protected class under Title VII and is entitled to the same protections as the rest of that class.[163]

The second clause[164] of the PDA, however, goes one step further by distinguishing the analysis for pregnancy discrimination claims from other claims of discrimination under Title VII.[165] This clause departs from the standard Title VII analysis because it establishes a unique test which requires only that the plaintiffs be "similar in their ability or inability to work" to others who received more favorable treatment—not similarly situated in all respects.[166] The Court correctly concluded that to avoid

159. *See* PDA GUIDANCE, *supra* note 10, § I.A.5 (reaching this conclusion from the language of the PDA requiring equal treatment based on "ability or inability to work").

160. *See* Young v. United Parcel Serv., Inc., 575 U.S. __, No. 12-1226, slip op. at 17–18 (2015) (exploring possible interpretations of the second clause); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000) (explaining that it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)).

161. 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions").

162. *See* Brief for Petitioner at 21–23, Young v. United Parcel Serv., Inc., 575 U.S. __ (2015) (No. 12-1226), 2014 WL 4441528 (inferring that for an employer to deny light duty to a pregnant employee when it provides it for employees with off-the-job injuries is discrimination based on sex/pregnancy as prohibited by the first clause); *see also* Young v. United Parcel Serv., Inc., 707 F.3d 437, 447 (4th Cir. 2013) (granting that the first clause included pregnancy discrimination under the sex discrimination prohibition).

163. *Young*, 707 F.3d at 447.

164. 42 U.S.C. § 2000e(k) ("[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work").

165. *See Young*, No. 12–1226, slip op. at 19 (asserting that "the second clause was intended to do more" than include pregnancy in the category of sex discrimination); *see also* Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996) (highlighting that the second clause does more than "merely recogniz[e] that discrimination on the basis of pregnancy constitutes unlawful sex discrimination").

166. *See Ensley-Gaines*, 100 F.3d at 1226 (contrasting the "ability to work" test with the traditional Title VII analysis that requires that the plaintiff be similar "in all respects" to

rendering it superfluous, the second clause cannot simply require employers to treat pregnant employees the same as it does non-pregnant employees who are similar in all respects; the first clause already accomplishes that.[167] The second clause imposes an additional mandate requiring employers to make decisions regarding pregnant employees based on their similarity in ability or inability to work as other comparable employees.[168]

In addition to the plain meaning of the PDA, the legislative history of the Act supports deference to the Guidance. A primary concern of Congress in enacting the PDA was preventing employers from treating women who get pregnant as "marginal workers," under the assumption that they would end up leaving their jobs for family responsibilities.[169] Significantly, the House Report on the enactment of the PDA states that "the 'same treatment' may include employer practices of transferring workers to lighter assignments . . . or other practices, so long as the requirements and benefits are administered equally for all workers in terms of their actual ability to perform work[,]" demonstrating that light duty was conceptualized early in the PDA's history.[170]

Finally, EEOC has long supported the position that the PDA could require employers to provide light duty for pregnant workers.[171] In an appendix published in 1979, which explains the effects of the PDA, EEOC presented a series of questions and answers regarding the obligations imposed on employers by the PDA.[172] In response to a question about what an employer must do when a pregnant employee is temporarily unable to perform some aspect of her job, EEOC presented a hypothetical situation where a pregnant employee's job function included carrying

---

those who received more favorable treatment).

167. *See* Brief for Petitioner at 23, Young v. United Parcel Serv., Inc., 575 U.S. __ (2015) (No. 12-1226), 2014 WL 4441528 (citing Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2468–69 (2014) (acknowledging a presumption that statutory construction should avoid surplusage)); *see also* UAW v. Johnson Controls, Inc., 499 U.S. 187, 205 (1991) (acknowledging the significance of the second clause).

168. *See Johnson Controls*, 499 U.S. at 201, 204–05 (commenting that the concurrence "seeks to read the second clause out of the Act" by arguing that an employer may use inability to be pregnant as an occupational qualification, regardless of whether pregnancy or ability to be pregnant affects a woman's ability to perform the job).

169. *See* H.R. REP. NO. 95–948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751 (asserting that the risk of women being relegated to low-paying jobs due to pregnancy is enough reason for employers to be required to treat pregnant women as they would treat other employees based on their ability or inability to work).

170. *Id.* at 5, 1978 U.S.C.C.A.N. at 4753.

171. 29 C.F.R. 917 (1975) (demonstrating consistency in EEOC's position from the early days of the PDA).

172. *Id.*

materials to the machine she operated.[173] EEOC unequivocally declared that "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function."[174] The Court in *Young* acknowledged this particular past interpretation by EEOC, and even acknowledged that prior to the enactment of the PDA EEOC had issued guidance stating that workers with pregnancy-related disabilities should have access to the same benefits given to workers with temporary disabilities.[175] The Guidance released in July 2014 merely restates an interpretive position that EEOC has held from the early days of the PDA.

The plain meaning of the text, the legislative history, and the consistency of EEOC's position on light duty for pregnant workers all support the conclusion that the Guidance is a permissible construction of Title VII.[176] As the Court has conceded, Congress's intent was for EEOC to enforce Title VII, which should mean that EEOC's interpretation of ambiguous language in Title VII only needs to be reasonable for deference to be appropriate.[177] Factors such as legislative history, plain language, and consistency all point to the reasonableness of an agency's interpretation of a statute.[178]

B. The Court Should Have Granted Deference and Established a Clear Standard for Analyzing EEOC Guidance

Prior to the decision in *Young*, some argued that the Guidance constituted a significant change in interpretation of the PDA and that it should have been subject to public notice and comment.[179] However, because the legislative history and the consistency of the EEOC's position on reasonable accommodations both indicate that this was not a substantial shift in the interpretation of the PDA, these factors, along with the plain meaning of the Act, establish that the Guidance is a reasonable interpretation of the PDA and is therefore entitled to deference.[180]

---

173. *Id.* at 918.

174. *Id.*

175. Young v. United Parcel Serv., Inc., 575 U.S. __, No. 12-1226, slip op. at 14 (2015) (citing 29 C.F.R. § 1604.10(b) (1975)).

176. *See generally* Reno v. Koray, 515 U.S. 50, 61 (1995) (granting *Chevron* deference to informal agency guidance because it was a permissible construction of the statute).

177. *See* EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115–16 (1988) (noting ample support in legislative history, purpose, and plain language for EEOC's interpretation).

178. *See supra* Part I.B (discussing instances when the Court has and has not granted deference to EEOC).

179. *Id.*

180. *See supra* Part I.A.

1. Why the Court Should Have Granted Deference

One factor that weighed against the Courts granting deference to EEOC was the timing of the issuance of the guidance.[181] This factor, however, should not have been given significant weight with regard to the Guidance. The Court has previously ruled that a reasonable interpretation of a statute may be granted deference even if it was not adopted contemporaneously to the enactment of the statute;[182] and even when it was adopted in response to the litigation at hand, deference is given so long as that interpretation is reasonable.[183] That the Guidance was released only after the Fourth Circuit released its decision in *Young* should not have hindered the Court considering the position of EEOC on the issue of light duty.[184] Because EEOC Guidance is a permissible construction of the PDA, it is far more comparable to *Motorola* and *Smiley*, both instances where the Court granted deference to agency actions taken after the litigation in question had begun.[185] The Guidance is distinguishable from *De La Mota,* where deference was denied under a *Skidmore* analysis, because EEOC's guidance was the statement of the agency as a whole and not a single agent speaking on behalf of the agency.[186] Additionally, the position of EEOC regarding reasonable accommodations has been consistent throughout its enforcement of the PDA, whereas in *De La Mota* the interpretation in question conflicted with an earlier application of the statute.[187]

A second argument against granting deference to an interpretation of EEOC is that the position has not been consistent since the enactment of Title VII.[188] Indeed, some commentators argue that the Guidance represents the first time EEOC has taken the position that light duty should be given to pregnant workers when similar accommodations are given to

181. *See* Young v. United Parcel Serv., Inc., 575 U.S. __, No. 12–1226, slip op. at 16–17 (2015) (discussing the recent release of the PDA Guidance); *see also supra* Part I.B.2 (examining the reasoning in *Arabian Am. Oil Co.* and *Gilbert*).

182. Motorola, Inc. v. United States, 436 F.3d 1357, 1366 (Fed. Cir. 2006).

183. *See supra* notes 70–73 and accompanying text.

184. *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996) (allowing for deference to an agency interpretation adopted after the decision of the state's high court and before reaching the Supreme Court).

185. *See supra* Part I.A.3 (outlining cases wherein courts did and did not grant deference to agency action taken after litigation had begun).

186. *Id.*

187. *See supra* note 84 and accompanying text (explaining why the agency position in *De La Mota* was not entitled to deference).

188. *See* Young v. United Parcel Serv., Inc., 575 U.S. __, No. 12-1226, slip op. at 17 (2015) (citing instances where the Department of Justice and the U.S. Postal Service have taken contrary positions on the enforcement of the PDA); *see also supra* note 118 and accompanying text (noting consistency issues in *Arabian Am. Oil* and *Gilbert*).

other employees similar in their ability to work.[189] This assertion simply is not true. The position of EEOC on the issue of light duty for pregnant workers has been consistent from the very early years of the PDA and is supported by legislative history.[190]

In analyzing consistency, the Court in *Young* placed too much significance on the fact that other agencies in the federal government had previously taken a position on the PDA that conflicted with EEOC.[191] It is not unheard of, however, for two government agencies to end up on different sides of an issue in litigation.[192] The only question in the Court's analysis of consistency should have been whether the EEOC, as the agency with enforcement responsibility for Title VII, has consistently held the position asserted here. The Court's analysis in *Young* leaves a clear need for a consistent standard of analysis for EEOC guidance. That standard should be consistent with past cases such as *Commercial Office Products* and *Griggs*, which afforded "great deference" to the guidance of EEOC when the interpretation was both grammatically reasonable and aligned with legislative intent.[193]

In the interest of consistency and predictability regarding EEOC guidance in general, the Court in *Young* should have clearly defined EEOC guidance documents as being worthy of deference when they constitute a permissible construction of the statute they interpret, regardless of whether they were issued before or after the litigation began.

2. How the Court Could Have Reconciled With What It Saw as a Deficiency in the EEOC's Construction of the Statute

As discussed above, the factors that the Court used to set aside the Guidance should not have been given significant weight in the Court's analysis. Arguably, the Court's underlying reasoning for rejecting the

189. *See, e.g.*, Jeff Nowak, *Don't Be Tripped Up by Light Duty Obligations Under the FMLA and ADA: A Discussion of Employer Best Practices*, J.D. SUPRA BUS. ADVISOR (Oct. 6, 2014), http://www.jdsupra.com/legalnews/dont-be-tripped-up-by-light-duty-obliga-78154/ (characterizing the EEOC Guidance as "groundbreaking").

190. *See supra* notes 169–174 and accompanying text (exploring the legislative history of the PDA).

191. *See Young*, No. 12-1226, slip op. at 17 (questioning why EEOC's position is "contrary to the litigation position the Government previously took").

192. *See, e.g.*, EEOC v. Peabody W. Coal Co., 773 F.3d 977, 979–80, 982 (9th Cir. 2014) (considering opposing arguments from the EEOC and the Department of the Interior on an issue of interpreting Title VII's limited allowance of tribal hiring preferences on Native American reservations).

193. *See supra* Part I.B.1 (discussing instances when the Court granted deference to EEOC on Title VII).

Guidance was that it did not agree with EEOC's construction of the PDA. This can be inferred from both the insufficiency of the reasons discussed above and the Court's discussion of its view that the Guidance sufficiently failed to define "other persons."[194] The Court was clearly grappling with this issue during oral arguments for *Young*.[195] Justice Breyer presented a hypothetical situation where an employer provides accommodations for injured truck drivers who are injured as a result of driving an extra hazardous route but then does not provide comparable accommodations to a similarly injured pregnant driver who does not drive an extra hazardous route.[196]

This question is easily answered in a way that aligns with both the EEOC Guidance and Title VII precedent. A useful comparison is the analysis used when finding a comparator in a case alleging discriminatory discipline.[197] In finding this comparator, a court will look at a number of factors, with no one factor being dispositive, to find someone who is "similar enough to enable 'a meaningful comparison.'"[198] Factors to be considered may include job title, responsibilities, job site, standards of conduct, and the supervisor.[199]

In the truck driver hypothetical discussed above, a court considering a claim of pregnancy discrimination could consider these relevant factors and conclude that the driver on the extra hazardous route does not provide a "meaningful comparison" for a pregnant woman who was a driver on a normal delivery route.[200] This analysis works with the Guidance's prohibition on considering the source of the injury; in the truck driver hypothetical, the prohibited factor to consider would be the on-the-job source of the hazardous truck driver's injury and pregnancy as the source of the plaintiff's injury.

If the Court had simply read the usual Title VII framework for finding a

194. *See Young*, No. 12-1226, slip op. at 15–16 (considering the EEOC Guidance's position on with whom to compare pregnant women).

195. *See generally* Transcript of Oral Argument, Young v. United Parcel Serv., Inc., 575 U.S. ___ (2015) (No. 12-1226) (debating the issue of comparators).

196. *See id.* at 6–7 (presenting the injured truck driver hypothetical).

197. *See* Coleman v. Donahoe, 667 F.3d 835, 848–49 (7th Cir. 2012) (laying out the standards used when finding a comparator for a plaintiff alleging that discipline for a workplace violation was applied in a discriminatory manner).

198. *See id.* (quoting Humphries v. CBOCS W., Inc., 474 F.3d 387, 405 (7th Cir. 2007)) (stating that the comparators here "worked at the same job site . . . were subject to the same standards of conduct, violated the same rule, and were disciplined by the same supervisor").

199. *See id.* (discussing these various factors and noting how none are dispositive).

200. *See Humphries*, 474 F.3d at 405 (emphasizing that finding a "meaningful comparison" is simply a "factual inquiry" that looks for common features between the plaintiff and the comparator).

comparator in the Guidance, it would have had no reason to find the Guidance lacking and could have ruled it to be a permissible construction of the PDA. Instead, the Court has adopted a new "large percentage" of other workers comparison, which considers none of the above-discussed factors and leaves open an important question: a large percentage of which workers?[201] Now EEOC must enforce this standard while remaining uncertain about the weight given to any future guidance it will issue.

CONCLUSION

The Court's contradictory decisions about deference given to informal agency guidance, particularly when it comes to EEOC, have created significant uncertainty and unpredictability when it comes to the impact of enforcement guidance documents released by EEOC. Going forward, the Court should establish a clear standard. As Justice Scalia argued, cases involving guidance from EEOC should be dealt with by "assuming, without deciding, that the EEOC [is] entitled to deference on the particular point in question."[202] From that point of assumed deference, the Court should then use traditional forms of statutory construction to determine if ambiguous language exists and if the guidance is a permissible interpretation of that language.[203] This test would abandon the dichotomy between "legislative rules [and] other action," or between *Chevron* and *Skidmore*, that the Court has failed to apply with consistency and predictability.[204] This single standard of analysis would enable EEOC to better perform its function of ensuring workplace fairness and equality for all Americans.

201. *See* Young v. United Parcel Serv., Inc., 575 U.S. __, No. 12–1226, slip op. at 21 (2015) (stating that this "large percentage" consists of "nonpregnant workers," but not clarifying if this means all nonpregnant workers within the company, or just nonpregnant workers who would qualify as comparators for the plaintiff under a standard Title VII analysis).

202. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring).

203. *Id.*

204. *Id.*

ADMINISTRATIVE LAW REVIEW

Subscription and Order Form

The following are the prices for subscriptions and individual issues. Please contact us at 312-988-5522 with inquiries and orders.

1. Individual eligible for membership in the ABA (includes membership in Section of Administrative Law and Regulatory Practice) $60.00

2. Organization or individual located in the United States or its possessions not eligible for membership in the ABA $40.00

3. Organization or individual located outside of the United States and its possession not eligible for membership in the ABA $45.00

4. Law students attending an ABA accredited law school (includes membership in Section of Administrative Law and Regulatory Practice) $10.00

5. Back issue(s) less than two years old (For issues published more than two years ago contact William S. Hein & Co., Inc. at 800-828-7571). ..... $10.00 each

6. Quantity discount for five (5) or more copies of the same back issue ..... $8.00 each

Volume/Number	Quantity	Cost/Issue	Total
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Handling charge when ordering back issues $3.95. _____

Subscription (if student indicate name of school, if attorney give jurisdiction where admitted):_____

Total ..... _____

Please print
Name: .....
Title: .....
Company/Organization: .....
Address: .....
City/State/Zip: .....
Telephone: .....
Facsimile: .....
E-Mail: .....
Would you like to be placed on our e-mail mailing list ☐ Yes ☐ No

Method of payment
☐ Check enclosed (make check payable to The American Bar Association)
☐ Charge my credit: ☐ MasterCard ☐ Visa - Card Number: .....

Expiration Date: . . . . . Signature: .....

Send this form via facsimile to 312-988-5568 or mail to Member Services, American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611-4497. Orders also accepted via telephone at 312-988-5522.

Please allow two to three weeks for delivery.

THANK YOU FOR YOUR ORDER

The *Administrative Law Review* is ACCEPTING SUBMISSIONS for Recent Developments

The *Administrative Law Review* is accepting submissions, on an ongoing basis, to be considered for publication in the Recent Developments section.

Papers should be shorter than average articles and should report new, exciting events in administrative law and regulatory practice.

Topics may encompass recent events, case decisions, administration changes, new appointments, emerging trends, or review recently published literature that has the potential to change the face and practice of administrative law. The Recent Developments section updates our readers on the latest developments of administrative law and spurs discussion within the industry with concise, topical pieces.

Please send submissions or inquiries to:

alr.srde@wcl.american.edu

or

Senior Recent Developments Editor
Administrative Law Review
American University Washington College of Law
4801 Massachusetts Ave., NW, Suite 623
Washington, D.C. 20016

* * *

* * *

ADMINISTRATIVE LAW REVIEW

Volume 67 | Summer 2015 | Number 3

Editor in Chief
Neil A. Murphy

Executive Editor
Francesca C. Rawleigh

Managing Editor
Sam DePrimio

Executive Communications & Development Editor
Marissa Pisarick

Senior Recent Developments Editor
Theresa S. Kim

Senior Articles Editors
Breanna Diaz
Alison Gaske

Senior Note & Comment Editor
Lindsey Gaber

Senior ALR Award Editor
Michael T. Grimes

Senior Symposia Editor
Melissa D. Garcia

Articles Editors
Ebunola Aniyikaiye
Jeffrey M. Elkin
Kendal G. Hardison
Chi Ching Tsang

Note & Comment Editors
Johnathan R. Davey
Judson N. Kempson
Jessica A. Petrella
Kassie L. Richbourg
Meridith S. Satz

Senior Staff
Naomi I. Ahsan
Alexander N. Ball
Kelsey E. Beerer
Lillie W. Blanton
Sandra R. Braschi
Caitlin A. Buchanan
Elizabeth Helen Chadha
Meghan M. Clark-Kevar
Joseph C. Elliott
Crystal E. Evans
Michael D. Fumei
Safiya A. Hamit
Eitan R. Hoering
Stephanie Mendiola
Lauren E. O'Neil
Sheena Rangroo
Mai Lan G. Rodgers
Emma Burgess Roy
Tara Schoenhoff
Mara R. Veno
Caitlin E. Whaley

Junior Staff
Katherine Beck
Keiran Bleich
Catherine Butler
Michael Cabrera
Michael Chandeck
Christopher Creech
Adam Curfman
Seth DiAsio
Justyna Fehusiak
Olga Feysh
Ann Garcia
Ross Handler
James Hill
Kimberly Koruba
Jieun Lee
Elizabeth Leman
Daniel Lherault
Carolyn Mahoney
Sarah Martin
Robert Martinez
Allison Mazzei
Megan Mejia
Christina Moehrle
Adam Mogill
Ruby Moreno
Steven Nieman
Jared Sands
Lauren Shapiro
Shelby Smith
Lauren Tavar
Justin Teitell
Shelley Trautman
Amber Unwala
Karina Velez
Stephanie West

Faculty Board
Andrew F. Popper, Chair
J. Jonas Anderson
Gary J. Edles
Paul F. Figley
Amanda Frost
Lewis A. Grossman
Benjamin M. Leff
Amanda Cohen Leiter
Jeffrey S. Lubbers
Jamin B. Raskin
William J. Snape, III
Anthony E. Varona
Stephen J. Wermiel
Lindsay F. Wiley

Coordinator, Law Reviews
Sharon E. Wolfe

* * *

ADMINISTRATIVE LAW REVIEW ADVISORY BOARD

Hon. Judith S. Boggs

Barry Breen

Hon. Daniel Brenner

Reeve Bull

Andrew C. Cooper

Neil Eisner

Alexia Emmermann

Andrew Guhr

Gary Halbert

Sabrina S. Jawed

Hon. Scott Maravilla

David McConnell

Hon. Eve L. Miller

Warnecke Miller

Amit Narang

Naveen Rao

Scott Reid, M.P.

Judith Rivlin

Marc Sacks

Cary Silverman

Eric Simanek

Megan Tinker

Arthur Traynor

Greg Weinman

AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW FACULTY

Administration

Claudio M. Grossman, B.A., J.D., S.J.D., *Dean*
Anthony E. Varona, A.B., J.D., LL.M., *Associate Dean for Faculty and Academic Affairs*
Lia Epperson, B.A, J.D., *Associate Dean for Faculty and Academic Affairs*
Jenny Roberts, B.A., J.D., *Associate Dean for Scholarship*
Robert D. Dinerstein, A.B., J.D., *Associate Dean for Experiential Education, Director, Clinical Programs*
David B. Jaffe, B.A., J.D., *Associate Dean for Student Affairs*
Billie Jo Kaufman, B.S., M.S., J.D., *Associate Dean of Library and Information Resources*
Khadijah Al-Amin-El, *Director, Office of Development and Alumni Relations*
Rebecca T. Davis, B.S., M.A.T., *Assistant Dean, Office of the Registrar*
Khalid R. O. Khalid, B.A., M.A., *Assistant Dean for Finance and Administration*
D. Akira Shiroma, B.S., J.D., *Assistant Dean for Admissions and Financial Aid*
Tracy Jenkins, B.A., J.D., *Assistant Dean for Career & Professional Development*

Full-Time Faculty

David E. Aaronson, B.A., M.A., Ph.D., The George Washington University; LL.B., Harvard University; LL.M., Georgetown University. *B.J. Tennery Professor of Law* and *Director of the Trial Advocacy Program*
Evelyn G. Abravanel, A.B., J.D., Case Western Reserve University. *Professor of Law*
Padideh Ala'i, B.A., University of Oregon; J.D., Harvard University. *Professor of Law*
Jonas Anderson, B.S., University of Utah; J.D., Harvard University, *Associate Professor of Law*
Kenneth Anderson, B.A., University of California at Los Angeles; J.D., Harvard University. *Professor of Law*
Jonathan B. Baker, A.B., J.D., Harvard University; Ph.D., Stanford University. *Professor of Law*
Susan D. Bennett, A.B., M.A., Yale University; J.D., Columbia University. *Professor of Law* and *Director of the Community and Economic Development Law Clinic*
Barlow Burke, A.B., Harvard University; LL.B., M.C.P., University of Pennsylvania; LL.M., S.J.D., Yale University. *Professor of Law* and *John S. Myers and Alvina Reckman Myers Scholar*
Susan D. Carle, A.B., Bryn Mawr College; J.D., Yale University. *Professor of Law*
Michael W. Carroll, A.B., University of Chicago; J.D., Georgetown University. *Professor of Law* and *Director of the Program on Information Justice and Intellectual Property*
Janie Chuang, B.A., Yale University; J.D., Harvard University. *Associate Professor of Law*
John B. Corr, B.A., M.A., John Carroll University; J.D., Georgetown University; Ph.D., Kent State University. *Professor of Law*
Jennifer Daskal, B.A., Brown University; M.A., Cambridge University; J.D., Harvard Law School. *Assistant Professor of Law*
Angela Jordan Davis, B.A., Howard University; J.D., Harvard University. *Professor of Law*
Robert D. Dinerstein, A.B., Cornell University; J.D., Yale University. *Professor of Law* and *Director of Clinical Programs*
Jeremi Duru, B.A., Brown University; M.P.P., Harvard University; J.D., Harvard Law School. *Professor of Law*
Walter A. Effross, B.A., Princeton University; J.D., Harvard University. *Professor of Law*
Lia Epperson, B.A., Harvard University; J.D., Stanford University. *Associate Professor of Law* and *Director of S.J.D. Program*
Christine Haight Farley, B.A., Binghamton University; J.D., University at Buffalo Law School; LL.M., J.S.D., Columbia University. *Professor of Law*
Amanda Frost, A.B., J.D., Harvard University. *Professor of Law*
Llezlie Green Coleman, B.A., Dartmouth College; J.D., Columbia Law School, *Assistant Professor of Law*
Robert K. Goldman, B.A., University of Pennsylvania; J.D., University of Virginia. *Professor of Law* and *Louis C. James Scholar*
Claudio M. Grossman, Licenciado en Ciencias Jurídicas y Sociales, Universidad de Chile, Santiago; Doctor of the Science of Law, University of Amsterdam. *Dean, Professor of Law* and *Raymond I. Geraldson Scholar in International and Humanitarian Law*
Lewis A. Grossman, B.A., Yale University; J.D., Harvard University; Ph.D., Yale University. *Professor of Law*
Heather Hughes, B.A., University of Chicago; J.D., Harvard University. *Professor of Law*
David Hunter, B.A., University of Michigan; J.D., Harvard University. *Professor of Law* and *Director of the International Legal Studies Program*
Peter Jaszi, A.B., J.D., Harvard University. *Professor of Law* and *Faculty Director of the Glushko-Samuelson Intellectual Property Law Clinic*
Cynthia E. Jones, B.A., University of Delaware; J.D., American University Washington College of Law. *Professor of Law*
Billie Jo Kaufman, B.S., M.S., University of Indiana at Bloomington; J.D., Nova Southeastern University. *Associate Dean for Library and Information Resources* and *Professor of Law*
Benjamin Leff, B.A., Oberlin College; M.A., University of Chicago Divinity School; J.D., Yale University. *Professor of Law*
Amanda Cohen Leiter, B.S., M.S., Stanford University; M.S., University of Washington; J.D., Harvard University. *Professor of Law*
James P. May, B.A., Carleton College; J.D., Harvard University. *Professor of Law*
Binny Miller, B.A., Carleton College; J.D., University of Chicago. *Professor of Law* and *Director of the Criminal Justice Clinic*
Elliott S. Milstein, B.A., University of Hartford; J.D., University of Connecticut; LL.M., Yale University. *Professor of Law*
Fernanda Nicola, B.A., Law Degree, University of Turin; Ph.D., Trento University, Italy; LL.M., S.J.D., Harvard University. *Professor of Law*
Mark Niles, B.A., Wesleyan University; J.D., Stanford University. *Professor of Law*

Diane F. Orentlicher, B.A., Yale University; J.D., Columbia University. *Professor of Law*

Teresa Godwin Phelps, B.A., M.A., Ph.D., University of Notre Dame; M.S.L., Yale University. *Director of the Legal Rhetoric and Writing Program* and *Professor of Law*

Andrew D. Pike, B.A., Swarthmore College; J.D., University of Pennsylvania. *Professor of Law*

Nancy D. Polikoff, B.A., University of Pennsylvania; M.A., The George Washington University; J.D., Georgetown University. *Professor of Law*

Andrew F. Popper, B.A., Baldwin-Wallace College; J.D., DePaul University; LL.M., The George Washington University. *Professor of Law and Director of the Integrated Cirriculum Program and*

Jamin B. Raskin, B.A., J.D., Harvard University. *Director of the LL.M. Program in Law and Government* and *Professor of Law*

Jayesh Rathod, A.B., Harvard University; J.D., Columbia University. *Professor of Law* and *Director of the Immigrant Justice Clinic*

Ira P. Robbins, A.B., University of Pennsylvania; J.D., Harvard University. *Professor of Law and Justice, Director of the J.D./M.S. Dual Degree Program in Law and Justice*, and *Barnard T. Welsh Scholar*

Jenny M. Roberts, B.A., Yale University; J.D., New York University. *Professor of Law*

Ezra Rosser, B.A., Yale University; J.D., Harvard Law School; M.Phil., University of Cambridge. *Professor of Law*

Herman Schwartz, A.B., J.D., Harvard University. *Professor of Law, Co-Director, Center for Human Rights and Humanitarian Law*

Ann Shalleck, A.B., Bryn Mawr College; J.D., Harvard University. *Professor of Law, Director of the Women and the Law Program*, and *Carrington Shields Scholar*

Mary Siegel, B.A., Vassar College; J.D., Yale University. *Professor of Law*

Brenda Smith, B.A., Spelman College; J.D., Georgetown University. *Professor of Law*

David Snyder, B.A., Yale University; J.D., Tulane Law School. *Professor of Law* and *Director, Business Law Program*

Robert Tsai, B.A., University of California at Los Angeles; J.D., Yale University. *Professor of Law*

Anthony E. Varona, A.B., Boston College; J.D., Boston College; LL.M., Georgetown University. *Professor of Law* and *Associate Dean for Faculty and Academic Affairs*

Stephen I. Vladeck, B.A., Amherst College; J.D., Yale University. *Professor of Law*

Perry Wallace, Jr., B.Engr., Vanderbilt University; J.D., Columbia University. *Professor of Law* and *Director of the J.D./MBA Dual Degree Program*

Lindsay F. Wiley, A.B., J.D, Harvard University; M.P.H., Johns Hopkins University. *Associate Professor of Law*

Paul R. Williams, A.B., University of California at Davis; J.D., Stanford University; Ph.D., University of Cambridge. *Rebecca I. Grazier Professor of Law and International Relations* and *Director of the J.D./M.A. Dual Degree Program*

Law Library Administration

John Heywood, B.S., Northern Arizona University; J.D., American University Washington College of Law. *Associate Law Librarian*

Sima Mirkin, B.Engr.Econ., Byelorussian Polytechnic Institute; M.L.S., University of Maryland. *Associate Law Librarian*

Shannon Roddy, *Assistant Law Librarian*

William T. Ryan, B.A., Boston University; J.D., American University Washington College of Law; M.L.S., University of Maryland. *Law Librarian*

Amy Taylor, B.A., Rhodes College; M.S.L.I.S., Catholic University of America; J.D., The University of Alabama. *Associate Law Librarian*

Ripple Weistling, B.A., Brandeis University; M.A., King's College; J.D., Georgetown University; M.S.L.S., Catholic University of America. *Assistant Law Librarian*

Linda Wen, B.A., Hunan Normal University; M.S., University of South Carolina, *Associate Law Librarian, Head of Collections and Bibliographic Services*

Emeriti

Isaiah Baker, A.B., Yale University; M.A., DePaul University; M.B.A., J.D., Columbia University; LL.M., Harvard University. *Associate Professor of Law Emeritus*

Daniel Bradlow, B.A., University of Witwatersrand, South Africa; J.D., Northeastern University Law School; LL.M., Georgetwon University Law Center; LL.D., University of Pretoria. *Professor of Law Emeritus*

David F. Chavkin, B.S., Michigan State University; J.D., University of California at Berkeley. *Professor of Law Emeritus*

Egon Guttman, LL.B., LL.M., University of London. *Professor of Law* and *Levitt Memorial Trust Scholar Emeritus*

Patrick Kehoe, B.C.S., Finance, Seattle University; J.D., M.L.S., University of Washington. *Professor of Law Emeritus*

Nicholas Kittrie, A.B, LL.B., M.A., University of Kansas; LL.M., S.J.D., Georgetown University Law Center. *University Professor Emeritus*

Candace S. Kovacic-Fleischer, A.B., Wellesley College; J.D., Northeastern University. *Professor of Law*

Robert Lubic, *Professor of Law Emeritus*

Anthony Morella, A.B., Boston University; J.D., American University Washington College of Law. *Professor of Law Emeritus*

Michael E. Tigar, B.A., J.D., University of California at Berkeley. *Professor Emeritus*

Robert G. Vaughn, B.A., J.D., University of Oklahoma; LL.M., Harvard University. *Professor of Law Emeritus* and *A. Allen King Scholar*

Richard Wilson, B.A., DePauw University; J.D., University of Illinos College of Law. *Professor of Law Emeritus*

Special Faculty Appointments

Nancy S. Abramowitz, B.S., Cornell University; J.D., Georgetown University. *Professor of Practice of Law* and *Director of the Janet R. Spragens Federal Tax Clinic.*

Elizabeth Beske, A.B., Princeton University; J.D., Columbia University. *Legal Rhetoric Instructor*

Elizabeth Boals, B.S., Virginia Polytechnic Institute and State University; J.D., George Mason University. *Practitioner-In-Residence, Assocaite Director, Trial Practice Program*

Brandon Butler, B.A., University of Georgia; M.A., University of Texas at Austin; J.D. University of Virginia School of Law. *Practitioner in Residence*

Claire Donohue, B.S., Cornell University; J.D., M.S.W., Boston College, LL.M., The George Washington University Law School. *Practitioner in Residence*

Kate Elengold, *Practitioner in Residence, Glushko-Samuelson Intellectual Property Law Clinic*

Paul Figley, B.A., Franklin & Marshall College; J.D., Southern Methodist University. *Associate Director of Legal Rhetoric* and *Legal Rhetoric Instructor*

Sean Flynn, B.A., Pitzer College (Claremont); J.D., Harvard University. *Associate Director, Program on Information Justice and Intellectual Property* and *Professorial Lecturer in Residence*

Dorcas Gilmore, *Practitioner in Residence*

Horacio Grigera Naón, LL.D., J.D., University of Buenos Aires; L.L.M., S.J.D. Harvard University. *Distinguished Practitioner in Residence* and *Director of the International Arbitration Program*

Elizabeth Keith, B.A., University of North Carolina at Chapel Hill; J.D., George Mason University. *Legal Rhetoric Instructor*

Daniela Kraiem, B.A., University of California at Santa Barbara; J.D., University of California at Davis. *Associate Director of the Women and the Law Program*

Jeffery S. Lubbers, A.B., Cornell University; J.D., University of Chicago. *Professor of Practice in Administrative Law*

Claudia Martin, Law Degree, Universidad de Buenos Aires; LL.M., American University Washington College of Law. *Professorial Lecturer in Residence*

Juan Mendez, Certificate, American University College of Law; Law Degree, Stella Maris Catholic University. *Professor of Human Rights Law in Residence*

Jennifer Mueller, J.D., Harvard Law School. *Practitioner in Residence, Janet R. Spragens Federal Tax Clinic.*

Sunita Patel, *Practitioner in Residence, Civil Advocacy Clinic*

Victoria Phillips, B.A., Smith College; J.D., American University Washington College of Law. *Professor of the Practice of Law*

Heather Ridenour, B.B.A., Texas Women's University; J.D., Texas Wesleyan. *Director of Legal Analysis Program* and *Legal Rhetoric Instructor*

Diego Rodriguez-Pinzon, J.D., Universidad de los Andes; LL.M., American University Washington College of Law; S.J.D., The George Washington University. *Professorial Lecturer in Residence* and *Co-Director, Academy on Human Rights and Humanitarian Law*

Susana SáCouto, B.A., Brown University; M.AL.D, The Fletcher School of Law and Diplomacy; J.D., Northeastern University. *Professorial Lecturer in Residence* and *Director, War Crimes Research Office*

Macarena Saez, J.D., University of Chile School of Law; L.L.M. Yale Law School. *Fellow in the International Legal Studies Program*

Anita Sinha, B.A., Barnard College; J.D., New York University. *Practitioner in Residence, Immigrant Justice Clinic*

William Snape, B.A., University of California at Los Angeles; J.D., George Washington University. *Director of Adjunct Development* and *Fellow in Environmental Law*

David Spratt, B.A., The College of William and Mary; J.D., American University Washington College of Law. *Legal Rhetoric Instructor*

Richard Ugelow, B.A., Hobart College; J.D., American University Washington College of Law; LL.M., Georgetown University. *Practitioner in Residence*

Stephen Wermiel, A.B., Tufts University; J.D., American University Washington College of Law. *Professor of the Practice of Law*

William Yeomans, B.A., Trinity College; J.D., Boston University Law School; LL.M., Harvard University. *Practitioner in Residence, Director of Legislative Practicum*

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

OFFICERS AND COUNCIL

Officers

Chair	Jeffrey A. Rosen*
Chair-Elect	Renée M. Landers*
Vice Chair	John F. Cooney*
Secretary	Linda D. Jellum*
Budget Officer	Hon. Edward J. Schoenbaum*
Assistant Budget Officer	Louis J. George*
Section Delegates	Hon. H. Russell Frisby, Jr.*
	Ronald M. Levin*
Last Retiring Chair	Anna Williams Shavers*

* *Executive Committee Member*

ABA Board of Governors Liaison	Joseph B. Bluemel

Council

Member 2016	Jack M. Beermann
	James P. Gerkis
	Ryan Nelson
	Lynn White
Member 2017	Jane C. Luxton
	William S. Morrow, Jr.
	Connor Raso
	David Rostker
Member 2018	Ronald J. Krotoszynski
	Levon Q. Schlichter
	Christopher J. Walker
	Adam J. White

Ex-Officio

State Administrative Law	TBD
Executive Branch	Jeffrey G. Weiss
Judiciary	Hon. A. Raymond Randolph
Legislative Branch	Daniel Flores
Administrative Judiciary	Hon. Julian Mann III
Young Lawyers Division	Christopher R. Fortier
Law Student Division	Kevin Misener

* * *