

Insurance Coverage, Prescription Contraception, and the Regression of Title VII and the PDA [*In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007)]

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964¹ was “the nation’s first full-scale legislation prohibiting private sector employment discrimination.”² Its purpose was to create equality in the realm of employment by forbidding discrimination against employees on the basis of “race, color, religion, sex, [and] national origin.”³ In 1978, Congress modified the definitions section of Title VII by passing the Pregnancy Discrimination Act (PDA),⁴ a change triggered by a then-recent Supreme Court interpretation of the term “sex” as used in Title VII.⁵ The PDA incorporated “pregnancy, childbirth, [and] related medical conditions” into the definition of the terms “because of sex” and “on the basis of sex,”⁶ but until recently, neither the Supreme Court nor any of the appellate courts had considered whether the scope of Title VII, as amended by the PDA, encompassed contraception.⁷ In *In re Union Pacific Railroad Employment Practices Litigation*,⁸ the United States Court of Appeals for the Eighth Circuit became the first circuit court to consider the issue. Remarkably, the reasoning and methods of statutory interpretation and

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1. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

2. HAROLD S. LEWIS, JR., & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 1 (West Group, St. Paul, 2001).

3. See 42 U.S.C. § 2000e-2(a) (2000); see *infra* text accompanying note 45.

4. 42 U.S.C. § 2000e(k) (2000).

5. Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 670 (1983) (noting that Congress acted in response to Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976)).

6. See *infra* text accompanying note 78.

7. *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 940 (8th Cir. 2007) (observing that “[n]either the circuit courts nor the Supreme Court has considered whether the [Pregnancy Discrimination Act] PDA applies to contraception”).

8. 479 F.3d 936 (8th Cir. 2007).

construction employed by the court closely resemble the Supreme Court's decision in *General Electric Co. v. Gilbert*,⁹ the exact case that prompted Congress's passage of the PDA.¹⁰

In 1998, Sylvia A. Law observed that no one had yet brought a claim of discrimination on the basis of sex under Title VII, as amended by the PDA, for a lack of coverage of prescription contraception under an otherwise comprehensive prescription coverage plan.¹¹ Law believed such a claim would be "a slam-dunk legal argument."¹² Notably, in the nine years following the publication of Law's article, a growing number of courts have entertained claims involving insurance coverage for contraception.¹³ The Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing Title VII, took the lead by concluding that the failure to cover prescription contraception "to the same extent, and on the same terms," as similar drugs and preventative services constituted discrimination under Title VII, as amended by the PDA.¹⁴ Several district courts have also analyzed the issue and the EEOC's position; while some of these courts have agreed with the agency's conclusion, others have ruled to the contrary.¹⁵

The Eighth Circuit became the first federal appellate court to consider the issue in *In re Union Pacific*, a case in which the court faced an issue similar to the one the EEOC had faced six years earlier.¹⁶ The

9. 429 U.S. 125 (1976).

10. See discussion *infra* Part III.B.

11. Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 364, 386 (1998).

12. *Id.* at 364.

13. The Equal Employment Opportunity Commission (EEOC) addressed the issue first in an opinion letter. *Decision on Coverage of Contraception*, 2 Emp. Prac. Guide (CCH) ¶ 6878, at 7154 (EEOC Dec. 14, 2000), available at <http://www.eeoc.gov/policy/docs/decision-contraception.html>. Numerous district courts have also heard cases relating to the exclusion of contraception from insurance plans. *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014, 1015 (W.D. Mo. 2006) (considering damages for past expenses related to prescription contraception as well as a potential class certification); *Cummins v. State*, No. 02-cv-4201-JPG, 2005 U.S. Dist. LEXIS 42634, at *3 (S.D. Ill. Aug. 30, 2005); *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1140 (D. Neb. 2005); *Coolley v. Daimler Chrysler Corp.*, 281 F. Supp. 2d 979, 981 (E.D. Mo. 2003); *Mauldin v. Wal-Mart Stores, Inc.*, No. Civ.A.1:01-CV2755JEC, 2002 WL 2022334, at *19 (N.D. Ga. Aug. 23, 2002) (certifying a class of employees who were alleging sex discrimination for lack of coverage for prescription contraception); *Alexander v. Am. Airlines, Inc.*, No. 4:02-CV-0252-A, 2002 WL 731815, at *1 (N.D. Tex. Apr. 22, 2002); *EEOC v. UPS*, 141 F. Supp. 2d 1216, 1218 (D. Minn. 2001) (focusing on general Title VII claims of discrimination); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1268 (W.D. Wash. 2001).

14. *Decision on Coverage of Contraception*, 2 Emp. Prac. Guide (CCH) ¶ 6878, at 7157. Congress created the EEOC with the passage of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-4 (2000). The EEOC enforces various employment-related statutes, including Title VII. 2 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1206 (Paul W. Cane, Jr. et al. eds., ABA 3d ed. 1996) (1976). In regard to Title VII, the commission's duties include accepting, investigating, and conciliating charges of discrimination as well as educating the public about Title VII. *Id.* The agency also possesses the authority both to initiate litigation under Title VII and to participate in private litigation related to Title VII. *Id.*

15. See *In re Union Pac.*, 479 F.3d at 940 n.1 (listing the district courts addressing the same issue and the respective holdings from each case).

16. Compare *id.* at 939 (stating the issue as "whether [defendant's] policy of denying coverage for all contraception violates Title VII, as amended by the PDA"), with *Decision on Coverage of Contraception*, 2 Emp. Prac. Guide (CCH) ¶ 6878, at 7154 (analyzing whether the denial of coverage

Eighth Circuit reversed the district court's decision and held the lack of coverage for contraception under an otherwise comprehensive prescription coverage plan does not constitute discrimination "on the basis of sex."¹⁷ In the process, the court essentially disregarded the EEOC opinion, avoided analyzing the district court decisions on point, and contradicted not only Supreme Court precedent, but Eighth Circuit precedent as well.¹⁸ To provide guidance for future courts, litigants, and perhaps legislatures, this comment will analyze the Eighth Circuit's opinion and explore some of the problems associated with the court's reasoning and ultimate conclusion.

II. CASE DESCRIPTION

The certified class of plaintiffs consisted of "[a]ll females employed by Union Pacific Railroad Company after February 9, 2001, enrolled in one of the Agreement Plans who used prescription contraception, at least in part for the purpose of preventing pregnancy, without insurance reimbursement from said Plan."¹⁹ Benefits provided by the various agreement plans included: (1) services such as routine physicals, immunization shots, drug and alcohol treatments, smoke cessation treatments, dental exams and cleanings, and cancer screenings; (2) prescription drugs such as blood-pressure and cholesterol-lowering drugs, hormone replacement therapy drugs, and drugs to prevent disease and disease progression in HIV positive patients; and (3) drugs used exclusively by males such as those used to prevent benign prostatic hypertrophy and those used to treat or prevent erectile dysfunction.²⁰ No coverage existed under the plans for allergy medications, infertility/fertility drugs, or any form of contraception used for the sole purpose of preventing pregnancy.²¹ The plans, however, covered contraception for non-contraceptive, medically necessary purposes such as treating skin or menstrual problems.²² The plaintiffs brought suit, claiming Union Pacific discriminated "on the basis of sex" "by providing health insurance benefits that selectively exclude all Federal Drug Administration (FDA)

for "prescription contraceptive drugs and devices" violates Title VII, as amended by the PDA).

17. Compare *In re Union Pac.*, 479 F.3d at 942 (holding the scope of the PDA does not reach contraception), with *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1149 (D. Neb. 2005) (holding the exclusion of coverage for prescription contraception violates Title VII, as amended by the PDA).

18. See *In re Union Pac.*, 479 F.3d at 940 (describing the differing opinions among the district courts in a footnote without any analysis regarding these positions); see *infra* Parts V.B-C.

19. *In re Union Pac.*, 378 F. Supp. 2d at 1140.

20. *Id.* at 1141; see *In re Union Pac.*, 479 F.3d at 938.

21. *In re Union Pac.*, 479 F.3d at 938.

22. See *In re Union Pac.*, 378 F. Supp. 2d at 1141; see also *In re Union Pac.*, 479 F.3d at 938. As noted by the plaintiffs, the irony of this position is that the exclusions apply to all Federal Drug Administration (FDA) approved uses while the coverage of contraceptives applies to only to non-FDA approved uses for such drugs. Appellees' Brief at 7-8, *In re Union Pac.*, 479 F.3d 936 (No. 06-1706).

approved prescription contraception.”²³

A. The United States District Court for the District of Nebraska

District Judge Laurie Smith-Camp granted the plaintiffs’ motion for partial summary judgment on their disparate treatment claim.²⁴ The court first noted that “[s]ummary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.”²⁵ The analysis began by setting forth the statutory framework under which the issue arose.²⁶ By its express language, the PDA “applies to ‘women affected by pregnancy’ and not merely to *pregnant* women.”²⁷ Furthermore, the judge observed that the Supreme Court’s interpretations of the PDA extended its coverage to women who faced the “risk of pregnancy” as well as employees who had a “childbearing capacity.”²⁸ With this framework as a starting point, the judge adopted the reasoning of the EEOC and the cases that had relied upon the agency’s position.²⁹ Ultimately, Union Pacific’s health coverage discriminated “on the basis of sex,” because the coverage “treats medical care women need to prevent pregnancy less favorably than it treats medical care needed to prevent other medical conditions that are no greater threat to employees’ health than is pregnancy.”³⁰

The court reached its conclusion after labeling several of the parties’ arguments unpersuasive, and in discrediting these arguments, the court made several significant findings.³¹ First, the court should only

23. *In re Union Pac.*, 378 F. Supp. 2d at 1140; *see infra* Part II.A.

24. *In re Union Pac.*, 378 F. Supp. 2d at 1140, 1144 n.13. Title VII prohibits an employer from treating some people differently than others when “race, color, religion, sex, or national origin” form the basis of the differential, or disparate, treatment. 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 9 (Paul W. Cane, Jr. et al. eds., ABA 3d ed. 1996) (1976). The Supreme Court has held that a facially neutral employment practice might violate Title VII if the practice has a disparate impact on the protected class. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971). Generally, a disparate impact on a protected class occurs when an employment practice affects one group disproportionately to the effect the practice has on other groups. *See id.* An employer need not intend to discriminate against a protected group for the practice to have a disparate impact on that group, and even facially neutral practices might have such a disproportionate impact on a protected group. *See id.* In the instant case, the plaintiffs brought claims of disparate treatment and disparate impact. Class Action Complaint at 12, *In re Union Pac.*, 378 F. Supp. 2d 1139 (D. Neb. 2005) (No. 8:03cv437). Because the judge ruled in favor of the plaintiffs on the first claim of disparate treatment, the disparate impact claims have not yet been litigated by the parties; thus, on appeal, the sole issue was the disparate treatment claim. *See In re Union Pac.*, 479 F.3d at 938 (noting the appeal derived from the district court’s granting of the motion for partial summary judgment).

25. *In re Union Pac.*, 378 F. Supp. 2d at 1142 (citing FED. R. CIV. P. 56(c)).

26. *Id.* at 1142-43.

27. *Id.* at 1143.

28. *Id.* (analyzing the Supreme Court opinions in *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 670 (1983), and *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991)).

29. *Id.* at 1144.

30. *Id.* at 1149.

31. *Id.* at 1144-49 (addressing unpersuasive arguments advanced by both parties).

examine Union Pacific's treatment of its employees, making the broader social costs of unplanned pregnancy irrelevant in a discrimination analysis.³² Second, the increased financial costs associated with providing equal treatment for women in the form of prescription contraception cannot justify discrimination against them.³³ Third, only women have the potential and capacity to conceive and become pregnant.³⁴ By focusing on the health risks of excluding contraception, which prevents pregnancy, the court reasoned that exclusions for contraception, "by definition, affect only the health of *women*."³⁵ Fourth, while some contraceptives affect fertility, others merely prevent conception or implantation (barrier methods and intrauterine devices).³⁶ Accordingly, contraception not only affects fertility (a potentially gender-neutral purpose) but also controls or reduces the potential of pregnancy (a gender-specific purpose).³⁷ Fifth, although many of the prescription drugs covered by the agreement plans serve as treatments, they often serve as preventative drugs as well, treating the underlying condition *and* preventing a worse condition.³⁸ Contraception, likewise, serves both as a treatment for some medical conditions and as a prevention for pregnancy; thus, these other preventative drugs and treatments provide a useful comparison for detecting discrimination among the benefits provided.³⁹ Finally, the court determined that pregnancy "has a profound impact on a woman's health," which is far greater than the impact of many of the medical conditions covered by the insurance plans.⁴⁰ Consequently, measuring the comprehensiveness of the coverage provided to each group requires a determination of each group's relative health risks and an analysis of the benefits provided to meet these needs.⁴¹

B. The United States Court of Appeals for the Eighth Circuit

The majority began its analysis by changing the scope of the in-

32. *Id.* at 1144-45 (implying that a discussion of broader social objectives should be left to legislatures).

33. *Id.* at 1145 (citing *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1085 n.14 (1983), and *Newport News*, 462 U.S. at 679).

34. *Id.* at 1145.

35. *Id.* (noting that fertility treatments and sterilization "may apply equally to men and women, and not violate Title VII and the PDA").

36. *Id.* at 1146.

37. *Id.* (reasoning that infertility medically affects both genders while contraception only medically affects women).

38. *Id.* at 1146.

39. *See id.* at 1146-48.

40. *Id.* at 1147-49. As part of the analysis, the court detailed a hypothetical, gender-neutral "disease," showcasing the risks to health that pregnancy posed to women. *Id.* at 1147-48. This hypothetical was created in part in response to Union Pacific's expert witness, who conceded that male attitudes toward illness and treatments were much different from the attitudes of women. *Id.* at 1147.

41. *See id.* at 1148-49 (observing that the proper inquiry must focus on whether "the Plans cover medicines or medical services to prevent employees from developing diseases or conditions that pose an equal or lesser threat to employees health than does pregnancy").

quiry. Rather than limiting the scope of the inquiry to prescription contraception, the court characterized the issue as “whether Union Pacific’s policy of denying coverage for *all* contraception violates Title VII, as amended by the PDA.”⁴² It concluded “the coverage provided to women [was] not less favorable than that provided to men” because the insurance coverage excluded all contraception, meaning the plans did not discriminate against members of either sex.⁴³ Consequently, the court found neither a general Title VII violation nor a violation of Title VII, as amended by the PDA, reversed the district court, and remanded the case for further proceedings.⁴⁴

III. BACKGROUND

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”⁴⁵ In *Gilbert*, the Supreme Court held that the term “sex,” as found in the statute, did not encompass pregnancy.⁴⁶ Congress responded by passing the PDA, which amended the definitions section of Title VII.⁴⁷ By inserting the amendment into Title VII’s definitional provisions, Congress intended the PDA both to alter the definitions of the terms “because of sex” and “on the basis of sex” to include pregnancy *and* to adopt a specific statutory framework for evaluating general Title VII claims.⁴⁸ Since 1978, the Supreme Court has applied this statutory framework to define the scope of the PDA as extending to discrimination on the basis of “potential for pregnancy.”⁴⁹ While courts have generally interpreted remedial, civil rights statutes broadly, the circuit courts have divided over the exact scope of the PDA.⁵⁰

42. *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 939, 945 (8th Cir. 2007) (emphasis added). The court of appeals also examined the coverage provided under a general Title VII analysis, or a Title VII analysis not limited to the amended definitions provided by the PDA. *Id.* at 943-44. Because the district court found the policy exclusions facially discriminatory under the PDA, it never considered the issue under a general Title VII analysis. *See In re Union Pac.*, 378 F. Supp. 2d at 1149 (concluding the defendant’s insurance policies violated Title VII, as amended by the PDA).

43. *In re Union Pac.*, 479 F.3d at 944-45.

44. *Id.* at 943, 945.

45. 42 U.S.C. § 2000e-2(a) (2000).

46. *See* discussion *infra* Part III.A.

47. *See* discussion *infra* Part III.B.

48. *See* discussion *infra* Part III.B.

49. *See* discussion *infra* Part III.B.2.

50. *Compare Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (noting that remedial legislation should be broadly construed), *with* Julie Manning Magid, *Contraception and Contractions: A Divergent Decade Following Johnson Controls*, 41 AM. BUS. L.J. 115, 123 (2003) (observing a “crevasse [that] separates the circuit courts” regarding the scope of the PDA).

A. *Pregnancy as Constituting Discrimination on the Basis of Sex*

In *Gilbert*, the Supreme Court considered whether the exclusion of benefits for pregnancy from an otherwise comprehensive disability benefit program constituted sex discrimination under Title VII.⁵¹ The employer provided “nonoccupational sickness and accident benefits” to all employees but excluded benefits for disabilities arising from pregnancy.⁵² Basing its analysis upon a prior Fourteenth Amendment equal protection case, the Court stated “[w]hile it is true that only women can become pregnant, it does not follow that every [] classification concerning pregnancy is a sex-based classification”⁵³ While recognizing that pregnancy was indeed confined to one sex, the Court reasoned that pregnancy was not only often desirable but was different from all other covered disabilities.⁵⁴ The Court concluded the insurance plan was facially nondiscriminatory “in the sense that ‘[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.’”⁵⁵ The insurance plan did “not exclude anyone from benefit eligibility because of gender but merely remove[d] one physical condition—pregnancy—from the list of compensable disabilities.”⁵⁶ Based on these findings, the Court held that the exclusion of pregnancy benefits from an otherwise comprehensive disability plan was not discrimination “on the basis of sex.”⁵⁷

Before completing its analysis, the Court set aside the EEOC decision that contradicted its holding.⁵⁸ In evaluating the amount of deference courts owe agency interpretive rulings, the Court utilized the standard set forth in *Skidmore v. Swift & Co.*⁵⁹ Under this standard, administrative opinions, although not binding authority, provide valuable guidance to courts and litigants.⁶⁰ The amount of deference a court should give these opinions “will depend upon 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

51. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 127-28 (1976).

52. *Id.* at 128-29.

53. *Id.* at 134 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)). The *Geduldig* Court determined that there was no Equal Protection Clause violation and thus no unlawful discrimination based on an analysis of a similar exclusion of pregnancy benefits. *Id.* at 133-34. The *Gilbert* Court reiterated that there had been a specific finding that no discrimination had taken place. *See id.* at 135.

54. *Id.* at 136. (“[W]e have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one race or sex.”).

55. *Id.* at 138 (quoting *Geduldig*, 417 U.S. at 496-97).

56. *Id.* at 134 (quoting *Geduldig*, 417 U.S. at 496-97).

57. *Id.* at 145-46.

58. *Id.* at 140-45.

59. 323 U.S. 134, 140 (1944); *Gilbert*, 429 U.S. at 141. The *Skidmore* opinion provides “[t]he most comprehensive statement of the role of interpretative rulings such as the EEOC guidelines” *Gilbert*, 429 U.S. at 141.

60. *Skidmore*, 323 U.S. at 140.

to persuade, if lacking power to control.”⁶¹ The Court discredited the EEOC’s opinion by noting that not only had the agency rendered the opinion eight years after the statute’s enactment, but the agency had not maintained a consistent position over that time period either.⁶² Regarding the consistency of the agency’s opinion, a direct conflict existed between the agency’s interpretation of Title VII and its early interpretations of the statute.⁶³ Furthermore, the Court found an apparent conflict between the EEOC’s interpretation and an interpretation of what the Court considered a relevant statutory equivalent in the Equal Pay Act.⁶⁴ Based on these inconsistencies, the Court decided it could not afford the EEOC opinion any deference or it would face the risk of being “reduced to [] total abdication in construing the statute.”⁶⁵

The dissenting Justices began by expressing disdain for the majority’s repudiation of the unanimous agreement among the circuit courts as well as the EEOC decision.⁶⁶ They also raised two primary concerns: (1) a classification centered on pregnancy was indeed strongly sex related⁶⁷ and (2) the disability plan excluded a risk unique to women.⁶⁸ “[I]t is the capacity to become pregnant which primarily differentiates the female from the male;”⁶⁹ thus, “[t]he classification is between persons who face a risk of pregnancy and those who do not.”⁷⁰ With these concerns in mind, both dissenting opinions stated the exclusion of pregnancy from an otherwise comprehensive disability benefits program constituted discrimination “on the basis of sex.”⁷¹

B. *The Pregnancy Discrimination Act*

Congress passed the PDA in direct response to the *Gilbert* holding.⁷² As the Supreme Court observed in *Newport News Shipbuilding and Dry Dock Co. v. EEOC*,⁷³ Congress intended the PDA to change the way courts interpreted and applied Title VII.⁷⁴ According to Con-

61. *Id.*

62. *Gilbert*, 429 U.S. at 142.

63. *Id.* at 142-43 (finding conflict between the agency’s guideline and an opinion letter issued closer to the passage of Title VII).

64. *Id.* at 143-45 (comparing the EEOC’s interpretation of Title VII with the interpretation of the Equal Pay Act by the Wage and Hour Administrator based on the attention given to the Equal Pay Act by Congress when Congress amended Title VII to add a sentence about differentiating between sexes for determining wages or compensation).

65. *Id.* at 145.

66. *Id.* at 146-47 (Brennan, J., dissenting).

67. *Id.* at 149.

68. *Id.* at 161-62 (Stevens, J., dissenting).

69. *Id.* at 162.

70. *Id.* at 161 n.5.

71. *See id.* at 146-47 (Brennan, J., dissenting); *id.* at 162 (Stevens, J., dissenting).

72. *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 670 (1983); Harrison A. Williams, Jr., *Foreword* to LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978 SER. NO. 96-2, at III (U.S. Gov. Printing Office 1979).

73. 462 U.S. 669 (1983).

74. *See id.* at 676, 679; Williams, Jr., *supra* note 72.

gress, the dissenting Justices “correctly express both the principle and the meaning of [T]itle VII,”⁷⁵ and “[i]t is the committee’s view that the dissenting Justices correctly interpreted the Act.”⁷⁶ The PDA amended the definitions section of Title VII by adding a single definition for the terms “because of sex” or “on the basis of sex,”⁷⁷ which reads:

[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; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.⁷⁸

1. Legislative History and Plain Language of the PDA

The PDA’s legislative history illustrates its purpose—to overturn the Supreme Court’s decision in *Gilbert* and to adopt the dissenting Justices’ analytical framework.⁷⁹ Neither the legislative history nor the statute’s plain language, however, reference contraception.⁸⁰ Congress’s silence appears to support two distinct possibilities: (1) either Congress did not consider contraception coverage at all or (2) Congress did not intend the PDA to cover contraception.⁸¹ In either case, some courts have been reluctant to imply a specific intent where none is expressly stated.⁸²

Notwithstanding congressional silence regarding contraception,

75. S. REP. NO. 95-331, at 2 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978 SER. NO. 96-2, at 39 (U.S. Gov. Printing Office 1979) [hereinafter SENATE LEGISLATIVE HISTORY]; *see Newport News*, 462 U.S. at 678 (quoting S. REP. NO. 95-331, at 2-3 (1977)).

76. H.R. REP. NO. 95-948, at 2 (1978), *reprinted in* LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978 SER. NO. 96-2, at 148 (U.S. Gov. Printing Office 1979) [hereinafter HOUSE LEGISLATIVE HISTORY]; *see Newport News*, 462 U.S. at 678 (quoting H.R. REP. NO. 95-948, at 2 (1978)).

77. *Newport News*, 462 U.S. at 670 n.1.

78. 42 U.S.C. § 2000e(k) (2000).

79. SENATE LEGISLATIVE HISTORY, *supra* note 75, at 39-40; HOUSE LEGISLATIVE HISTORY, *supra* note 76; Williams, Jr., *supra* note 72.

80. *See In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 942 (8th Cir. 2007) (citing *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1274 (W.D. Wash. 2001)).

81. *Id.* at 942 & n.3 (noting that congressional silence indicates Congress “did not even consider the issue” (quoting *Tafflin v. Levitt*, 493 U.S. 455, 462 (1990)), and Congress should amend the legislation if it is interpreted contrary to congressional intent (quoting *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004))).

82. *See id.* (concluding Congress’s silence regarding contraception cannot be interpreted to require expansion of coverage of the PDA to include contraception). The reluctance to expand the scope of the PDA stems from the idea that the Act specifically refers to pregnancy and post-pregnancy conditions, but not to pre-pregnancy conditions. *See Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996) (“The plain language of the PDA does not suggest that ‘related medical conditions’ should be extended to apply outside the context of ‘pregnancy’ and ‘childbirth.’”); *see also* Appellant’s Brief at 22-24, *In re Union Pac.*, 479 F.3d 936 (No. 06-1706) (noting that the legislative history makes it clear that Congress was focused on pregnancy and post-pregnancy conditions, not pre-pregnancy conditions when it enacted the PDA).

many arguments utilize the PDA's legislative history as well as its plain language in support of the position that the PDA encompasses contraception.⁸³ At least one of these arguments merits brief discussion. In *Erickson v. Bartell Drug Co.*,⁸⁴ the court believed the critical factor to be Congress's express intent to adopt "the [*Gilbert*] dissent's broader interpretation of Title VII," which recognized the reality of "sex-based differences between men and women employees."⁸⁵ These differences often "require[] employers to provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same."⁸⁶ Congress, however, did not intend to add new rights or duties to employers beyond Title VII, but rather to clarify congressional intent regarding the definition of sex.⁸⁷ Because Congress explicitly approved the *Gilbert* dissents' interpretation of "both the principle and the meaning of [T]itle VII,"⁸⁸ the issue becomes whether this theory of interpretation supports inclusion rather than exclusion, especially in those borderline cases being reviewed on appeal.⁸⁹

2. Supreme Court Interpretation of the PDA

The Supreme Court has had several opportunities to interpret the scope of the PDA, and it has affirmed the PDA was Congress's attempt to codify the views of the dissenting Justices in *Gilbert*.⁹⁰ In *Newport News*, the Court noted that Title VII does not require the provision of healthcare benefits and prescription services; however, if employers provide healthcare benefits and services, they have to be provided in a non-discriminatory manner.⁹¹ The Court believed the PDA and its legislative history provided the proper framework for analyzing discrimina-

83. See *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1270 (W.D. Wash. 2001) (noting the silence regarding contraception should not matter because Congress was adopting an interpretive approach that required a broad reading of the statute); see also Appellees' Brief at 22-23, *In re Union Pac.*, 479 F.3d 936 (No. 06-1706) (noting the legislative history makes it clear that Congress was adopting the approach to statutory interpretation utilized by the dissenting Justices in *Gilbert*); Brief for Certain Members of the Congress of the United States as Amicus Curiae Supporting Appellees at 4-5, *In re Union Pac.*, 479 F.3d 936 (No. 06-1706) (observing that the terms "include, but are not limited to" were Congress's attempt to require a broad reading of the PDA, just as the dissenting Justices had done in *Gilbert*).

84. 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

85. *Id.* at 1270. The court bolsters this conclusion with the observation that "Congress has generally chosen to interfere with the judiciary's interpretation of Title VII only where the courts attempted to restrict its application . . ." *Id.* at 1269.

86. *Id.* at 1270 (citing *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1084 n.14 (1983)).

87. HOUSE LEGISLATIVE HISTORY, *supra* note 76, at 149-50.

88. SENATE LEGISLATIVE HISTORY, *supra* note 75, at 39.

89. See *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402 (N.D. Ill. 1994) (reasoning that the use of the term "related" in the PDA's express language suggests "that interpretation should favor inclusion rather than exclusion in the close cases").

90. See, e.g., *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 676, 678-79 (1983).

91. See *id.* at 684 n.25 (discussing the differences between providing healthcare benefits in a non-discriminatory fashion and not providing healthcare benefits at all).

tion claims.⁹² This framework requires a court to analyze whether the healthcare coverage provided to one group is more or less comprehensive than the healthcare coverage provided to another group.⁹³ Thus, the Court reasoned that the spouses of male employees had to receive benefits equally comprehensive to those received by the spouses of female employees, which necessarily required additional coverage for the sex-specific condition of pregnancy.⁹⁴

In *UAW v. Johnson Controls, Inc.*,⁹⁵ the Supreme Court addressed the PDA's jurisdictional scope.⁹⁶ The case involved an employer that limited the type of work females of childbearing age could perform.⁹⁷ The employer's policies prevented pregnant women and women of childbearing age from performing tasks that could expose them to a certain amount of lead.⁹⁸ Classifying women based on their "ability to become pregnant," the Court reasoned, could be nothing other than "explicit sex discrimination" in light of Title VII and the PDA.⁹⁹ The Court's finding of discrimination complied with the PDA's objective of adopting the view of the dissenting Justices in *Gilbert*.¹⁰⁰ As Justice Stevens stated, "[I]t is the capacity to become pregnant which primarily differentiates the female from the male."¹⁰¹ Thus, the Court established the PDA's scope and jurisdictional reach as extending beyond the actual biological condition of pregnancy and including the biological condition of "potential for pregnancy."¹⁰²

3. Circuit Split Concerning Scope of PDA

Since the Supreme Court decided *Johnson Controls* more than fifteen years ago, the courts of appeal have split over the proper scope of the PDA.¹⁰³ The division centers around the question of whether the PDA only protects pregnant women from different treatment or

92. *Id.* at 676.

93. *Id.* ("Under the proper test petitioner's plan is unlawful, because the protection it affords to married male employees is less comprehensive than the protection it affords to married female employees."). Although this statement focused on a conclusion regarding discrimination against two separate groups, it demonstrates the fact that the proper framework should focus on the comprehensiveness of the provided coverage.

94. *See id.* at 685 & n.26 (concluding that excluding pregnancy benefits from women while providing complete coverage for men constitutes discrimination "on the basis of sex").

95. 499 U.S. 187 (1991).

96. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198-99 (1991) (noting that classifications based on "childbearing capacity" and "potential for pregnancy . . . [u]nder the PDA . . . must be regarded, for Title VII purposes, in the same light as explicit sex discrimination").

97. *Id.* at 191-92.

98. *Id.* at 192 (citing the defendant's company policy regarding working classifications).

99. *Id.* at 199 ("In its use of the words 'capable of bearing children' . . . as the criterion for exclusion, *Johnson Controls* explicitly classifies on the basis of potential for pregnancy.").

100. *See supra* text accompanying notes 72-76.

101. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 162 (1976) (Stevens, J., dissenting).

102. *Johnson Controls*, 499 U.S. at 199 (finding discrimination under the PDA even when applying it to women not pregnant but only capable of such a condition).

103. Magid, *supra* note 50, at 123.

whether the statute's protections extend to all women based on the specific gender characteristic of capacity for pregnancy.¹⁰⁴ While the disagreement has developed as a consequence of issues other than contraception, it would appear to predict how some courts would analyze insurance coverage for contraception under the PDA.¹⁰⁵

One approach utilizes a biological interpretation, limiting the scope and reach of the PDA to women who are actually pregnant.¹⁰⁶ The Eighth Circuit advocated this interpretation in *Krauel v. Iowa Methodist Medical Center*,¹⁰⁷ in which the court considered the PDA's applicability to coverage for infertility treatments.¹⁰⁸ While admitting that the PDA did extend to "potential pregnancy" because only women had such potential, the court decided that infertility was outside the scope of the PDA.¹⁰⁹ Infertility occurs prior to conception rather than after conception, as is the case with pregnancy, childbirth, and related medical conditions.¹¹⁰ The Eighth Circuit bolstered its conclusion by noting infertility applies to both men and women, making it a gender-neutral issue.¹¹¹

Circuits adhering to the second approach include the First, Second, and D.C. Circuits.¹¹² As one commentator describes it, these circuits have interpreted the PDA "to encompass broader protections than those related to the biological condition of pregnancy."¹¹³ Although none of these circuits have considered the scope of the PDA regarding pre-pregnancy conditions, they have interpreted it to extend beyond a specified biological condition.¹¹⁴ The rationale for this approach is simply that a bright-line cannot be drawn at pregnancy because of the Supreme Court's holding in *Johnson Controls*.¹¹⁵

4. Contraception Under the PDA

The EEOC issued a decision in 2000 that placed the coverage of contraception squarely within the ambit of Title VII and the PDA.¹¹⁶

104. *Id.*

105. *Id.* at 123-32 (describing the split of authority and using past examples to guess whether contraception would be included or excluded).

106. *Id.* at 123-28. The circuits following this interpretation are the Third, Sixth, Seventh, and Eighth Circuits. *Id.* at 123.

107. 95 F.3d 674 (8th Cir. 1996).

108. *Id.* at 674, 679-80; see Magid, *supra* note 50, at 126-27.

109. *Krauel*, 95 F.3d at 679-80.

110. *Id.* (concluding that "related medical conditions" applies to the post-conception terms "pregnancy" and "childbirth" and thus does not apply outside those biological conditions).

111. *Id.* at 680.

112. Magid, *supra* note 50, at 129.

113. *Id.*

114. *Id.*

115. *Cf. In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 945, 947 (8th Cir. 2007) (Bye, Cir. J., dissenting) (arguing that a bright-line cannot be drawn at conception because it would contradict Supreme Court precedent).

116. Decision on Coverage of Contraception, 2 Emp. Prac. Guide (CCH) ¶ 6878, at 7154 (EEOC

Based on *Johnson Controls*, the agency determined that the PDA extends beyond the biological condition of pregnancy to “a woman’s potential for pregnancy.”¹¹⁷ Second, the agency described the use of prescription contraceptives as “a means to prevent, and to control the timing of, the medical condition of pregnancy.”¹¹⁸ Accordingly, the proper comparison required an examination of the coverage provided for other medical drugs and services “used to prevent the occurrence of other medical conditions.”¹¹⁹ Based on these findings, the agency evaluated the defendant’s insurance plan to determine whether the coverage provided for the prevention of other medical conditions differed from the coverage provided for prescription contraception.¹²⁰ The EEOC also found the gender-neutral language of the plan’s exclusion to be irrelevant because only women use prescription contraception.¹²¹ Therefore, the agency determined that employers had to “cover the expenses of prescription contraceptives to the same extent, and on the same terms, that they cover the expenses of [other] types of drugs, devices, and preventative care”¹²²

Shortly after the EEOC decision, the Western District of Washington became the first federal court to consider the issue.¹²³ In *Erickson*, the court examined the language of the PDA, its legislative history, and the Supreme Court precedents addressing its scope, and determined the “exclusion of prescription contraception from [the defendant’s] prescription plan is inconsistent with the requirements of federal law.”¹²⁴ The court also reasoned that “[m]ale and female employees have different, sex-based disability and healthcare needs, and the law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception.”¹²⁵ The test for discrimination utilized by the court took these sex-related differences into account and determined that coverage for both sexes had to be equally comprehensive.¹²⁶ Pregnancy presented “a fundamental and immediate healthcare need” for women who lacked coverage under the insurance plans, and because the plans provided almost complete coverage for men, the exclusion for contraception was discriminatory.¹²⁷ Since the *Erickson* decision in

Dec. 14, 2000), available at <http://www.eeoc.gov/policy/docs/decision-contraception.html>.

117. See *id.* at 7155.

118. *Id.*

119. *Id.*

120. *Id.* at 7155-56 (listing the drugs and services provided by the pertinent insurance plans).

121. *Id.* at 7157.

122. *Id.*

123. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1268 (W.D. Wash. 2001).

124. *Id.* at 1271.

125. *Id.* (observing the interplay between the broad social goals of Title VII and the passage of the PDA).

126. *Id.* at 1272 (citing *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983)).

127. *Id.* at 1276-77.

2001, several other district courts have considered the same issue and agreed with its reasoning.¹²⁸

Several district courts, however, have reached the opposite conclusion.¹²⁹ In *Alexander v. American Airlines, Inc.*,¹³⁰ the court dismissed the plaintiff's PDA claim on standing grounds.¹³¹ Nevertheless, the judge noted that "[b]y no stretch of the imagination does the prohibition against discrimination based on pregnancy, childbirth, or related medical condition[s] require the provision of contraceptives"¹³² Likewise, in *EEOC v. UPS*,¹³³ the court, in dictum, stated its skepticism of the plaintiff's claim based on the Eighth Circuit's holding in *Krauel*, a case in which the court had found the PDA inapplicable to infertility treatments because they occurred prior to pregnancy.¹³⁴ *Cummins v. Illinois*¹³⁵ might stand alone as the only district court case that truly stands for the proposition that the PDA does not encompass contraception.¹³⁶ The court reasoned that the state had an interest in limiting insurance coverage at some point, and contraception presented a rational place to draw the line.¹³⁷ Furthermore, because the exclusions in question applied to all contraception, women were not the only group affected by the exclusion of contraception from coverage.¹³⁸

IV. COURT'S DECISION

The majority began its discussion by rejecting the issue as framed by the district court and adopting the framework advanced by Union Pacific.¹³⁹ The district court had compared coverage benefits for prescription contraceptives to the coverage provided for other forms of preventative medications and services.¹⁴⁰ Because the policies in ques-

128. See *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 940 n.1 (8th Cir. 2007) (listing the courts in agreement with *Erickson* as the Eastern and Western Districts of Missouri, the Northern District of Georgia, and the District of Nebraska).

129. *Id.* (listing the courts reaching a decision contrary to *Erickson* as the Southern District of Illinois, the District of Minnesota, and the Northern District of Texas).

130. No. 4:02-CV-0252-A, 2002 WL 731815 (N.D. Tex. Apr. 22, 2002).

131. *Id.* at *2, *4 (dismissing the claim for lack of insurance coverage for contraception because plaintiff had not attempted to obtain benefits for contraception, thus she did not suffer an injury in fact).

132. *Id.* at *4 (observing that the insurance plans excluded contraceptives for both genders).

133. 141 F. Supp. 2d 1216 (D. Minn. 2001).

134. *Id.* at 1218 n.1 ("The Eighth Circuit has made clear that prevention of conception is outside the scope of the PDA." (citing *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679-80 (8th Cir. 1996))).

135. No. 02-cv-4201-JPG, 2005 U.S. Dist. LEXIS 42634 (S.D. Ill. Aug. 30, 2005).

136. See *id.* at *20-*26.

137. See *id.* at *21-*23.

138. See *id.* at *23-*25.

139. *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 939 (8th Cir. 2007).

140. *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1148-49 (D. Neb. 2005). The district court framed the issue in a manner consistent with both the EEOC decision and the other district courts that had followed the EEOC's reasoning. Compare *id.* (comparing coverage for prescription contraception with other preventative drugs and devices), with *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1273-74 (W.D. Wash. 2001) (finding no satisfactory distinction be-

tion excluded all contraception, however, the Eighth Circuit framed the issue as “whether Union Pacific’s policy of denying coverage for all contraception violate[d] Title VII, as amended by the PDA.”¹⁴¹ Therefore, “[t]he proper comparator [was] the provision of the medical benefit in question, contraception.”¹⁴² Based on this analysis, the court issued two holdings: (1) contraception resembles infertility in that both apply prior to conception to both genders, and because the PDA’s scope does not extend to infertility treatments, it likewise cannot encompass contraception,¹⁴³ and (2) no general violation of Title VII existed because “the coverage provided to women [was] not less favorable than that provided to men.”¹⁴⁴

Regarding the scope of the PDA, the Eighth Circuit relied on *Krauel* for the proposition that the prevention of conception differs significantly from pregnancy and related medical conditions, which only occur *after* conception.¹⁴⁵ Thus, like infertility, contraception prevents conception, occurs prior to pregnancy, and falls outside the scope of the PDA.¹⁴⁶ The court also observed that the exclusion applied to men and women and covered all contraception, making it a gender-neutral exclusion, much like the exclusion of infertility treatments at issue in *Krauel*.¹⁴⁷

The court utilized an interpretation of the PDA in which the term “related medical conditions” modifies the two preceding terms, “pregnancy” and “childbirth.”¹⁴⁸ To be related to pregnancy or childbirth, medical conditions have to occur as a direct result of either pregnancy or childbirth.¹⁴⁹ The court distinguished *Johnson Controls*, noting that it “does not support an expansion of the PDA to cover fertility matters prior to contraception because ‘[p]otential pregnancy, unlike infertility, is a medical condition that is sex-related because only women can become pregnant.’”¹⁵⁰ The court further concluded the plain language of the PDA is silent as to contraceptives, which “cannot be interpreted to

tween prescription contraception, other preventative drugs, and other prescription drugs), and Decision on Coverage of Contraception, 2 Emp. Prac. Guide (CCH) ¶ 6878, at 7155-56 (EEOC Dec. 14, 2000), available at <http://www.eeoc.gov/policy/docs/decision-contraception.html> (comparing prescription contraception to other prescription drugs and preventative drugs and devices).

141. *In re Union Pac.*, 479 F.3d at 939.

142. *Id.* at 944. *Merriam-Webster’s Collegiate Dictionary* defines comparator as “a device for comparing something with a similar thing or with a standard measure.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 252 (11th ed. 2005).

143. *In re Union Pac.*, 479 F.3d at 943 (basing its comparison of contraception and infertility treatments on an analysis of *Krauel*).

144. *Id.* at 944-45 (issuing the holding in regards to a general Title VII analysis of the plaintiffs’ discrimination claims unconstrained by the boundaries of the PDA).

145. *See id.* at 941-42.

146. *Id.* at 942.

147. *See id.*

148. *Id.* at 941.

149. *Id.*

150. *Id.* (quoting *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996)).

expand the PDA to cover contraception.”¹⁵¹

The court found the EEOC decision unpersuasive, the rationale for the rejection being threefold. First, in the case considered by the EEOC, the employer provided coverage for surgical contraceptive methods, so the agency only considered the issue of coverage for prescription contraception.¹⁵² Second, the EEOC compared coverage provided for prescription contraceptives with coverage provided for a broad range of other preventative treatments without adequately supporting the choice of comparators.¹⁵³ Finally, the agency’s decision came “22 years after the enactment of the PDA. The delay brings into question the consistency and persuasiveness of the EEOC’s position.”¹⁵⁴

The court’s holding regarding the general Title VII analysis relied on the fact that the employer had not made any employment decisions on the basis of gender.¹⁵⁵ The plaintiffs were not treated less favorably than other similarly situated employees because benefits for contraception used for birth control were excluded from the policies of all Union Pacific employees.¹⁵⁶ Because the proper scope of the issue and the proper comparator both revolve around coverage for all contraception, the issue should not be expanded to examine all forms of “medicines or medical services [that] prevent employees from developing diseases or conditions that pose an equal or lesser threat to employees’ health than does pregnancy.”¹⁵⁷

The dissent began by stating that the exclusion of prescription contraception only affects women because “they bear all of the health consequences of unplanned pregnancies.”¹⁵⁸ Insurance plans that exclude preventative prescriptions required by women, while providing preventative services used solely by men, are facially discriminatory.¹⁵⁹ While surgical contraceptive methods are indeed gender neutral, women bear the brunt of the impact resulting from the exclusion of such “gender-neutral” benefits.¹⁶⁰ Moreover, because Union Pacific presented no evidence of insurance plans that provide coverage for non-prescription contraceptives such as condoms, the proper analysis involves a compari-

151. *Id.* at 942 (citing *Tafflin v. Levitt*, 493 U.S. 455, 462 (1990)). The court also drew a distinction between abortion (ending a pregnancy) and contraception (preventing pregnancy), noting that the express exclusion of abortion does not “impl[y] an intent to include coverage of contraception.” *Id.* at 942.

152. *Id.* at 943.

153. *Id.*

154. *Id.*

155. *See id.* at 944 (“[W]hen an employer’s action is not based on a sex classification, it is not a sex-based violation of Title VII.” (citing *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir. 1997))).

156. *Id.*

157. *See id.* (quoting *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1148 (D. Neb. 2005)).

158. *Id.* at 945 (Bye, Cir. J., dissenting).

159. *Id.*

160. *Id.*

son between coverage provided for prescription contraception and coverage provided for other types of preventative care or treatments.¹⁶¹

The dissent also reasoned that the PDA and Title VII are remedial civil rights statutes that should be broadly construed.¹⁶² Moreover, “[t]he use of the phrase ‘include, but are not limited to’ mandates a broad reading of the PDA because it suggests Congress was being illustrative rather than exclusive with the list following the phrase.”¹⁶³ The Supreme Court broadly construed the PDA in *Johnson Controls* when it held the scope of the statute reached “potential pregnancy,” and even the Eighth Circuit itself has indicated the PDA encompasses “potential pregnancy” and the chance of becoming pregnant again.¹⁶⁴ The dissent concluded that contraception apparently fit within the PDA’s scope because contraception prevents pregnancy only in women, and “[w]ith prescription contraception a woman controls her potential pregnancy.”¹⁶⁵

V. COMMENTARY

“This case is unusual in that it presents a question the resolution of which . . . turns largely upon the conceptual framework chosen to identify and describe the operational features of the challenged [health care benefit plans].”¹⁶⁶ These words, written by Justice Brennan in dissent in *Gilbert*, ring just as true for the present case as they did for *Gilbert*. The way the Eighth Circuit framed the issue, interpreted the PDA, and conducted the corresponding analysis in the present case echoes the Supreme Court’s analytical framework and corresponding analysis in *Gilbert*.¹⁶⁷ Both courts framed the issue differently than the courts below and in a way seemingly contrary to the weight of authority on the issue.¹⁶⁸ Additionally, both majorities applied similar, yet incorrect, methods of statutory interpretation and construction to the statute.¹⁶⁹ As noted above, Congress statutorily rejected the analytical framework and statutory interpretation utilized in *Gilbert*.¹⁷⁰ Because *In re Union Pacific* parallels *Gilbert*, the Eighth Circuit’s reasoning suffers from the same flaws as did *Gilbert*.¹⁷¹ *In re Union Pacific* thus becomes another

161. *See id.*

162. *Id.* (citing *Allen v. Entergy Corp.*, 193 F.3d 1010, 1020 (8th Cir. 1999)).

163. *Id.* at 946 (citing *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941)).

164. *Id.* at 946-47.

165. *Id.* at 947-49.

166. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 147 (1976) (Brennan, J., dissenting) (analyzing the lack of leave benefits for pregnancy under an otherwise comprehensive disability leave program).

167. *See* discussion *infra* Part V.A.

168. *See* discussion *infra* Part V.A.

169. *See* discussion *infra* Part V.B.

170. *See* discussion *supra* Parts III-III.B.2.

171. *See* discussion *infra* Parts V.A.-B.

case the outcome of which “turns largely upon the conceptual framework chosen”¹⁷² “Under the proper test petitioner’s plan is unlawful, because the protection it affords to [female] employees is less comprehensive than the protection it affords to [male] employees.”¹⁷³

A. Analytical Framework

The first similarity between *Gilbert* and *In re Union Pacific* is the way the two courts framed the issues and made comparisons, both of which contravene the weight of authority on the issue.¹⁷⁴ Congress intended the PDA to change “the test of discrimination employed by the Court in [*Gilbert*].”¹⁷⁵ Because the analytical framework of discrimination the Eighth Circuit utilized in *In re Union Pacific* tracks the framework used by the Supreme Court in *Gilbert*, the Eighth Circuit’s opinion cannot comport with this congressionally-mandated test of discrimination.¹⁷⁶

In *Gilbert*, the Supreme Court focused on “a gender-free assignment of risks” rather than “the risks excluded from the otherwise comprehensive program”¹⁷⁷ The Court’s approach centered on the actual coverage provided and the actual exclusion at issue rather than the effect of the exclusion on the sexes, a change of focus at odds with the lower courts and the EEOC.¹⁷⁸ Under this method, because both genders received coverage for all other disabilities, the employer’s single exclusion of pregnancy from the list of covered disabilities did not constitute discrimination “on the basis of sex.”¹⁷⁹ The employer merely removed a single disability from the otherwise comprehensive list.¹⁸⁰ Likewise, in *In re Union Pacific*, the Eighth Circuit focused on a gender-

172. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 147 (1976).

173. *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983). The bracketed words in the quotation are the author’s substitution of words used by the Court. *See supra* note 93 for the original language. The alterations do change the literal meaning of the quotation, but the sentence is being reproduced to illustrate the test for discrimination used by the Court. The test examines the comprehensiveness of the coverage provided, regardless of which protected group is at issue. *See discussion infra* Part V.A.

174. *See supra* text accompanying note 66; *see discussion supra* Part III.B.4.

175. *Newport News*, 462 U.S. at 676 (determining the intent of Congress was to directly overrule *Gilbert*’s holding and the framework employed by the Court in that case).

176. A good portion of the parties’ arguments and both courts’ opinions were devoted to determining the proper scope of the issue and the correct comparator to use in the analysis, testifying to the importance to each side of utilizing the correct framework. *See In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 939 (8th Cir. 2007); *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1147-49 (D. Neb. 2005); Appellant’s Brief at 15-35, *In re Union Pac.*, 479 F.3d 936 (No. 06-1706); Appellees’ Brief at 20-34, 46-53, *In re Union Pac.*, 479 F.3d 936 (No. 06-1706).

177. *Gilbert*, 429 U.S. at 147 (Brennan, J., dissenting) (comparing the framework of the majority with the framework of the lower courts and noting the effect on the case’s outcome of choosing one framework over the other).

178. *See id.* at 147-48 (commenting on the significance of the switch in the conceptual framework chosen).

179. *Id.* at 147.

180. *See id.* at 134 (majority opinion).

free exclusion of benefits rather than benefits provided by the otherwise comprehensive program.¹⁸¹ In other words, the court examined the exclusion in terms of the overall healthcare benefits provided to both genders rather than taking into account the effect of the exclusion on the genders.¹⁸² The court reasoned that because the exclusion applied to both genders equally, “the coverage provided to women is not less favorable than that provided to men.”¹⁸³ This conclusion simply restates the words of Justice Rehnquist in *Gilbert*—“[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.”¹⁸⁴

As explained above, Congress intended for the PDA to measure the comprehensiveness of the coverage provided each group.¹⁸⁵ Measuring an insurance plan’s exclusions, however, reveals nothing about the comprehensiveness of the coverage.¹⁸⁶ As *Gilbert* demonstrates, healthcare benefits might be “equal” for both genders when a single exclusion exists, but the coverage provided to one gender may be less comprehensive than the coverage provided to the other gender.¹⁸⁷ Comprehensive coverage requires an insurance plan to meet “[t]he special or increased healthcare needs associated with a woman’s unique sex-based characteristics . . . to the same extent, and on the same terms, as other healthcare needs.”¹⁸⁸ Thus, determining the comprehensiveness of coverage requires a comparison of the actual medical needs of each gender with the effect of insurance exclusions on these medical needs.¹⁸⁹ Because the

181. See *supra* note 177; cf. *In re Union Pac.*, 479 F.3d at 939-42 (noting that a discrimination claim requires a showing of more favorable treatment to those outside the protected class, and assuming that the exclusion of contraception for both sexes amounts to equally favorable treatment without analyzing the exclusion’s effects).

182. See *In re Union Pac.*, 479 F.3d at 944.

183. *Id.* at 944-45 (observing that “[the] health plans do not cover any contraception used by women such as birth control, sponges, diaphragms, intrauterine devices or tubal ligations or any contraception used by men such as condoms and vasectomies”).

184. *Gilbert*, 429 U.S. at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)).

185. See *supra* note 93 and accompanying text. As discussed previously, the legislative history of the PDA demonstrated congressional agreement with the *Gilbert* dissents. See *supra* notes 72-74 and accompanying text. In *Newport News*, the Supreme Court construed the PDA as changing “the test of discrimination employed by the Court in [*Gilbert*].” *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983). Thus, “the proper test” is derived specifically from the congressional reaction to *Gilbert* and the subsequent Supreme Court interpretation of that reaction. See discussion *supra* Parts III.B-III.B.2.

186. An analysis of an insurance plan’s exclusions could provide a basis for determining the comprehensiveness of the exclusions themselves, but not the plan as a whole. Cf. *Gilbert*, 429 U.S. at 147-48 (Brennan, J., dissenting) (observing that the majority’s analysis focused on a single exclusion from coverage that applied to both sexes, leading the majority to conclude the exclusion could not constitute discrimination against either sex even though it only affected women).

187. See *id.* (observing that the majority’s view saw the exclusion as non-discriminatory because all other risks were “mutually covered for both sexes”).

188. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001); see Breena M. Roos, Note, *The Quest for Equality: Comprehensive Insurance Coverage of Prescription Contraceptives*, 82 B.U.L. REV. 1289, 1289 (2002) (stating that “women between the ages of nineteen and sixty-four pay sixty-eight percent more in out-of-pocket medical expenses than men of the same age,” in large part due to the cost of reproductive services, including contraception (footnote omitted)).

189. See *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1143 (D. Neb.

health risks of pregnancy affect only women, insurance plans should cover these risks to the same degree as similar risks faced by men.¹⁹⁰ Concluding that contraception is gender neutral fails to take into account the effect of the exclusion of contraception on these “different, sex-based . . . healthcare needs.”¹⁹¹ Because pregnancy and the “potential for pregnancy” are specific, serious medical conditions that affect only women, excluding benefits for these conditions can only be non-discriminatory if benefits are excluded for similar health risks that affect only men.¹⁹² Accordingly, a court must begin with a study of the actual medical and healthcare requirements of each gender before it can determine whether the healthcare coverage provided one gender is less comprehensive than the coverage provided the other gender.¹⁹³

In both cases, the EEOC and the lower courts analyzed the scope of the coverage provided to each group in relation to the scope of each group’s unique health risks.¹⁹⁴ Under this framework, the inquiry focuses not on the level or amount of coverage provided to each gender but rather on the comprehensiveness of the coverage provided.¹⁹⁵ For example, if coverage is provided for ninety percent of one gender’s health risks, coverage must be provided for ninety percent of the other gender’s health risks so that the provided coverage treats the genders equally.¹⁹⁶ This framework also accords with “the proper test” for discrimination under the PDA as determined by the Supreme Court in *Newport News*.¹⁹⁷

All tests for discrimination under Title VII necessarily involve a comparison in order to determine whether a protected group has been treated differently than other groups.¹⁹⁸ *In re Union Pacific* involved a question of discrimination regarding women “enrolled in one of the Agreement Plans who used prescription contraception.”¹⁹⁹ Thus, the proper inquiry in the case involved a comparison of healthcare benefits

2005) (noting the comparison should be with “other similar health risks”); *Erickson*, 141 F. Supp. 2d at 1271-72 (noting that only women use prescription contraception, making it a special healthcare need for women, and the exclusion from the otherwise comprehensive insurance program cannot comport with a plan that is equally comprehensive to both sexes).

190. *See In re Union Pac.*, 378 F. Supp. 2d at 1146 (observing that regardless of which sex uses contraception, not using contraception by either sex only affects the health of women).

191. *Erickson*, 141 F. Supp. 2d at 1271.

192. *See In re Union Pac.*, 378 F. Supp. 2d at 1148-49; *see also In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 945 (8th Cir. 2007) (Bye, Cir. J., dissenting).

193. *See In re Union Pac.*, 378 F. Supp. 2d at 1147-48 (detailing a hypothetical health risk comparable to pregnancy before analyzing comparable medicines or medical services).

194. *See, e.g., id.* at 1143 (noting that “the clear language of the statute requires that the Plans treat the risk of pregnancy no less favorably than the Plans treat other similar health risks”).

195. *See Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983).

196. *Cf. id.* at 683 (describing what comprehensive means in terms of treating the sexes equally).

197. *See supra* notes 92-93, 173 and accompanying text.

198. *Newport News*, 462 U.S. at 683 (stating the test for discrimination under Title VII involves a determination of whether a person has been treated “in a manner which but for that person’s sex would be different” (quoting *L.A. Dep’t of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978))).

199. *In re Union Pac.*, 378 F. Supp. 2d at 1140.

for prescription contraception provided to this class of women with similar benefits provided to other groups, specifically men.²⁰⁰ Moreover, this comparison will only illuminate potential discrimination when the proper comparator is used to gauge the comprehensiveness of the coverage provided to both groups.²⁰¹

The Eighth Circuit used “all contraception” as the comparator in *In re Union Pacific*, however, using “all contraception” as the comparator will not adequately answer the comprehensiveness question.²⁰² “All contraception” includes surgical methods for both men and women, prescription contraception for women, and non-prescription methods for both men and women.²⁰³ Insurance plans, however, rarely provide coverage for non-prescription contraceptives such as condoms, which makes these types of methods irrelevant to the issue of insurance coverage.²⁰⁴ Moreover, surgical contraceptive methods apply to both genders equally because viable surgical procedures exist for both men and women.²⁰⁵ Consequently, the exclusion of surgical contraceptive methods constitutes a gender-neutral exclusion.²⁰⁶ Prescription contraception, on the other hand, only applies to women because no such contraception exists for men.²⁰⁷ As the district judge observed in *In re Union Pacific*, however, exclusions for prescription contraception affect the health of women only, so the advent of prescription contraception for men would not change the analysis.²⁰⁸ Because both non-prescription contraceptives and surgical contraceptive methods differ substantially from prescription contraceptives, the Eighth Circuit incorrectly relied on “all contraception” as the comparator.²⁰⁹

B. Scope and Construction of Statute

The dissent in *In re Union Pacific* discusses the correct scope of the PDA with regard to contraception, and many scholars have argued this

200. See *id.* at 1143, 1148.

201. See Appellant’s Brief at 43-45, *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007) (No. 06-1706).

202. See *supra* notes 141-142 and accompanying text.

203. *In re Union Pac.*, 479 F.3d at 939; Roos, *supra* note 188, at 1293.

204. See *In re Union Pac.*, 479 F.3d at 945 (Bye, Cir. J., dissenting) (commenting that Union Pacific had not provided any evidence of an insurance policy that provided benefits for condoms); Roos, *supra* note 188, at 1293 (stating that insurance plans do not encompass these non-prescription methods because they “do not require a physician’s supervision”).

205. See *In re Union Pac.*, 479 F.3d at 945 (Bye, Cir. J., dissenting) (observing that even if surgical methods did not apply to both genders, they would still only affect the health of women); Law, *supra* note 11, at 368 (stating that sterilization is “the only medically prescribed and provided contraceptive service available to both men and women”).

206. See Law, *supra* note 11, at 368 (stating such methods apply to both sexes).

207. See, e.g., *In re Union Pac.*, 479 F.3d at 939.

208. *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1146 (D. Neb. 1995).

209. See *In re Union Pac.*, 479 F.3d at 945 (Bye, Cir. J., dissenting).

issue sufficiently.²¹⁰ Accordingly, it will be briefly described here. *Johnson Controls* held that the PDA reaches “potential pregnancy” and “capacity for childbirth.”²¹¹ This view corresponded with the idea as set forth in *Newport News* that stated because “insurance programs ‘deal with future risks rather than historic facts,’” a classification based on pregnancy deals with those women who face such a potential risk.²¹² Furthermore, *Merriam-Webster’s Collegiate Dictionary* defines “potential” as “capable of development into actuality” and “capacity” as “the faculty or potential for treating, experiencing, or appreciating.”²¹³ Both definitions relate to future events, and because only women have the “capacity for childbirth,” only women can have a future chance of becoming pregnant.²¹⁴ Thus, “potential pregnancy” in a female who has the “capacity for childbirth” could logically be described as “potential conception” because a “capacity for childbirth” necessarily includes the “potential to conceive.”²¹⁵ Consequently, if “potential pregnancy” falls within the coverage of the PDA, so too should “potential conception.”²¹⁶

In *Krauel*, the Eighth Circuit admitted that because only women can become pregnant, “potential pregnancy” constitutes a sex-related medical condition.²¹⁷ In considering the applicability of the PDA to infertility, however, the court observed that infertility affects both genders.²¹⁸ In *In re Union Pacific*, the court extended this reasoning to contraception based on a belief that contraception “applies to both men and women like ‘infertility.’”²¹⁹ The court defined “contraception” as the “deliberate prevention of conception or impregnation,” but decided that because the prevention occurs prior to pregnancy, the PDA cannot apply.²²⁰ A flaw exists in this reasoning in that contraception affects a woman’s “potential pregnancy” as well as her “capacity for childbirth.”²²¹ Although men can use contraception, the use or lack thereof has no adverse medical effect on men.²²² The court’s “bright-line,”

210. See Magid, *supra* note 50, at 117-20; Law, *supra* note 11, at 364, 378-79.

211. See *supra* note 96 and accompanying text.

212. *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 161 n.5 (1976) (Stevens, J., dissenting)).

213. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 182, 971 (11th ed. 2005).

214. See *Gilbert*, 429 U.S. at 161 n.5 (Stevens, J., dissenting).

215. In terms of future possibility, a future possibility of becoming pregnant would also be a future possibility of conceiving. Cf. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991) (describing a classification based on “childbearing capacity” as a protection of “unconceived children,” unfairly administered in that case).

216. Cf. *id.* (noting the defendant was not protecting “the unconceived children of all its employees”).

217. *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996).

218. *Id.*

219. *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 942 (8th Cir. 2007).

220. *Id.* (quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 271 (11th ed. 2005)).

221. See *supra* note 216 and accompanying text. If the PDA applies to “potential conception,” and contraceptives affect conception, contraceptives fall within the ambit of the PDA.

222. Cf. *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1146 (D. Neb.

drawn at conception, directly contradicts both *Johnson Controls* and *Krauel* because it affects “a medical condition that is sex-related.”²²³ Thus, prior precedent and basic logic prohibit the scope of the PDA from being restricted to the biological condition of pregnancy and mandate a statutory scope that encompasses the biological condition of “potential conception.”²²⁴

Furthermore, Congress’s “goal [for] Title VII was to end years of discrimination in employment and to place all men and women . . . on equal footing.”²²⁵ The PDA did not alter this purpose but merely changed the definition of certain terms within the statute.²²⁶ Interestingly, Congress has only overruled the courts’ interpretations of Title VII with legislation such as the PDA when the courts attempt to restrict the application of the statute.²²⁷ Accordingly, because of Title VII’s remedial nature, it “should be construed broadly to effectuate its purpose[.]”²²⁸ The present case, however, all but abandons this canon of statutory construction.²²⁹ By not examining the comparative effect of the exclusion of contraception on the sexes, the Eighth Circuit had no basis for determining whether the statute’s purpose had been effectuated.²³⁰ Thus, the court failed to consider whether its holding corresponded to the broad interpretation of Title VII as exemplified by the dissenting Justices in *Gilbert*.²³¹

C. Rejection of the EEOC Decision

A final point that merits discussion involves the Eighth Circuit’s rejection of the EEOC decision. Congress vested the EEOC with the primary enforcement responsibility of Title VII and the PDA.²³² Although not binding on the courts, “the EEOC’s interpretation of ambiguous language need only be reasonable to be entitled to deference.”²³³ Agencies such as the EEOC represent “a body of experience and informed judgment to which courts . . . may properly resort for

2005) (stating the use of male contraceptives “has no beneficial impact on the health of the male”).

223. *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996); see *In re Union Pac.*, 479 F.3d at 947 (Bye, Cir. J., dissenting).

224. See *In re Union Pac.*, 479 F.3d at 947 (Bye, Cir. J., dissenting) (arguing that “potential pregnancy” should fall within the ambit of the PDA).

225. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001).

226. See discussion *supra* Part III.B.

227. See *supra* note 85 and accompanying text.

228. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

229. See *In re Union Pac.*, 479 F.3d at 945 (Bye, Cir. J., dissenting) (citing *Allen v. Entergy Corp.*, 193 F.3d 1010, 1020 (8th Cir. 1999) (disagreeing with the reasoning employed by the majority because it is at odds with the broad construction usually given Title VII)).

230. See discussion *supra* Part V.A.

231. See *supra* note 85 and accompanying text.

232. See 42 U.S.C. § 2000e-5(a) (2000); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988).

233. *Commercial Office Prods.*, 486 U.S. at 115 (citing *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979)).

guidance.”²³⁴ Prior to *Gilbert*, the Supreme Court had afforded agency interpretations “great deference,” but in that case the Court altered its standard by merely considering such opinions.²³⁵ Likewise, prior to *In re Union Pacific*, Eighth Circuit case law supported the idea that EEOC guidelines “are entitled to great deference by the courts,”²³⁶ but in that case, the court adopted an approach in which the agency’s opinion must “have the ‘power to persuade.’”²³⁷

The three reasons used by the Eighth Circuit in rejecting the EEOC’s decision cannot withstand analysis, even in the face of this lower standard of deference.²³⁸ First, the distinction between the cases based on the coverage of surgical contraception methods has no bearing on the outcome, because exclusions for prescription contraception still only affect the health of women.²³⁹ Second, the agency’s comparison of prescription contraception to a variety of other preventative medical services constitutes a reasonable comparison that should be afforded deference.²⁴⁰ Moreover, choosing the correct comparison in such cases constitutes “the type of complex economic and social inquiry that Congress wisely left to resolution by the EEOC pursuant to its Title VII mandate.”²⁴¹ Finally, the length of time between the EEOC’s decision and the passage of the PDA has little bearing on the agency’s consistency.²⁴² A consistent position can only emerge upon the establishment of a single position.²⁴³ As noted above, the issue had not arisen prior to the EEOC decision; thus, no position existed with which the agency could be inconsistent.²⁴⁴ This fact makes the court’s questioning of the agency’s “consistency and persuasiveness” meritless.²⁴⁵ Therefore, the

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

235. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 155-56 (1976) (Brennan, J., dissenting) (noting that the majority changed the standard so that EEOC “guidelines are ‘entitled to consideration’” (quoting majority opinion at 141)).

236. *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1144 (D. Neb. 2005) (quoting *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651, 653 (8th Cir. 1975)).

237. *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 943 (8th Cir. 2007) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).

238. *See supra* notes 152-154 and accompanying text.

239. *See supra* notes 205-208 and accompanying text.

240. *See In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1146-47 (D. Neb. 2005) (arguing why prescription contraception should be compared to other preventative drugs).

241. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 155 (1976) (Brennan, J., dissenting) (citing H.R. REP. No. 92-238, at 8 (1972)).

242. *See id.* at 156 (criticizing the majority for rejecting the EEOC decision when the agency carefully mapped the contours of the statutes in question).

243. *Merriam-Webster’s Collegiate Dictionary* defines “consistent” as “marked by harmony, regularity, or steady continuity . . . marked by agreement . . . showing steady conformity to character, profession, belief, or custom.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 266 (11th ed. 2005). The agency’s ruling persuaded several courts, and it consisted of a natural progression of defining the boundaries of the PDA. There is little room for inconsistency when the decision is the first on point, and in agreement with earlier and later pronouncements.

244. *See supra* note 13.

245. *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 943 (8th Cir. 2007); *see Gilbert*, 429 U.S. at 156-57 (1976) (Brennan, J., dissenting) (criticizing the majority for throwing out

agency's "tardy indecisiveness" demonstrates no "evidence of inconsistency," and the court should have granted the EEOC decision its "due deference."²⁴⁶

VI. CONCLUSION

After the *Gilbert* decision, Congress statutorily overruled the Supreme Court's holding as well as its narrow interpretation of Title VII by passing the PDA. Congress specifically intended for the PDA to adopt the broader interpretations of the statute as proffered by the dissenting Justices in *Gilbert*. The Supreme Court has subsequently construed the PDA broadly, interpreting its scope as extending to classifications based on a woman's "potential for pregnancy" and "capacity for childbirth." Despite this fact, the circuit courts disagree on its proper scope.

In *In re Union Pacific*, the Eighth Circuit became the first circuit court to consider the PDA's applicability to insurance coverage for contraception. The court discredited an opinion by the EEOC, in which the agency declared exclusions for prescription contraception discrimination "on the basis of sex." The Eighth Circuit, however, believed such exclusions affected both genders equally, thus they could not be discriminatory. The court further reasoned that contraception occurred prior to pregnancy, and as such, it was beyond the scope of the PDA.

The Eighth Circuit's reasoning and conclusions mirror those of the Supreme Court in *Gilbert*. Both Congress and the Supreme Court have declared *Gilbert* to be a flawed decision, and the Eighth Circuit's opinion suffers from many of the same flaws. By making improper comparisons, the court failed to account for the medical effect contraception has on women, and it failed to distinguish contraception from other gender-neutral issues such as infertility. Because the court overlooked this effect, it could not adequately determine whether the coverage provided women was equally comprehensive to that provided men. Finally, by tracking *Gilbert*, the court failed to implement the broad social goals of Title VII and the PDA.

the EEOC's carefully reasoned and thought-out opinion).

246. *Gilbert*, 429 U.S. at 157 (1976) (Brennan, J., dissenting).