

FIXING INCONSISTENT PATERNALISM UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAW

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At present, our federal employment discrimination laws fail to provide uniform and consistent legal protection when an employer engages in applicant-specific paternalism—the practice of excluding an applicant merely to protect that person from job-related safety and/or health risks uniquely attributable to his or her federally protected characteristic(s). Under Title VII of the Civil Rights Act of 1964, the courts and the Equal Employment Opportunity Commission (EEOC) reject such paternalism, demanding that the applicant alone decide whether to pursue (and accept) a job that poses risks related to his or her sex, race, color, religion, or national origin. In contrast, under the Americans with Disabilities Act of 1990 (ADA), the courts and the EEOC allow applicant-specific paternalism, thereby permitting an employer to seize decisionmaking power from a disabled applicant.

Consequently, the validity of an excluded applicant's employment discrimination claim regrettably depends on a single factor or variable: the protected characteristic at issue. The "favored" characteristic (a Title VII characteristic) yields a viable claim, but the "disfavored" characteristic (an ADA disability) produces a losing claim.

This Article proposes a new approach—termed "informational paternalism"—that brings needed uniformity and consistency of legal protection in the area of applicant-specific paternalism. This middle-ground approach has two features: a blanket prohibition of applicant-specific paternalism, and a job-related risk notification requirement. Together, these two features are justified because they: (a) reflect a longstanding philosophy of both Congress and the Supreme Court that rejects an employer's applicant-specific protective purpose as an unacceptable basis for excluding an applicant; (b) serve to fully advance federal antidiscrimination policy; and (c) embrace a philosophy shared by Congress and the Occupational Safety and Health Administration that seeks to protect workers by providing them with information relevant to their employment-related decisions (rather than by seizing their decisionmaking power).

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INTRODUCTION

paternalism, n. [The] policy or practice of taking responsibility for the individual affairs of . . . [others], esp. by supplying their needs or regulating their conduct in a heavy-handed manner.¹

Typically, a job applicant has the power to decide whether to pursue and accept an employment position. But consider a job that exposes an applicant to safety and/or health risks that are uniquely attributable to his or her sex, disability, or any other characteristic protected under federal employment discrimination law. May an employer lawfully exclude that applicant merely to protect him or her from relevant characteristic-specific risks? Or does this paternalistic exclusion—which this Article labels applicant-specific

1. BLACK’S LAW DICTIONARY 1163 (8th ed. 2004); see also *id.* at 915 (defining the term “legal paternalism” as “[t]he theory that a . . . legal system is justified in controlling the individual and private affairs of citizens”).

paternalism—actually discriminate against this applicant because of his or her federally protected characteristic?

Consider the following two scenarios, and ask yourself whether the applicant has (or should have) a viable federal employment discrimination claim:

Situation #1: Company A manufactures lawn-related products, which contain amounts of lead, mercury, and pesticides. Employees who work in the manufacturing plant are exposed to these substances.

Sheila, who is pregnant, works at Company A and applies for a promotion that would require her to work in the manufacturing plant. Studies have confirmed that pregnant women (and women capable of becoming pregnant) who are exposed to these substances have a higher risk of pregnancy-related and/or birth defect-related problems.

While Sheila understands the referenced risks, she still wants to pursue the position. She is the best-qualified applicant for the job and would pose no risk to other employees while working in her individual station. Nonetheless, Company A—wanting to protect Sheila from the referenced risks—excludes her from consideration and then hires a less-qualified male applicant.

Situation #2: Company B manufactures cars. Employees who work in the manufacturing plant use steel saws, metal bending machines, and/or bolt guns in their individual stations.

Bill, who has epilepsy, works at Company B and applies for a promotion that would require him to work in the manufacturing plant. Studies have confirmed that epileptics who use heavy equipment have a higher risk of workplace injury as a result of seizures that may occur while operating the equipment.

While Bill understands the referenced risks, he still wants to pursue the position. He is the best qualified applicant for the job and would pose no risk to other employees while working in his individual station. Nonetheless, Company B—wanting to protect Bill from the referenced risks—excludes him from consideration and then hires a less-qualified, nondisabled applicant.

* * *

Interestingly, our federal employment discrimination laws lack uniformity and consistency of legal protection in this area—they treat Sheila and Bill (and Companies A and B) differently. The reason for this discrepancy is simple: Our courts prohibit applicant-specific paternalism by employers under some, but not all, of our federal employment discrimination laws.

Under Title VII of the Civil Rights Act of 1964 (Title VII),² which generally prohibits employment discrimination because of a person's race, color, religion, sex, or national origin,³ the Supreme Court and the Equal Employment Opportunity Commission (EEOC), as the federal administrative agency that enforces Title VII, have rejected applicant-specific paternalism, thus preserving an individual applicant's decisionmaking power rather than permitting an employer to seize that power.⁴ Consequently, in Situation #1 above, Sheila retains the power to balance the job's benefits against its safety and/or health risks (uniquely related to her federally protected gender and pregnancy statuses) and to choose whether to pursue and accept the job, if offered. Under Title VII, Company A cannot legally make that choice for Sheila by excluding her from the job for the paternalistic reason of protecting her from these characteristic-related risks. If Company A does so, Sheila has a viable sex-based discrimination claim.

In contrast, under the Americans with Disabilities Act of 1990 (ADA),⁵ which generally prohibits employment discrimination against a qualified individual with a disability because of that disability,⁶ the Supreme Court and the EEOC, which is also charged with enforcing the ADA, have allowed applicant-specific paternalism, thus permitting an employer to seize disabled

2. 42 U.S.C. §§ 2000e-2000e-17 (2006).

3. See *id.* § 2000e-2(a)(1). In addition, the Pregnancy Discrimination Act of 1978 (PDA) amended Title VII to clarify that, for purposes of unlawful discrimination, the term "because of sex" includes "because of or on the basis of pregnancy, childbirth, or related medical conditions . . ." PDA, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (codified as amended at 42 U.S.C. § 2000e(k)).

Title VII also prohibits retaliatory discrimination against a person for having "opposed any practice made an unlawful employment practice" by Title VII or having "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a).

4. See, e.g., *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) ("It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."); *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) ("[T]he argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself."); see also *infra* Part I.A.2 (discussing applicable Supreme Court precedent under Title VII).

5. Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. § 12101).

6. 42 U.S.C. § 12112(a). The term "disability" is defined in the Americans With Disabilities Act of 1990 (ADA) as (i) a "physical or mental impairment that substantially limits one or more of the major life activities of such individual," (ii) having "a record of such an impairment," or (iii) "being regarded as having such an impairment." *Id.* § 12102(2). A "qualified individual with a disability" refers to a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). The ADA contains an antiretaliation provision similar to that of Title VII. See *id.* § 12203(a); *supra* note 3 (describing Title VII's antiretaliation provision).

applicants' decisionmaking power.⁷ As a result, in Situation #2 above, Bill does not retain the power to balance the job's benefits against its safety and/or health risks (uniquely related to his federally protected disability status) or to choose whether to pursue and accept the job, if offered. Under the ADA, Company B can legally make that choice for Bill by excluding him from the job for the paternalistic reason of protecting him from these characteristic-related risks. If Company B does so, Bill regrettably lacks a viable disability-based discrimination claim.

Part I of this Article discusses in detail these two contrasting views regarding workplace paternalism: the Title VII-based view that applicant-specific paternalism is an unacceptable, unreasonable justification for discriminatory job exclusions;⁸ and the opposing ADA-based view that such paternalism is an acceptable, reasonable justification for discriminatory job exclusions.⁹ This Part concludes by exploring the Older Workers Benefit Protection Act of 1990 (OWBPA),¹⁰ which in part enumerates information-related measures that employers must satisfy before an employee can validly waive a federal age discrimination claim under the Age Discrimination in Employment Act of 1967 (ADEA).¹¹

Part II then proposes and defends "informational paternalism" as a new, middle-ground approach that brings needed uniformity and consistency of legal protections to the area of applicant-specific paternalism

7. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 76 (2002) (upholding in an ADA disability-based discrimination case an Equal Employment Opportunity Commission (EEOC) regulation that "authorizes refusal to hire an individual because his performance on the job would endanger his own health, owing to a disability"); 29 C.F.R. § 1630.15(b)(2) (2010) (stating that an employer's "qualification standard" for a job "may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace"); *id.* § 1630.2(r) (defining similarly the term "direct threat"); see also *infra* Part I.B.2–I.B.3 (discussing the EEOC's direct threat regulations and applicable Supreme Court precedent under the ADA).

8. See *infra* Part I.A.1–I.A.2 (discussing EEOC regulations and applicable Supreme Court precedent under Title VII).

9. See *infra* Part I.B.2–I.B.3 (discussing EEOC regulations and applicable Supreme Court precedent under the ADA).

10. Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 623, 626, 630 (2006)).

11. *Id.* § 201 (codified as amended at 29 U.S.C. § 626(f)). See *infra* Part I.C (discussing the provisions and legislative history of the Older Workers Benefit Protection Act of 1990 (OWBPA)). The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employment discrimination because of a person's age (forty years old or older). 29 U.S.C. §§ 623(a), 631(a) (limiting the ADEA's scope to persons "at least 40 years of age"). The ADEA also contains an antiretaliation provision similar to those of Title VII and the ADA. *Id.* § 623(d); *supra* notes 3, 6 (describing Title VII's and the ADA's antiretaliation provisions, respectively).

under federal employment discrimination law. This proposed approach has two key features:

- (a) *Prohibition of applicant-specific paternalism.* Under federal employment discrimination law, an employer engages in an unlawful employment practice when it paternalistically excludes an applicant because of job-related safety and/or health risks *posed to that individual* due to his or her federally protected characteristic(s); and
- (b) *Job-related risk notification.* When applicant-specific paternalism is prohibited pursuant to (a), an employer must notify the applicant (in writing and before he or she begins employment) of *known* job-related safety and/or health risks (if any) that are attributable to any *known* federally protected characteristic of the applicant.¹²

Informational paternalism represents a significant improvement in federal employment discrimination law. First, the “prohibition of applicant-specific paternalism” feature is warranted because it reflects a longstanding philosophy shared by Congress (per the ADA and the OWBPA) and the Supreme Court that rejects an employer’s applicant-specific protective purpose as an unacceptable basis for excluding an applicant.¹³ This feature further serves to fully advance federal employment discrimination policy.¹⁴ Second, the “job-related risk notification” feature embraces a clear philosophy shared by Congress (per the OWBPA) and the Occupational Safety and Health Administration (OSHA) (per its federal regulations accompanying the Occupational Safety and Health Act of 1970¹⁵) that seeks to protect workers by providing them with information relevant to their employment-related decisions, rather than seizing their decisionmaking power.¹⁶

I. VARYING VIEWS OF WORKPLACE PATERNALISM UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAW

Over the past forty years, the Supreme Court and the EEOC have tackled the issue of applicant-specific paternalism under both Title VII and the ADA. Similarly, Congress directly discussed this issue when enacting the ADA; it also addressed broader workplace paternalism concerns when enacting

12. See *infra* Part II.A (discussing the two features of informational paternalism).

13. See *infra* Part II.B.1.a (discussing the ADA, the OWBPA, and applicable Supreme Court precedent).

14. See *infra* Part II.B.2 (discussing federal employment discrimination policy).

15. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–78).

16. See *infra* Part II.C (discussing the OWBPA and applicable federal Occupational Safety and Health Administration (OSHA) regulations).

the OWBPA. Thus, to gain a complete understanding of the Supreme Court and Congress's philosophy regarding this issue, it is important to understand workplace paternalism's current place within the Title VII, ADA, and OWBPA contexts.

A. Title VII Context

Before exploring the Supreme Court's two primary decisions rejecting applicant-specific paternalism under Title VII, it is helpful to review the context in which this issue first surfaced in the lower courts and how those courts initially dealt with it.

1. Circuit Court and EEOC Rejection of Applicant-Specific Paternalism

Soon after the passage of Title VII in 1964, the issue of applicant-specific paternalism arose in the context of sex-based discrimination and Title VII's "bona fide occupational qualification" (BFOQ) defense. Title VII affords this BFOQ defense to employers "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."¹⁷ The ADEA contains a comparable BFOQ defense to federal age discrimination claims.¹⁸

Nonetheless, in the 1960s, some states and employers implemented gender-protective job restrictions (such as lifting and work hour limitations)

17. 42 U.S.C. § 2000e-2(e)(1) (2006). To prevail on a BFOQ defense under Title VII or the ADEA, an employer must show that being of a particular religion, sex, or national origin, or being of a particular age, represents a job qualification that is reasonably necessary to the "essence" or . . . 'central mission' of the employer's business" or "central purpose of the enterprise." *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 201–03 (1991) (citing *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977); *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985)) (Title VII pregnancy-based discrimination case); see also *W. Air Lines*, 472 U.S. at 419 (noting that in an ADEA age-based discrimination case, the relevant considerations for resolving a BFOQ defense include whether the age qualification was reasonably necessary to the essence of the employer's business).

Congress purposefully excluded the Title VII-protected characteristics of race and color from the BFOQ defense. See 42 U.S.C. § 2000e-2(e)(1) (including only religion, sex, and national origin); *Knight v. Nassau Cnty. Civil Serv. Comm'n*, 649 F.2d 157, 162 (2d Cir. 1981) ("Congress specifically excluded race from the list of permissible bona fide occupational qualifications."); *Patrolmen's Benevolent Ass'n of N.Y. v. City of New York*, 74 F. Supp. 2d 321, 337 (S.D.N.Y. 1999) ("[The BFOQ exception] does not apply to discrimination based on race or color. The legislative history of Title VII indicates that this exclusion of race was not an oversight, but an intentional prohibition." (citation omitted)).

18. See 29 U.S.C. § 623(f)(1) (2006) ("It shall not be unlawful for an employer to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . .").

that excluded women from certain jobs.¹⁹ When employers later faced Title VII sex-based discrimination claims by these excluded women, they often defended on two primary grounds: (a) the intent behind these job restrictions was good-faith, paternalistic protection of individual women applicants (such as from overexertion and/or excessive hours), not unlawful or malicious discrimination; and (b) in light of these job restrictions, being a man was a BFOQ for the applicable position.

The Fifth Circuit's 1969 decision in *Weeks v. Southern Bell Telephone & Telegraph Co.*²⁰ is an early illustration of an employer's failed efforts to justify applicant-specific paternalism under Title VII. Lorena Weeks was a woman who had worked at Southern Bell for almost twenty years, and she applied for a "switchman" position.²¹ One month after Weeks had applied, Southern Bell notified her that it had decided not to assign women to that job, which ultimately went to a less senior male applicant.²²

In part, Southern Bell's decision to exclude women from this position was based on protective legislation in Georgia that prevented women from occupying certain positions.²³ In particular, the Georgia Commissioner of Labor had issued Rule 59, a paternalistic regulation that prohibited women and minors from holding jobs that involved lifting over thirty pounds.²⁴ The switchman position involved occasional lifting of weights in excess of thirty pounds and being subject to "call out 24 hours a day."²⁵

After Weeks's rejection, she filed a sex-based discrimination claim against Southern Bell under Title VII.²⁶ Southern Bell contended that its exclusion of women applicants from the switchman position was justified because the intent behind the Rule 59 regulation was good-faith, paternalistic protection of individual women applicants, not unlawful discrimination, and in light of this regulation, being a man was a BFOQ for the job.²⁷ The district court agreed, concluding that Southern Bell's BFOQ defense was viable.²⁸

The Fifth Circuit reversed, holding that Southern Bell's sex-based job restriction violated Title VII by "den[ying] desirable positions to a great many

19. See *infra* notes 20–36 and accompanying text (discussing Fifth, Seventh, and Ninth Circuit cases that addressed examples of these sex-based job restrictions).

20. 408 F.2d 228 (5th Cir. 1969).

21. *Id.* at 230.

22. *Id.*

23. *Id.* at 232.

24. *Id.* at 232–33.

25. *Id.* at 234.

26. *Id.* at 229–30.

27. *Id.* at 232.

28. *Id.* at 233.

women perfectly capable of performing the duties involved.”²⁹ In response to Southern Bell’s argument regarding the benevolent, protective motive behind the job restriction, the Fifth Circuit bluntly concluded that “Title VII rejects just this type of romantic paternalism as unduly Victorian”³⁰ To support this rejection of applicant-specific paternalism as an unacceptable basis for Title VII’s BFOQ defense, the court highlighted the importance of preserving a woman applicant’s decisionmaking power regarding employment-related choices:

Title VII . . . instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the [BFOQ] exception Congress intended to renege on that promise.³¹

Having rejected Southern Bell’s contention regarding its good-faith, paternalistic intent, the Fifth Circuit turned to its BFOQ argument. The court explained that Southern Bell had clearly not met its BFOQ burden of showing that all or substantially all women would be unable to perform the job’s duties safely and efficiently.³² Instead, the Fifth Circuit explained that Southern Bell offered no evidence concerning women’s lifting abilities and simply sought to “have us ‘assume,’ on the basis of a ‘stereotyped characterization’ that few or no women can safely lift 30 pounds, while all men are treated as if they can.”³³

As a final point, the court briefly highlighted a potential problem with allowing purportedly protective reasons to justify an employer’s job-based exclusions—namely, that such reasons “could be used as a smoke screen by any employer bent on discriminating against women.”³⁴

29. *Id.* at 236. Rule 59 was repealed about six months before the court’s decision in *Weeks*. *Id.* at 233. As a result, the Fifth Circuit noted that it need not decide the reasonableness or the constitutionality of the rule under the Supremacy Clause of the U.S. Constitution. *Id.* (observing the potential “irreconcilable conflict” between Title VII and Rule 59 under the Supremacy Clause, but noting that “the issue of protective state legislation [had] disappear[ed] from the case”).

30. *Id.* at 236.

31. *Id.*

32. *Id.* at 235.

33. *Id.* at 235–36.

34. *Id.* at 236.

By the early 1970s, the Seventh Circuit³⁵ and Ninth Circuit³⁶ had also rejected applicant-specific paternalism as an improper basis for Title VII's BFOQ defense. And, in 1969, the EEOC revised its Title VII-based regulations regarding gender-protective state laws and regulations that excluded women from certain jobs.³⁷ In these revised regulations, the EEOC—like the circuit courts—rejected applicant-specific paternalism under Title VII:

The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.³⁸

35. See *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969) (“The trial court . . . concluded that Colgate had acted reasonably and in the interest of the safety of its female employees in imposing the thirty-five-pound [weight lifting] restriction. While this was a carefully reasoned and conscientious approach, we hold it error . . .” (citation omitted)).

36. See *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219, 1227 (9th Cir. 1971) (“[W]e conclude that Southern Pacific’s [restriction on women from working long hours and lifting heavy objects] is not excusable under the BFOQ concept”; see also *id.* at 1226 n.10 (“[I]t is immaterial that the state laws in question, or the employer’s labor policy, were not enacted or prescribed with an intent to discriminate [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms . . . unrelated to measuring job capability.” (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971))).

The Ninth Circuit highlighted the Supremacy Clause issue as to the referenced California job restrictions for women. See *id.* at 1225 (“It would appear that these state law limitations upon female labor run contrary to the general objectives of Title VII . . . and are therefore, by virtue of the Supremacy Clause, supplanted by Title VII.”).

37. Guidelines on Discrimination Because of Sex, 34 Fed. Reg. 13367 (Aug. 19, 1969) (codified at 29 C.F.R. § 1604.1(b)(1)–(2) (1970)).

38. *Id.* at 13368; see also *Rosenfeld*, 444 F.2d at 1226 (“[The EEOC has] taken the position that state ‘protective’ legislation . . . conflicts with the policy of non-discrimination manifested by Title VII of the Act.”).

The current EEOC regulations on this issue are virtually identical to the revised 1969 EEOC regulations:

The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

29 C.F.R. § 1604.2(b)(1) (2010).

2. 1977 and Beyond: The Supreme Court's Rejection of Applicant-Specific Paternalism

Over the next two decades, the Supreme Court similarly rejected applicant-specific paternalism under Title VII on two separate occasions—the first in *Dothard v. Rawlinson*³⁹ in 1977 and the second in *International Union v. Johnson Controls, Inc.* in 1991.⁴⁰

In *Dothard*, Dianne Rawlinson was a woman who had applied for a job as a correctional counselor trainee with the Alabama Board of Corrections (ABOC).⁴¹ The ABOC had implemented Administrative Regulation 204, which created gender criteria for correctional counselors in contact positions (defined as involving “continual close physical proximity to inmates”) at maximum security prisons.⁴² Under this regulation, members of one sex could not serve in contact positions at prisons that housed only inmates of the other sex.⁴³ Thus, in practice, women were automatically excluded from contact positions in Alabama’s four all-male prisons.⁴⁴ Importantly, the ABOC had implemented this regulation not for the protection of individual women applicants but to avoid “disruption of the orderly running and security of the institution” that “the presence of the opposite sex would cause.”⁴⁵

After Rawlinson’s rejection, she filed a sex-based discrimination lawsuit against the ABOC, in which she alleged that Administrative Regulation 204 violated Title VII.⁴⁶ The ABOC argued that its exclusion of women applicants from these correctional counselor positions was warranted because its intent behind Administrative Regulation 204 was good-faith protection of the

The revised 1969 EEOC regulations reversed the EEOC’s prior regulations regarding gender-protective state laws and regulations under Title VII, which had provided:

The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting [sic] women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception [S]o, for example, restrictions on lifting weights will not be deemed in conflict with Title VII except where the limit is set at an unreasonably low level which could not endanger women.

29 C.F.R. § 1604.1(c) (1969); see also *Rosenfeld*, 444 F.2d at 1226 (“On August 19, 1969, the Commission revoked a portion of its Guidelines on Discrimination [B]ecause of Sex . . . and inserted a new subsection (b).”).

39. 433 U.S. 321 (1977).

40. 499 U.S. 187 (1991).

41. *Dothard*, 433 U.S. at 323.

42. *Id.* at 325.

43. *Id.* at 326–28.

44. *Id.*

45. *Id.* at 325 n.6.

46. *Id.* at 324–26.

safety and/or health of institution-essential third parties (such as inmates and other co-workers).⁴⁷ In light of this regulation, the ABOC consequently asserted that being a man was a BFOQ for the job.⁴⁸ A three-judge district court rejected this BFOQ defense.⁴⁹

In a seven-to-two decision, the Supreme Court reversed, concluding that Administrative Regulation 204 fell “within the narrow ambit of the [BFOQ] exception.”⁵⁰ Importantly, the Court addressed the issue of applicant-specific paternalism in its discussion of acceptable versus unacceptable justifications for sex-based job exclusions per Title VII’s BFOQ defense.⁵¹ Specifically, the Court addressed two potential good-faith justifications for these job exclusions: (a) the narrower, paternalistic purpose of protecting individual women applicants from safety and/or health risks; and (b) the broader, business-based purpose of protecting the safety and/or health of third parties who comprise the “essence” of an institution’s business operations.⁵²

As to the first justification, the Court observed initially that gender-based job exclusions aimed only at protecting individual women applicants were exercises in “romantic paternalism.”⁵³ Consequently, the Court—like the Fifth Circuit in *Weeks*—rejected applicant-specific paternalism under Title VII and emphasized the importance of preserving a woman applicant’s decisionmaking power regarding employment choices: “In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the

47. *Id.* at 336.

48. *Id.* at 332–33.

49. *Id.* at 333–34 (noting the district court’s conclusion that Administrative Regulation 204 was “based on . . . stereotypical assumptions” and fell outside “the narrow ambit of the [BFOQ] exception”); *id.* at 336–37 (noting the district court’s ruling that being male was not a BFOQ for the job).

50. *Id.* at 334. Justice Rehnquist, joined by Chief Justice Burger and Justice Blackmun, concurred in the Court’s conclusion on the BFOQ issue. *Id.* at 337 (Rehnquist, J., concurring in the result and concurring in part). Justice Marshall, joined by Justice Brennan, dissented from the Court’s conclusion on this issue. *Id.* at 340 (Marshall, J., concurring in part and dissenting in part).

51. *See id.* at 335 (majority opinion).

52. *See id.* at 333–36.

53. *Id.* at 335 (citing *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)). *Frontiero v. Richardson* involved a Fifth Amendment due process claim based on the Air Force’s sex-based standards for determining dependency status of a serviceperson’s spouse. *See Frontiero*, 411 U.S. at 678. Reversing the trial court, the Court said that “[t]raditionally, [sex] discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.” *Id.* at 684. The Court went on to note that “this paternalistic attitude became . . . firmly rooted in our national consciousness.” *Id.* Originally, the “romantic paternalism” language appeared in the Fifth Circuit’s *Weeks* decision in 1969. *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969); *supra* note 30 and accompanying text (quoting this language).

individual woman to make that choice for herself.”⁵⁴ Moreover, Justices Marshall and Brennan, while dissenting from the Court’s ultimate conclusion on the BFOQ issue,⁵⁵ nonetheless created unanimity on this rejection of applicant-specific paternalism under Title VII:

The Court properly rejects two proffered justifications for denying women jobs as prison guards. It is simply irrelevant here that a guard’s occupation is dangerous and that some women might be unable to protect themselves adequately. . . . [A]s the Court holds, ‘the argument that a particular job is too dangerous for women’ is refuted by the ‘purpose of Title VII to allow the individual woman to make that choice for herself.’ Some women, like some men, undoubtedly are not qualified and do not wish to serve as prison guards, but that does not justify the exclusion of all women from this employment opportunity.⁵⁶

In contrast, the Court permitted the second justification for sex-based job exclusions per Title VII’s BFOQ defense—namely, the broader, business-based purpose of protecting institution-essential third parties.⁵⁷ In general terms, the Court explained that the BFOQ defense was viable and proper when “the essence of the business operation would be undermined by not hiring members of one sex exclusively.”⁵⁸

Applying these principles, the Court concluded that Administrative Regulation 204 permissibly stemmed from this broader purpose of protecting institution-essential third parties, rather than the narrower, paternalistic purpose of protecting individual women applicants.⁵⁹ In support of this conclusion, the Court first highlighted evidence that showed that Alabama

54. *Dothard*, 433 U.S. at 335. See *supra* note 31 and accompanying text (discussing the Fifth Circuit’s *Weeks* decision on this issue).

55. *Dothard*, 433 U.S. at 344 (Marshall, J., concurring in part and dissenting in part) (disagreeing with the Court because the evidentiary record had not shown the “presence of women guards” to have led to “a single incident amounting to a serious breach of security in any Alabama institution”); see also *id.* at 342 (“There is simply no evidence in the record to show that women guards would create any danger to security in Alabama prisons significantly greater than that which already exists.”); *id.* at 345 (“The Court points to no evidence in the record to support the asserted ‘likelihood that inmates would assault a woman because she was a woman.’”).

56. *Id.* at 341 (citation omitted); see also *id.* at 342 (“[T]he Court recognizes that possible harm to women guards is an unacceptable reason for disqualifying women”); cf. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544–45 (1971) (Marshall, J., concurring) (“Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity. The exception for a ‘bona fide occupational qualification’ was not intended to swallow the rule.”).

57. See *Dothard*, 433 U.S. at 333–36.

58. *Id.* at 333 (quoting *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971)) (internal quotation marks omitted); see *supra* note 17 and accompanying text (discussing the scope of the BFOQ defense under Title VII).

59. *Dothard*, 433 U.S. at 335–37.

prisons had “peculiarly inhospitable . . . environment[s] of violence and disorganization”⁶⁰ as well as “jungle atmosphere[s]”⁶¹ and that “the use of women as guards in ‘contact’ positions under the existing conditions in Alabama maximum-security male penitentiaries would pose a substantial security problem.”⁶²

Based on this evidence, the Court observed that “it would be an oversimplification to characterize Regulation 204 as an exercise in ‘romantic paternalism.’”⁶³ Instead, the Court concluded that “[m]ore is at stake in this case . . . than an individual woman’s decision to weigh and accept the risks of employment in a ‘contact’ position in a maximum-security male prison.”⁶⁴ Expanding on the “more” that was at stake, the Court emphasized Administrative Regulation 204’s broader purpose of protecting institution-essential third parties:

The essence of a correctional counselor’s job is to maintain prison security. A woman’s relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood.

The likelihood that inmates would assault a woman because she was a woman would pose a real threat . . . to the basic control of the penitentiary and protection of its inmates and other security personnel. The employee’s very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor’s responsibility.⁶⁵

60. *Id.* at 334–35.

61. *Id.* at 334 (citing *Pugh v. Locke*, 406 F. Supp. 318, 325 (M.D. Ala. 1976)).

62. *Id.* at 336.

63. *Id.* at 335.

64. *Id.* (emphasis added).

65. *Id.* at 335–36. While the *Dothard* court was silent on this issue, the Supreme Court has traditionally afforded deference to prison administrators in the related context of prisoner challenges to certain constitutionally suspect practices or policies. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 528 (2005) (Thomas, J., dissenting) (“Traditionally, federal courts rarely involved themselves in the administration of state prisons, ‘adopt[ing] a broad hands-off attitude towards problems of prison administration.’” (quoting *Procunier v. Martinez*, 416 U.S. 396, 404 (1974))); *Turner v. Safley*, 482 U.S. 78, 89 (1987) (“Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration . . . Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby ‘unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.’” (quoting *Procunier*, 416 U.S. at 407)); *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (“The District Court . . . got off on the wrong foot in this case by not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement.”).

About fifteen years after *Dothard*, the Supreme Court again rejected applicant-specific paternalism under Title VII in *International Union v. Johnson Controls, Inc.*⁶⁶ Johnson Controls was a battery manufacturer, and certain jobs exposed employees to lead as part of the manufacturing process.⁶⁷ This lead exposure “entail[ed] health risks” for these workers, including “the risk of harm to any fetus carried by a female employee.”⁶⁸

In 1977, Johnson Controls announced its first official policy concerning employment of women in lead-exposure work.⁶⁹ This initial policy stopped short of excluding women capable of bearing children from these lead-exposure jobs.⁷⁰ Instead, the policy both (a) “emphasized that a woman who expected to have a child should not choose a job in which she would have [lead] exposure” and (b) required any women applying for these jobs to sign a written statement that not only “advised of the risk of having a child while [she] was exposed to lead” but also stated that “medically speaking, [it was] just good sense not to run that risk if you . . . do not want to expose the unborn child to risk.”⁷¹ Accordingly, Johnson Controls had implemented this policy for the “protection of the health of the unborn child[ren]” of the women applicants.⁷²

Then, in 1982 and with the same protective purpose, Johnson Controls “shifted from a policy of warning to a policy of exclusion.”⁷³ Specifically, the company implemented an exclusionary “gender-based fetal-protection policy,”⁷⁴ which expressly provided that “women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead”⁷⁵

66. 499 U.S. 187 (1991).

67. *Id.* at 190.

68. *Id.*

69. *Id.* at 191.

70. *Id.*

71. *Id.*

72. *Id.*; *see also id.* at 190 (framing the issue as whether an employer may exclude women applicants “because of its concern for the health of the fetus the woman might conceive”); *id.* at 196 (similarly asking whether an employer “seeking to protect potential fetuses” may discriminate against women applicants); *id.* at 198 (“[J]ohnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees.”); *id.* at 206 (referencing “Johnson Controls’ professed moral and ethical concerns about the welfare of the next generation”); *id.* at 207 (referencing the sincerity of “Johnson Controls’ fear of prenatal injury”).

73. *Id.* at 190–91. Johnson Controls changed to this exclusionary policy because, between 1979 and 1983, six Johnson Controls women employees in high lead exposure positions had shown excessive blood-lead levels, and at least one baby born from these women had shown an elevated blood-lead level. *Int’l Union v. Johnson Controls, Inc.*, 886 F.2d 871, 876–77 (7th Cir. 1989). Consequently, the company concluded that the prior policy was unable to achieve its protective purpose. *Id.* at 876.

74. *Johnson Controls*, 499 U.S. at 190.

75. *Id.* at 192.

After Johnson Controls rejected job applications under the new policy, several women filed a sex-based discrimination class action against the company in which they alleged that the gender-based fetal-protection policy violated Title VII and the Title VII-amending Pregnancy Discrimination Act of 1978 (PDA).⁷⁶ Johnson Controls contended that its exclusion of women applicants from these lead manufacturing process jobs was justified because its intent was the broader, good-faith purpose of protecting at-risk third parties (in this case, the women's unborn children) per *Dothard's* so-called "safety exception"⁷⁷ and, in light of this policy, being a man was a BFOQ for these jobs.⁷⁸ The district court granted summary judgment to Johnson Controls.⁷⁹

Sitting en banc, the Seventh Circuit affirmed by a seven-to-four majority.⁸⁰ The majority in part concluded that the gender-based fetal-protection policy "should be recognized as establishing a [BFOQ] defense protecting the policy against claims of sex discrimination."⁸¹ Seeking to apply the Supreme Court's principles from *Dothard*, the majority reached two BFOQ-related conclusions that were critical to its decision. First, the majority concluded that institutional or "industrial safety . . . [was] part of the essence of Johnson Controls' business."⁸² Put differently, the majority classified safe battery manufacture at Johnson Controls as a "safety interest" that constituted an "essential goal . . . every bit as critical to the mission of [the institution's] business as rehabilitation of prisoners is to the mission of the prison facility [in *Dothard*]."⁸³

Second, the majority concluded that the gender-based fetal-protection policy met the requisite BFOQ defense threshold, because it was "reasonably

76. *Id.* The PDA amended Title VII to clarify that, for purposes of unlawful discrimination, the term "because of sex" includes "because of or on the basis of pregnancy, childbirth, or related medical conditions." Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000e(k) (2006)).

77. *Johnson Controls*, 499 U.S. at 202 (referencing Johnson Controls' argument that its policy "falls within the so-called safety exception to the BFOQ").

78. *See id.*

79. *Id.* at 193.

80. *Int'l Union v. Johnson Controls, Inc.*, 886 F.2d 871, 875 (7th Cir. 1989). Judges Cudahy, Easterbrook, Flaum, and Posner dissented. *See id.* at 901-02 (Cudahy, J., dissenting); *id.* at 902-08 (Posner, J., dissenting); *id.* at 908-21 (Easterbrook and Flaum, JJ., dissenting).

81. *Id.* at 901 (majority opinion); *see also id.* at 893 ("[W]e are . . . convinced that Johnson Controls' fetal protection policy could be upheld under the bona fide occupational qualification defense.")

82. *Id.* at 898; *see also id.* at 896 ("[I]ndustrial safety (preventing hazards to health) is legitimately part of the 'essence' of the 'business' of a battery manufacturer, as it is of any manufacturing enterprise . . .").

83. *Id.*

necessary to further,”⁸⁴ and “directly related to,” the “essential goal” of industrial safety—specifically, by “protect[ing] unborn children from a substantial risk of devastating and permanent impairment of loss of intellectual ability or injury to vital organs resulting from exposure to a toxic industrial chemical.”⁸⁵ The majority recognized *Dothard*’s requirement that there be something more at stake than the “individual woman’s decision to weigh and accept the risks of employment”⁸⁶ in finding that “the intellectual and physical development of the baby she may carry” met this need.⁸⁷

The Supreme Court reversed, stating that it had “no difficulty concluding that Johnson Controls cannot establish a BFOQ [defense]” for its gender-based fetal-protection policy.⁸⁸ In reaching its decision, the Court highlighted two important issues: the general issue of whether good-faith or benign intent could be a justification for intent-based discrimination (disparate treatment);⁸⁹ and the specific issue of the proper parameters for Title VII’s BFOQ defense in protection- and safety-based situations.⁹⁰

First, the Court expressly rejected any notion that intent-based discrimination under Title VII could be justified by an employer’s good-faith or benign purpose:

Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. . . . The beneficence of an employer’s purpose does not undermine the conclusion that an explicit gender-based policy is sex-based discrimination . . . and thus may be defended only as a BFOQ.⁹¹

84. *Id.* at 898.

85. *Id.* at 896; *see also id.* at 899 (“[The policy] is reasonably necessary to the industrial safety-based concern of protecting the unborn child from lead exposure.”); *id.* at 901 (“Johnson Controls has met its burden of establishing that the fetal protection program is reasonably necessary to industrial safety.”).

86. *Id.* at 897 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977)).

87. *Id.* at 897–98; *see also id.* at 898 (“*Dothard* supports, rather than bars, a conclusion that an employer’s fetal protection policy constitutes a [BFOQ].”).

88. *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991). Justice White (joined by Chief Justice Rehnquist and Justice Kennedy) and Justice Scalia concurred in the Court’s decision on the BFOQ issue. *Id.* at 211–22 (White, J., concurring in part and concurring in the judgment); *id.* at 223–24 (Scalia, J., concurring in the judgment).

89. *See id.* at 197–200 (majority opinion).

90. *See id.* at 200–07.

91. *Id.* at 199–200; *see also id.* at 199 (“[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.”). The Court also referenced its decision in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971) (per curiam), and noted that *Martin Marietta*’s “arguably benign motives” for its “express exclusion of women did not alter the intentionally discriminatory character of the policy” in that case. *Johnson Controls*, 499 U.S. at 199; *see also supra* note 56 (referencing the *Phillips* decision).

Applying these principles, the Court stated that the Seventh Circuit was incorrect when it “assumed that because the asserted reason for the sex-based exclusion (protecting women’s unconceived offspring) was ostensibly benign, the policy was not sex-based discrimination.”⁹² Instead, the Court noted that the “bias in Johnson Controls’ policy is obvious”⁹³ because it “excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender.”⁹⁴ Consequently, the Court held that this “fetal-protection policy is sex discrimination forbidden under Title VII unless [Johnson Controls] can establish that sex is a ‘bona fide occupational qualification.’”⁹⁵

Second, the Court turned to the specific issue of the proper parameters for Title VII’s BFOQ defense in protection- and safety-based situations.⁹⁶ As in *Dothard*, the Court addressed the issue of applicant-specific paternalism in its discussion of acceptable versus unacceptable justifications for sex-based job exclusions per Title VII’s BFOQ defense.⁹⁷ Just as it had done in 1977, the Court alluded to two potential good-faith justifications for these job exclusions: (a) the narrower, paternalistic purpose of protecting individual women applicants from safety and/or health risks; and (b) the broader, business-based purpose of protecting the safety and/or health of institution-essential third parties.⁹⁸

Regarding the first justification, the Court again rejected applicant-specific paternalism as an unacceptable basis for Title VII’s BFOQ defense.⁹⁹ Initially referencing its decision in *Dothard*, the Court reiterated that “danger to a woman herself does not justify discrimination”¹⁰⁰ and that—for a viable Title VII BFOQ defense—more must be at stake than an individual woman’s decision to weigh and accept the risks of employment.¹⁰¹ To support this view—as it did in *Dothard* and the Fifth Circuit did in *Weeks*—the Court

92. *Johnson Controls*, 499 U.S. at 198.

93. *Id.* at 197.

94. *Id.*; *see also id.* (“Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job.”); *id.* at 198 (“[J]ohnson Controls’ policy classifies on the basis of gender and childbearing capacity”); *id.* at 199 (“[J]ohnson Controls explicitly classifies on the basis of potential for pregnancy Respondent has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex.”); *id.* at 207 (“Johnson Controls has attempted to exclude women because of their reproductive capacity.”).

95. *Id.* at 200; *see also id.* at 197 (“Respondent’s fetal protection policy explicitly discriminates against women on the basis of their sex.”).

96. *Id.* at 200–07.

97. *Id.*

98. *See id.* at 202–06.

99. *Id.* at 202, 211.

100. *Id.* at 202.

101. *Id.* (citing *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977)).

strongly highlighted the importance of preserving a woman applicant's decisionmaking power regarding employment-related choices:

With the PDA, Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself. . . .

. . . .

. . . Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress has mandated this choice through Title VII, as amended by the PDA.¹⁰²

In fact, as the final substantive paragraph in its opinion, the Court once again highlighted its views regarding applicant-specific paternalism and the importance of a woman's decisionmaking power, noting: "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."¹⁰³

Regarding the second justification, the Court (as it had in *Dothard*) permitted the broader, business-based purpose of protecting institution-essential third parties for Title VII's BFOQ defense.¹⁰⁴ The Court also provided important clarity regarding the precise circumstances in which this third-party "safety exception" would trigger the BFOQ defense.¹⁰⁵ Specifically, the Court explained that an employer's third-party safety considerations properly enter into the BFOQ analysis when two requirements exist.¹⁰⁶ First, these third parties must be individuals who are "indispensable

102. *Id.* at 206–07; *see also id.* at 204 ("[W]omen as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."); *supra* note 31 and accompanying text (discussing the Fifth Circuit's *Weeks* decision on this issue); *supra* notes 54–56 and accompanying text (discussing the Supreme Court's *Dothard* decision on this issue).

103. *Johnson Controls*, 499 U.S. at 211; *see also id.* at 223 (Scalia, J., concurring in the judgment) ("By reason of the [PDA], it would not matter if all pregnant women placed their children at risk in taking these jobs As Judge Easterbrook put it in his dissent below: 'Title VII gives parents the power to make occupational decisions affecting their families. A legislative forum is available to those who believe that such decisions should be made elsewhere.'" (citing *Int'l Union v. Johnson Controls, Inc.*, 886 F.2d 871, 915 (7th Cir. 1989) (Easterbrook, J., dissenting))); *Johnson Controls*, 886 F.2d at 913 (Easterbrook, J., dissenting) ("No legal or ethical principle compels or allows Johnson [Controls] to assume that women are less able than men to make intelligent decisions about the welfare of the next generation"); *id.* at 915 ("Under the PDA neither the employer nor the court is authorized to essay an answer to this social puzzle.").

104. *Johnson Controls*, 499 U.S. at 202–07.

105. *Id.* at 202–04.

106. *Id.* at 203.

to the particular business at issue”¹⁰⁷ or “whose safety is essential to the business.”¹⁰⁸ Second, the federally protected characteristic (such as sex or pregnancy) must actually interfere with the employee’s ability to perform the job so as to compromise the referenced essence, central purpose, or central mission of the business.¹⁰⁹

To illustrate these two requirements, the Court highlighted a pair of its prior decisions: its 1977 *Dothard* decision; and its 1982 decision in *Western Air Lines, Inc. v. Criswell*,¹¹⁰ which involved a federal age discrimination claim under the ADEA against an airline that required—for passenger safety reasons—flight engineers and other cockpit crew members to retire once they reached sixty years old.¹¹¹ As to the first requirement, the Court observed that the institutionally indispensable or essential third parties were: (a) the inmates in *Dothard*; and (b) the airline passengers in *Western Air Lines*.¹¹² As to the second requirement, the Court characterized *Dothard* as involving a situation in which being a female correctional counselor “would create real risks of safety to others” (such as inmates and other co-workers), which then would jeopardize the prison’s central purpose of maintaining prison security.¹¹³ Similarly, the Court framed *Western Air Lines* as involving a situation in which being a significantly older person might preclude a flight engineer from properly assisting pilots, which then could jeopardize the airline’s central purpose of safe passenger transportation.¹¹⁴

Applying these principles regarding the third-party safety exception, the Court reached a conclusion different from those in *Dothard* and *Western Air Lines*—namely, that Johnson Controls’ gender-based fetal-protection policy fell short of Title VII’s BFOQ defense.¹¹⁵ In support of its conclusion, the

107. *Id.*

108. *Id.*

109. *Id.* at 203–04; *see also id.* at 206 (“[A]n employer must direct its concerns about a woman’s ability to perform her job safely and efficiently to those aspects of the woman’s job-related activities that fall within the ‘essence’ of the particular business.”).

110. 472 U.S. 400 (1985).

111. *Id.* at 402–06; *see also id.* at 406 (noting *Western Air Lines*’s defense that “the age 60 rule is a BFOQ ‘reasonably necessary’ to the safe operation of the airline”).

112. *Johnson Controls*, 499 U.S. at 203; *see also W. Air Lines*, 472 U.S. at 420–21 (approving jury instructions that “defined the essence of *Western*’s business as ‘the safe transportation of their passengers’ and “characterized safe transportation as the ‘essence’ of *Western*’s business”).

113. *Johnson Controls*, 499 U.S. at 202–03 (citing *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977)).

114. *See id.* at 203; *see also id.* (“Our safety concerns [in *Western Air Lines*] were not independent of the individual’s ability to perform the assigned tasks”); *see also W. Air Lines*, 472 U.S. at 421 (approving jury instructions that “specifically referred to the importance of ‘safe and efficient job performance’ by flight engineers” and “adequately focused on the importance of safety to the operation of *Western*’s business”).

115. *Johnson Controls*, 499 U.S. at 206–07.

Court determined that this policy simply did not stem from any broader, business-based purpose of protecting institution-essential third parties:

The unconceived fetuses of Johnson Controls' female employees . . . are neither customers nor third parties whose safety is essential to the business of battery manufacturing. No one can disregard the possibility of injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential aspect of battery making.¹¹⁶

As a result, the Court refused to view "the welfare of the next generation [to] be . . . a part of the 'essence' of Johnson Controls' business"¹¹⁷ and noted that Johnson Controls' "professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ . . ."¹¹⁸

Finally, the Court made two additional noteworthy points. First, the Court (somewhat like the Fifth Circuit in *Weeks*) briefly alluded to a possible problem with allowing an employer to exclude women applicants based on its concern for these applicants and/or their children: "Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities."¹¹⁹

116. *Id.* at 203–04; *see also id.* at 196 (observing that Judge Easterbrook's dissent from the Seventh Circuit's decision had "concluded . . . that the BFOQ defense would not prevail because [Johnson Controls'] stated concern for the health of the unborn was irrelevant to the operation of its business"); *id.* at 207 ("Judge Easterbrook in this case pertinently observed: 'It is word play to say that 'the job' at Johnson [Controls] is to make batteries without risk to fetuses in the same way 'the job' at Western Air Lines is to fly planes without crashing.'" (citing *Int'l Union v. Johnson Controls, Inc.*, 886 F.2d 871, 913 (7th Cir. 1989) (Easterbrook, J., dissenting))); *Johnson Controls*, 886 F.2d at 912 (Easterbrook, J., dissenting) ("Johnson [Controls] defends its fetal protection policy on the basis of concern for the welfare of the next generation, an objective unrelated to its ability to make batteries . . ." (citation omitted)).

In his concurrence, Justice White disagreed with the Court on this issue. *Johnson Controls*, 499 U.S. at 212–13 (White, J., concurring in part and concurring in the judgment) ("Common sense tells us that it is part of the normal operation of business concerns to avoid causing injury to third parties, as well as to employees, if for no other reason than to avoid tort liability and its substantial costs."); *id.* at 216–17 ("[A]voidance of substantial safety risks to third parties is *inherently* part of both an employee's ability to perform a job and an employer's 'normal operation' of its business . . . [P]rotecting fetal safety while carrying out the duties of battery manufacturing is as much a legitimate concern as is safety of third parties in guarding prisons (*Dothard*) or flying airplanes (*Criswell*)."); *id.* at 217 n.5 ("[S]afety to third parties is part of the 'essence' of most if not all businesses."); *see also Johnson Controls*, 886 F.2d at 904 (Posner, J., dissenting) ("[T]he 'normal operation' of a business encompasses ethical, legal, and business concerns about the effects of an employer's activities on third parties. An employer might be validly concerned on a variety of grounds both practical and ethical with the hazards of his workplace to the children of his employees.").

117. *Johnson Controls*, 499 U.S. at 207.

118. *Id.* at 206.

119. *Id.* at 211.

Second, the Court discussed whether (a) tort liability for potential prenatal injury to a fetus¹²⁰ and (b) the resulting “increased cost of fertile women in the workplace” could form the basis of a Title VII BFOQ defense.¹²¹ The Court rejected that potential argument for three reasons. First, the Court paralleled these tort liability concerns to “a fear that hiring fertile women will cost more[,]”¹²² and it then promptly rejected this “extra cost” argument: “The extra cost of employing members of one sex . . . does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender We merely reiterate our prior holdings that the incremental cost of hiring women cannot justify discriminating against them.”¹²³ Second, the Court indicated that state tort liability for any such prenatal injury would likely be federally preempted by Title VII.¹²⁴ Initially, the Court noted that federal law preempts state law “[w]hen it is impossible for an employer to comply with both state and federal requirements”¹²⁵ Applying this benchmark to circumstances like those in *Johnson Controls*, the Court strongly suggested that Title VII and state tort law share this

120. *Id.* at 208.

121. *Id.* *Johnson Controls* had not, in fact, made this argument. *Id.* at 210 (“[J]ohnson Controls has not argued that it faces any costs from tort liability, not to mention crippling ones”). But the Court observed that Judge Posner’s dissent from the Seventh Circuit’s decision had “expressed concern” about this issue. *Id.* at 208; see *Johnson Controls*, 886 F.2d at 905 (Posner, J., dissenting) (“The possibility of tort suits against battery manufacturers for lead injury to the child of a female employee is not merely a theoretical one.”); *id.* at 904 (“The employer would . . . be exposed to full common law damages, punitive as well as compensatory.”); *id.* at 905 (“That [potential tort liability] is a social cost that Title VII does not require a company to ignore. At some point it may become large enough to . . . supply the ground for a [BFOQ] of infertility.”).

122. *Johnson Controls*, 499 U.S. at 210.

123. *Id.* at 210–11 (referring to its decision in *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978)); see also *id.* (“We . . . are not presented with, nor do we decide, a case in which costs would be so prohibitive as to threaten the survival of the employer’s business.”).

In their concurring opinions, Justices White and Scalia disagreed with the Court’s stance on this issue. See *id.* at 212 (White, J., concurring in part and concurring in the judgment) (“[A] fetal-protection policy would be justified . . . if . . . an employer could show that exclusion of women from certain jobs was reasonably necessary to avoid substantial tort liability.”); *id.* at 215 (“[T]he [BFOQ] defense is broad enough to include considerations of cost and safety of the sort that could form the basis for an employer’s adoption of a fetal-protection policy.”); *id.* at 224 (Scalia, J., concurring in the judgment) (classifying as wrong the Court’s view that “increased cost alone—short of ‘costs . . . so prohibitive as to threaten the survival of the employer’s business’—cannot support a BFOQ defense”).

124. *Id.* at 209–10 (majority opinion). In his concurrence, Justice White expressed doubts as to the Court’s position on this issue. See *id.* at 213 (White, J., concurring in part and concurring in the judgment) (“[I]t is far from clear that compliance with Title VII will preempt state tort liability”).

125. *Id.* at 209 (majority opinion); see also *id.* at 223 (Scalia, J., concurring in the judgment) (“[I] am willing to assume . . . that any action required by Title VII cannot give rise to liability under state tort law.”).

“impossible” coexistence.¹²⁶ For example, the Court noted that the imposition of state tort liability for prenatal injury in such circumstances would “punish employers for complying with Title VII’s clear command.”¹²⁷ Similarly, the Court stated that compliance with state tort law in such circumstances would dissuade or flatly prevent employers from hiring women who are capable of manufacturing the product as efficiently as men,¹²⁸ thereby furthering “discrimination in the workplace” and impeding the accomplishment of Congress’s goals in enacting Title VII.¹²⁹ Third, the Court strongly doubted that state tort claims for prenatal injury in these circumstances would have any realistic chance of success.¹³⁰ Specifically, the Court stated that “[w]ithout negligence, it would be difficult for a court to find liability on the part of the employer.”¹³¹ The Court generally observed that if “the employer fully informs the woman of the risk, and the employer has not [otherwise] acted negligently, the basis for holding an employer liable seems remote at best.”¹³² As to Johnson Controls, the Court deeply questioned the likelihood of any resulting state tort liability, given its compliance with the lead standard developed by the OSHA and warning of its female employees about the damaging effects of lead.¹³³

As a result of the Supreme Court’s decision in *Johnson Controls*, the lower courts have consistently and firmly continued to reject applicant-specific paternalism under Title VII.¹³⁴

126. *Id.* at 208–10 (majority opinion).

127. *Id.* at 209.

128. *Id.* at 210.

129. *Id.*

130. *Id.* at 208.

131. *Id.*

132. *Id.*

133. *Id.*

134. *See, e.g.,* *Spees v. James Marine, Inc.*, 617 F.3d 380, 394 (6th Cir. 2010) (citing *Johnson Controls* and stating: “[A] reasonable jury could find that JMI’s decision to transfer Spees was made out of concern for her pregnancy and the well-being of her unborn child rather than because Spees was unable to perform her job as a welder. Such concerns, though laudatory, do not justify an adverse employment action.”); *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 134 (3d Cir. 1996) (citing *Johnson Controls* and stating: “[T]itle VII gives women the choice to take jobs that historically had been restricted by an employer’s professed concern for women’s health and well-being”); *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1315 (11th Cir. 1994) (citing *Johnson Controls* and stating: “Instead of permitting an employer to decide whether a pregnant woman can assume or continue a particular job, the Supreme Court [has] concluded that this type of decision must be left to the pregnant woman The right to make this decision rests with the woman. She may choose to continue working, to seek a work situation with less stringent requirements, or to leave the workforce. In some cases, these alternatives may, indeed, present a difficult choice. But it is a choice that each woman must make.” (citation omitted)).

B. ADA Context

The issue of applicant-specific paternalism has also arisen under the ADA.¹³⁵ Indeed, Congress, the EEOC, and the Supreme Court have each discussed whether such paternalism is an unacceptable, unreasonable justification for discriminatory job exclusions under the ADA, just as it is under Title VII. While the ADA's legislative history shows that Congress rejected applicant-specific paternalism in the disability context, the courts and the EEOC have nonetheless allowed such paternalism under the ADA.

1. Congressional Rejection of Applicant-Specific Paternalism

When enacting the ADA, Congress noted that the Act would “finally set in place the necessary civil rights protections for people with disabilities.”¹³⁶ In part, Congress reasoned that these “protections” were needed because individuals with disabilities were often “underprivileged and disadvantaged,”¹³⁷ “historically . . . isolate[d] and segregate[d]” by society,¹³⁸ and lacking “the political power and muscle to demand the protections that are rightfully theirs.”¹³⁹

With the ADA's protective mission in mind, Congress addressed applicant-specific paternalism in two distinct ADA contexts. First, in the findings section of the law, Congress observed that “individuals with disabilities continually encounter various forms of discrimination, including . . . overprotective rules and policies . . . [and] exclusionary qualification standards and criteria.”¹⁴⁰ In its list of examples of prohibited employer conduct under the ADA, Congress specifically included such “us[e] of qualification standards . . . or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities”¹⁴¹

Consistent with the ADA's concern regarding overprotective and exclusionary policies, the House Committee on Education and Labor explicitly

135. 42 U.S.C. § 12101 (2006).

136. H.R. REP. NO. 101-485, pt. 2, at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 322; *see also id.*, pt. 3, at 26, *reprinted in* 1990 U.S.C.C.A.N. 445, 449 (“[The ADA] extend[s] to [persons with disabilities] the same civil rights protections provided to women and minorities beginning in 1964.”).

137. *Id.*, pt. 3, at 25.

138. 42 U.S.C. § 12101(a)(2).

139. H.R. REP. NO. 101-485, pt. 2, at 40.

140. 42 U.S.C. § 12101(a)(5).

141. *Id.* § 12112(b)(6).

stated that an employer's "paternalistic concerns" regarding a disabled applicant's own safety were an unacceptable basis for his or her rejection:

Hence, the requirement that job selection procedures be "job-related and consistent with business necessity" underscores the need to examine all selection criteria to ensure that they . . . provide an accurate measure of an applicant's actual ability to perform the essential functions of the job It is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant.¹⁴²

The House Committee on the Judiciary reiterated this precise point¹⁴³ and further added: "The determination of whether a person is qualified . . . should not be based on the possibility that the employee or applicant will become incapacitated and unqualified in the future. Nor can paternalistic concerns about what is best for the person with a disability serve to foreclose employment opportunities."¹⁴⁴

Congress also addressed applicant-specific paternalism in the context of the ADA-created affirmative defenses that employers may assert.¹⁴⁵ As a general example of these defenses, the ADA provides that "[i]t may be a defense . . . that an alleged application of qualification standards . . . has

142. H.R. REP. NO. 101-485, pt. 2, at 72, *reprinted in* 1990 U.S.C.C.A.N. 303, 354, 356; *see also id.* at 58 ("It would also be a violation to deny employment to an applicant based on generalized fears about the safety of the applicant . . ."); *id.* at 74 ("Generalized fear about risks from the employment environment, such as exacerbation of the [applicant's] disability caused by stress, cannot be used by an employer to disqualify a person with a disability.").

In a few places within its legislative report, the Committee on Education and Labor referenced the proper rejection of a disabled applicant because of likely "harm" or "threat of harm" in the workplace but failed to specify to whom such "harm" or "threat of harm" must or may extend. *See id.* at 73-74 ("[I]f the examining physician found that there was high probability of substantial harm if the candidate performed the particular functions of the job in question, the employer could reject the candidate unless the employer could make a reasonable accommodation . . ."); *id.* ("[T]he assessment that there exists a high probability of substantial harm must be strictly based on valid medical analyses."); *id.* at 74 ("A physical or mental employment criterion can be used to disqualify a person with a disability only if it has a direct impact on the ability of the person to do their actual job duties without imminent, substantial threat of harm."); *see also* *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1068 n.6 (9th Cir. 2000) (observing that this vague language "does not make it clear to whom such 'substantial harm' might occur" and contrasting "this general discussion" with the "substantial evidence . . . that appears throughout the legislative history" regarding the applicability of the ADA's direct threat defense to situations in which "others" are at-risk), *rev'd*, 536 U.S. 73 (2002).

143. H.R. REP. NO. 101-485, pt. 3, at 42, *reprinted in* 1990 U.S.C.C.A.N. 445, 465 ("It is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant.").

144. *Id.* at 34.

145. 42 U.S.C. § 12113.

been shown to be job-related and consistent with business necessity”¹⁴⁶ But, as a more specific example regarding applicant-specific paternalism, Congress created a so-called “direct threat” defense under the ADA.¹⁴⁷ Specifically, this defense provides that an employer’s qualification standards “may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”¹⁴⁸ Similarly, Congress defined the term “direct threat” in the ADA as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”¹⁴⁹

Consistent with this express language regarding the direct threat defense, Congress repeatedly referenced the risk to “others in the workplace” when discussing the scope of the defense in the ADA’s legislative history. For example, the Committee on the Judiciary stated:

A qualification standard may also include a requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace.

....

. . . If the applicant is otherwise qualified for the job, he or she cannot be disqualified on the basis of a physical or mental condition unless the employer can demonstrate that the applicant’s disability poses a direct threat to others in the workplace.

....

146. *Id.* § 12113(a); *see also id.* § 12112(b)(6) (excluding from ADA-prohibited discrimination any qualification standards that are “shown to be job-related for the position in question and . . . consistent with business necessity”); 29 C.F.R. § 1630.15(b) (2010) (referencing this “job-related and consistent with business necessity” defense).

This defense is equally available to employers in disparate impact and disparate treatment actions under the ADA. *See id.* § 1630.15(c) (stating that an employer may defend a disparate impact claim by showing the “challenged standard, criterion or policy . . . to be job-related and consistent with business necessity”); MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 566–67 (7th ed. 2008) (“[Q]ualification standards that are either facially discriminatory or that have a disparate impact on disabled individuals . . . are subject to the same defenses—they may be defended on the basis that they are job related and consistent with business necessity.”); *id.* at 207 (“While disparate treatment discrimination is the purposeful exclusion of protected class members from jobs, disparate impact discrimination exists when employment policies, regardless of [neutral] intent, adversely affect one group more than another and cannot be adequately justified.”).

147. 42 U.S.C. § 12113(b).

148. *Id.*

149. *Id.* § 12111(3); *see also id.* § 12113(d)(3) (confirming that the ADA does not preempt any state or local laws regarding “food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others”).

. . . This amendment adopted by the Committee sets a clear, defined standard which requires actual proof of significant risk to others.¹⁵⁰

The Committee on Education and Labor similarly highlighted the applicability of the ADA's direct threat defense to situations in which others were at risk:

It is . . . acceptable to deny employment to an applicant or to fire an employee with a disability on the basis that the individual poses a direct threat to the health or safety of others or poses a direct threat to property. The determination that an individual with a disability will pose a safety threat to others must be made on a case-by-case basis
 . . . The standard to be used in determining whether there is a direct threat is whether the person poses a significant risk to the safety of others or to the property, not a speculative or remote risk¹⁵¹

Senator Edward Kennedy also described the ADA's direct threat defense as requiring risk(s) to other individuals in the workplace:

The ADA provides that a valid qualification standard is that a person not pose a direct threat to the health or safety of other individuals

150. H.R. REP. NO. 101-485, pt. 3, at 45-46 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 468-69; *see also id.* ("For example, an employer may not assume that a person with a mental disability, or a person who has been treated for a mental disability, poses a direct threat to others Thus, in the case of a person with mental illness there must be objective evidence from the person's behavior that the person has a recent history of committing overt acts or making threats which caused harm or which directly threatened harm [to others]."); *id.* at 46 n.37 ("[I]f the employer determines that the applicant has a history of mental illness, the employer cannot presume that the person poses a threat to the health or safety of others. Any determination of direct threat must be based on objective evidence, not stereotype or speculation."); *id.* at 92 (dissenting view of Rep. Chuck Douglas) ("If the employee would pose a 'direct threat' to the health or safety of individuals in the workplace, the employer has a defense for refusing to hire that individual The amendment clarified that a 'direct threat' is one which would place those other workers at a 'significant risk' from any harm. This was needed in order to address my concern about dangerous or unbalanced workers threatening coworkers.")

In defining "direct threat" within the ADA, Congress borrowed language from the Supreme Court's decision in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) (involving a claim of handicap-based discrimination). *See* H.R. REP. NO. 101-485, pt. 3, at 34 ("The Committee intends to codify the direct threat standard used by the Supreme Court in *School Board of Nassau County v. Arline*."); *id.* at 45 ("In order to determine whether an individual poses a direct threat to the health or safety of other individuals in the workplace, the Committee intends to use the same standard as articulated by the Supreme Court in *School Board of Nassau County v. Arline*."); *id.*, pt. 2, at 76, *reprinted in* 1990 U.S.C.C.A.N. 303, 359 ("[T]he term 'direct threat' is meant to connote the full standard set forth in the *Arline* decision.")

151. H.R. REP. NO. 101-485, pt. 2, at 56; *see also id.* at 76 ("[Q]ualification standards' may include a requirement that an individual with a currently contagious disease or infection shall not pose a direct threat to the health or safety of other individuals in the workplace [F]or a person with a currently contagious disease or infection to constitute a direct threat to the health or safety of others, the person must not pose a significant risk of transmitting the infection to others in the workplace"); *id.* at 150 ("[A]n employer need not hire or retain an employee who it shows has a currently contagious disease or infection that poses a direct threat to the health or safety of other individuals in the workplace.")

in the workplace—that is, to other coworkers or customers. . . . It is important . . . that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person’s health. . . . That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician.¹⁵²

2. EEOC Allowance of Applicant-Specific Paternalism

Despite the fact that ADA’s provisions and legislative history regarding the direct threat defense discussed only risk(s) to “other individuals in the workplace,” the EEOC subsequently changed the scope of this defense in its ADA-based regulations.

After the ADA was enacted in 1990, the EEOC adopted accompanying regulations that, in relevant part, expanded the direct threat defense by stating that an employer’s qualification standards “may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace.”¹⁵³ Consistent with this expanded language, the EEOC similarly defined “direct threat” to include risk(s) to the individual applicant:

Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job.¹⁵⁴

152. 136 CONG. REC. 17364, 17377 (1990) (statement of Sen. Kennedy).

153. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 56 Fed. Reg. 35,734, 35,738 (July 26, 1991) (codified at 29 C.F.R. § 1630.15(b)(2) (1992)).

154. 29 C.F.R. § 1630.2(r); *see also id.* (“In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm.”); *id.* app. § 1630.2(r) (“An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others.”).

The EEOC’s expanded language for the ADA’s direct threat defense was substantially drawn from its regulations under the Rehabilitation Act of 1973. *See* 29 C.F.R. § 1613.702(f) (1985), *reproduced in* *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1071 n.10 (9th Cir. 2000) (“A ‘qualified handicapped person’ [is] an individual who, among other things, is able to ‘perform the essential functions of the position in question without endangering the health and safety of the individual or others.’”), *rev’d*, 536 U.S. 73 (2002).

Clearly showing that this expanded language was no oversight, the EEOC's regulations proceeded to discuss in detail this new "of the individual" phrase and to provide an example when it would apply:

An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment¹⁵⁵

3. 2002 and Beyond: The Supreme Court's Allowance of Applicant-Specific Paternalism

In 2002, the Supreme Court addressed the propriety of the EEOC's regulatory expansion of the ADA's direct threat defense in *Chevron U.S.A. Inc. v. Echazabal*.¹⁵⁶ Mario Echazabal, who had been diagnosed with asymptomatic, chronic, active hepatitis C, applied twice over a three-year period for a job at a Chevron oil refinery.¹⁵⁷ On both occasions, Chevron offered the job to Echazabal, provided he passed a routine, pre-employment physical exam by Chevron's physicians.¹⁵⁸

These examinations revealed elevated liver enzyme levels and the hepatitis C condition,¹⁵⁹ and Chevron's physicians stated that Echazabal's impairment would be aggravated by continued exposure to toxins at the refinery.¹⁶⁰ Consequently, Chevron withdrew its employment offers because "Echazabal's liver might be damaged by exposure to the solvents and chemicals present in the coker unit."¹⁶¹ No evidence existed that the health of Echazabal's liver affected his ability to do the job.¹⁶²

155. 29 C.F.R. app. § 1630.2(r) (1992); see also *id.* ("This determination [that there exists a high probability of substantial harm to the individual] must be based on individualized factual data, using the [four] factors noted above . . .").

156. 536 U.S. 73.

157. *Echazabal*, 226 F.3d at 1065.

158. *Id.*

159. *Id.*

160. *Echazabal*, 536 U.S. at 76.

161. *Echazabal*, 226 F.3d at 1065; see also *id.* (indicating that Chevron withdrew its second job offer for the same reason).

162. *Id.* at 1072.

After Echazabal's rejections, he filed a disability-based discrimination lawsuit against Chevron under the ADA.¹⁶³ Chevron contended primarily that its refusals to hire Echazabal were justified under the ADA's direct threat defense (as expanded by the EEOC) because it had "reasonably concluded that [he] would pose a direct threat to his own health if he worked at the refinery."¹⁶⁴ The district court granted summary judgment to Chevron on its direct threat defense.¹⁶⁵

The Ninth Circuit reversed.¹⁶⁶ Opting to reject the EEOC's regulatory interpretation of the statutory direct threat provision,¹⁶⁷ the court in turn rebuffed applicant-specific paternalism under the ADA:

[T]he ADA's direct threat defense means what it says: it permits employers to impose a requirement that their employees not pose a significant risk to the health or safety of other individuals in the workplace. It does not permit employers to shut disabled individuals out of jobs on the ground that, by working in the jobs at issue, they may put their own health or safety at risk.¹⁶⁸

To bolster its decision, the Ninth Circuit offered two main justifications. First, the court considered the ADA's direct threat defense provisions to be "dispositive" and "clear" that "threats to other persons—including the disabled individual himself—are not included within the scope of the defense."¹⁶⁹ Given its view that the ADA's express language "plainly [did] not include threats to the disabled individual himself"¹⁷⁰ and "consistently

163. *Id.* at 1065.

164. *Id.* at 1065–66; *see also Echazabal*, 536 U.S. at 77 ("Chevron defended under a regulation of the [EEOC] permitting the defense that a worker's disability on the job would pose a 'direct threat' to his health . . .").

165. *Echazabal*, 536 U.S. at 77.

166. *Echazabal*, 226 F.3d at 1064, 1072.

167. *Id.* at 1069.

168. *Id.* at 1072; *see also id.* at 1064 ("[T]he principal question we consider is whether the 'direct threat' defense available to employers under the [ADA] applies to employees, or prospective employees, who pose a direct threat to their own health or safety, but not to the health or safety of other persons in the workplace. We conclude that it does not."); *id.* at 1070 ("[S]ection 12113 does not afford a defense on the basis that the performance of a job would pose a direct threat to an employee's (or prospective employee's) own health or safety.").

The Ninth Circuit's decision conflicted with the Eleventh Circuit's decision in *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996), in which it held that the ADA's direct threat defense could encompass risks or threats to the individual disabled applicant. *See Echazabal*, 536 U.S. at 78 (noting this circuit conflict).

169. *Echazabal*, 226 F.3d at 1066–67; *see also id.* at 1070 ("[T]he plain language of the direct threat provision is dispositive . . .").

170. *Id.* at 1067.

define[d] the direct threat defense to include only threats to others[.]”¹⁷¹ the Ninth Circuit dismissed any possibility that Congress committed a drafting error when it omitted from the defense threats to the disabled individual himself.¹⁷² Similarly, the court stated that the ADA’s “legislative history convincingly supports the unambiguous wording of the direct threat defense.”¹⁷³ Noting that the “direct threat” term is used hundreds of times throughout the ADA’s legislative history,¹⁷⁴ the Ninth Circuit observed that “[i]n nearly every instance in which the term appears, it is accompanied by a reference to the threat to ‘others’ or to ‘other individuals in the workplace.’ Not once is the term accompanied by a reference to threats to the disabled person himself.”¹⁷⁵

Second, the Ninth Circuit explained that its rejection of applicant-specific paternalism “makes good sense in light of the principles that underlie the ADA in particular and federal employment discrimination law in general.”¹⁷⁶ On this more general level, the court discussed the Supreme Court’s *Dothard* and *Johnson Controls* decisions and recognized that “courts have interpreted federal employment discrimination statutes to prohibit paternalistic employment policies.”¹⁷⁷ And, on the more particular level, the Ninth Circuit highlighted Congress’s ADA-based concern regarding overprotective rules and policies and observed that “the ADA was designed in part to prohibit discrimination against individuals with disabilities that takes the form of paternalism.”¹⁷⁸ To support this view, the court—like the Court in *Dothard* and *Johnson Controls* and the Fifth Circuit in *Weeks*—strongly emphasized the importance of preserving a disabled applicant’s decisionmaking power regarding employment-related choices:

Given Congress’s decision in the Title VII context to allow all individuals to decide for themselves whether to put their own health and safety at risk, it should come as no surprise that it

171. *Id.*; see also *id.* at 1066 (“On its face, the [direct threat] provision does not include direct threats to the health or safety of the disabled individual himself.”).

172. *Id.*; see also *id.* at 1069 (“[T]he intent of Congress is clear: the language of the direct threat defense plainly expresses Congress’s intent to include within the scope of a [direct threat] defense only threats to other individuals in the workplace.”); *id.* at 1071 (“[C]hevron’s reading of ‘essential functions’ would . . . circumvent Congress’s decision to exclude a paternalistic risk-to-self defense . . .”).

173. *Id.* at 1068; see also *id.* at 1067 (“[T]he legislative history of the ADA also supports the conclusion that the direct threat provision does not include threats to oneself.”).

174. *Id.*

175. *Id.*

176. *Id.* at 1068.

177. *Id.*

178. *Id.*

would enact legislation allowing the same freedom of choice to disabled individuals.

....

... Conscious of the history of paternalistic rules that have often excluded disabled individuals from the workplace, Congress concluded that disabled persons should be afforded the opportunity to decide for themselves what risks to undertake.¹⁷⁹

As a final point, the Ninth Circuit addressed the possibility that “forcing employers to hire individuals who pose a risk to their own health or safety would expose employers to tort liability.”¹⁸⁰ The court found this argument unpersuasive for two reasons. First, the Ninth Circuit—relying upon the Supreme Court’s language in *Johnson Controls*—highlighted that neither a fear that hiring a disabled individual will cost more than hiring an individual without disabilities nor the extra cost of employing disabled individuals would in itself provide an affirmative defense to a discriminatory refusal to hire those individuals.¹⁸¹ Second, the court—noting the *Johnson Controls* Court’s strong suggestion that state tort law would be preempted to the extent that it interfered with federal antidiscrimination law—referenced a similar result under the ADA: “[G]iven that the ADA prohibits employers from refusing to hire individuals solely on the ground that their health and safety may be threatened by the job, state tort law would likely be preempted if it interfered with this requirement.”¹⁸²

A unanimous Supreme Court reversed.¹⁸³ Applying the two-part regulatory deference standard set forth in its 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹⁸⁴ the Court concluded that

179. *Id.* at 1068–72. See *supra* note 31 and accompanying text (discussing the Fifth Circuit’s *Weeks* decision on this issue); *supra* notes 54–56 and accompanying text (discussing the Supreme Court’s *Dothard* decision on this issue); *supra* note 102 and accompanying text (discussing the Supreme Court’s *Johnson Controls* decision on this issue).

180. *Echazabal*, 226 F.3d at 1069–70.

181. *Id.* at 1070.

182. *Id.*

183. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 75–77 (2002).

184. 467 U.S. 837 (1984). In *Chevron*, the Supreme Court established a two-part inquiry when reviewing a federal agency’s construction or interpretation of an applicable statute. *Id.* at 842–44. The first inquiry is: “[W]hether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43. But if “Congress has not directly addressed the precise question at issue” and “the statute is silent or ambiguous with respect to the specific issue,” then the second inquiry is: “[W]hether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. In other words, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Id.* at 844.

the ADA “permits” the EEOC’s direct threat regulations that had “carrie[d] the defense one step further”¹⁸⁵

As to the first part of the *Chevron* deference standard, the Court concluded that (a) Congress had not spoken exhaustively in the ADA on threats to a worker’s own health¹⁸⁶ and (b) as a result, the direct threat defense was not an exclusive specification that precluded consideration of these harm-to-self threats.¹⁸⁷ Specifically, the Court believed that Congress included the harm-to-others provision as an example of legitimate qualifications that are “job-related and consistent with business necessity” under the ADA.¹⁸⁸ In light of such spacious defensive categories,¹⁸⁹ the Court viewed the ADA as leaving a gap¹⁹⁰ that allowed the EEOC a good deal of discretion in setting the limits of permissible qualification standards.¹⁹¹

As to the second part of the *Chevron* deference standard, the Court concluded that the EEOC’s expanded direct threat regulations were reasonable¹⁹² and that they made sense under the ADA.¹⁹³ *Chevron* had urged that the EEOC’s regulations were reasonable because they allow employers “to avoid [1] time lost to sickness, [2] excessive turnover from medical retirement or death, [3] litigation under state tort law, and [4] the risk of violating the national Occupational Safety and Health Act of 1970.”¹⁹⁴

Failing to discuss the first three justifications, the Court concluded that the concern with the Occupational Safety and Health Act was enough to show that the regulation is entitled to survive as reasonable.¹⁹⁵ First, the Court

185. *Echazabal*, 536 U.S. at 76, 78.

186. *Id.* at 84.

187. *Id.* at 80; *see also id.* at 81 (stating that the ADA’s “statutory language suggesting exclusiveness is missing”).

188. *Id.* at 80 (noting that the ADA’s direct threat defense provisions state that an employer’s qualification standards “may include” the requirement that an applicant not pose a direct threat to “others in the workplace”).

189. *Id.*

190. *Id.* at 79.

191. *Id.* at 80. In reaching this conclusion, the Court found inapplicable the statutory interpretive canon of *expressio unius est exclusio alterius*, which provides that “expressing one item of [an] associated group or series excludes another left unmentioned.” *Id.* at 80–81 (citing *United States v. Vonn*, 535 U.S. 55, 65 (2002)). As to the canon’s first element (expression as part of a series), the Court did not view the ADA’s defenses as containing any such series. *See id.* at 81 (“Strike two in this case is the failure to identify any such established series, including both threats to others and threats to self, from which Congress appears to have made a deliberate choice to omit the latter item as a signal of the affirmative defense’s scope.”). And, as to the canon’s second element (exclusiveness of statutory language), the Court, as mentioned above, found the ADA’s language neither exhaustive nor exclusive. *Id.* at 84 (“*Expressio unius* just fails to work here.”).

192. *Id.* at 87.

193. *Id.* at 84.

194. *Id.* at 84–87.

195. *Id.* at 84.

noted the Act's general purpose of "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions . . ."¹⁹⁶ Given this purpose, the Court (a) viewed as an open question whether an employer would be liable under the Act if it hired a disabled applicant who "knowingly consented to the particular dangers the job would pose to him"¹⁹⁷ and (b) thus believed that an "employer would be asking for trouble" if it hired this applicant who posed a direct threat to his or her own safety.¹⁹⁸

In addition, the Court briefly addressed whether workplace paternalism concerns prevented the EEOC's regulation from being reasonable.¹⁹⁹ While noting that "Congress had paternalism in its sights when it passed the ADA,"²⁰⁰ the Court discussed—and then approved—as reasonable the EEOC's position that distinguished impermissible paternalism towards broad classes of applicants from permissible paternalism towards individual, specifically at-risk applicants:

[T]he EEOC . . . [contends] that Congress [in the ADA] was not aiming at an employer's refusal to place disabled workers at a specifically demonstrated risk, but was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes. . . . The EEOC was certainly acting within the reasonable zone when it saw a difference between rejecting workplace paternalism and ignoring *specific and documented risks to the employee himself*, even if the employee would take his chances for the sake of getting a job.²⁰¹

Applying this EEOC distinction between impermissible and permissible paternalism, the Court viewed the EEOC's regulations as falling in the latter category,²⁰² because they disallow any sort of "sham protection" by (a) demanding "particularized enquiry" into the harms the employee would probably face²⁰³ and (b) requiring that judgments based on the direct threat provision be made on the basis of "individualized risk assessments."²⁰⁴ Consequently, and in only a single, brief footnote, the Court quickly distinguished its *Dothard* and *Johnson Controls* decisions as falling into the former category of impermissible paternalism: "Those cases . . . are beside the point, as they,

196. *Id.*

197. *Id.* at 84–85.

198. *Id.* at 85.

199. *Id.* at 85–86.

200. *Id.* at 85.

201. *Id.* at 85–86 (emphasis added).

202. *Id.*

203. *Id.* at 86.

204. *Id.* at 85 n.5; *see also supra* Part I.B.2 (discussing the EEOC's direct threat regulations).

like Title VII generally, were concerned with paternalistic judgments based on the broad category of gender”²⁰⁵

As a result of the Supreme Court’s decision in *Echazabal*—and contrary to their holdings in the Title VII context—the lower courts have consistently allowed applicant-specific paternalism under the EEOC’s expanded regulations regarding the ADA’s direct threat defense.²⁰⁶

C. OWBPA Context

Congress addressed broader workplace paternalism concerns when enacting the Older Workers Benefit Protection Act (OWBPA) in 1990.²⁰⁷ Title II of the OWBPA sets forth specific requirements that must be satisfied before an employee’s waiver of a federal age discrimination claim under the ADEA can be considered “knowing and voluntary” and thus valid.²⁰⁸ Specifically, under the OWBPA, an ADEA claim waiver will not be viewed as knowing and voluntary unless at a minimum the following seven requirements are met:²⁰⁹

- (1) the waiver is part of an employer-employee agreement “that is written in a manner calculated to be understood” by the employee;²¹⁰
- (2) the waiver “specifically refers to rights or claims arising under” the ADEA;²¹¹

205. *Echazabal*, 536 U.S. at 85 n.5; see also *id.* (referencing that these decisions “express[ed] concern under Title VII . . . with employers adopting rules that exclude women from jobs that are seen as too risky”).

206. See, e.g., *Bodenstab v. Cnty. of Cook*, 569 F.3d 651, 658 (7th Cir. 2009) (“Under the ADA, an individual is not qualified if he presents a ‘direct threat’ to his own health and safety or that of others.” (citing *Echazabal*, 536 U.S. at 78–89, 87)); *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 731 (5th Cir. 2007) (“The ADA does not protect an employee who poses a direct threat to the health and safety of herself or others in the workplace.”); *Pinckney v. Potter*, 186 F. App’x 919, 925 (11th Cir. 2006) (“An individual is also not a ‘qualified individual’ if, by performing the duties of a given position, he would pose a ‘direct threat’ to himself. . . . Regulations have extended the definition of ‘direct threat’ to include threats to the worker himself.” (citing *Echazabal*, 536 U.S. at 87)); *Turner v. Hershey Chocolate USA*, 440 F.3d 604, 614 (3d Cir. 2006) (“An employer is not required to provide a reasonable accommodation if it would pose a ‘direct threat’ to the safety of the employee or others.” (citing *Echazabal*, 536 U.S. 73)); cf. *EEOC v. Schneider Nat’l, Inc.*, 481 F.3d 507, 510 (7th Cir. 2007) (“The fact that . . . the worker himself [is] willing to assume a risk does not compel the worker’s current employer to do likewise.” (citing *Echazabal*, 536 U.S. 73)).

207. Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621, 623, 626, 630 (2006)).

208. 29 U.S.C. § 626(f).

209. *Id.* § 626(f)(1).

210. *Id.* § 626(f)(1)(A).

211. *Id.* § 626(f)(1)(B).

- (3) the waiver does not encompass rights or claims that arise after the date the waiver is signed;²¹²
- (4) the waiver is in exchange for consideration that is in addition to anything to which the employee is already entitled;²¹³
- (5) the employee “is advised in writing to consult with an attorney prior to executing the agreement”;²¹⁴
- (6) the employee “is given a period of at least 21 days within which to consider the agreement”;²¹⁵ and
- (7) the agreement affords the employee at least seven days after signing the agreement to revoke it.²¹⁶

Furthermore, when an ADEA waiver is to be signed by an employee as part of a larger termination program (such as a reduction-in-force) that is offered to a “group or class of employees,” the OWBPA substitutes one requirement and adds another for the waiver to be valid.²¹⁷ Specifically, the OWBPA:

- (a) substitutes a consideration or review period of “at least 45 days” (rather than “at least 21 days”);²¹⁸ and
- (b) adds an eighth requirement that “the employer . . . inform[] the individual in writing in a manner calculated to be understood by the average individual eligible to participate [in the program], as to: (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.”²¹⁹

Next, the OWBPA’s legislative history provides insight regarding Congress’s intent and motives for enacting these ADEA claim waiver requirements. While some members of Congress criticized the Act as “paternalistic in the extreme” and “the worst [example] of misguided

212. *Id.* § 626(f)(1)(C).

213. *Id.* § 626(f)(1)(D).

214. *Id.* § 626(f)(1)(E).

215. *Id.* § 626(f)(1)(F)(i).

216. *Id.* § 626(f)(1)(G). The OWBPA slightly lessens these seven requirements for any waiver of an ADEA claim that has already been filed with the EEOC or in court. *Id.* § 626(f)(2). In this situation, the OWBPA’s seven requirements still apply, except that an employee (a) need only be provided “a reasonable period of time” (rather than a twenty-one day period) to review the agreement and (b) does not have the seven-day right of revocation. *Id.* § 626(f)(2)(A)–(B).

217. *Id.* § 626(f)(1)(F)(ii), (H).

218. *Id.* § 626(f)(1)(F)(ii).

219. *Id.* § 626(f)(1)(H)(i)–(ii).

benevolence,”²²⁰ Congress explained that the OWBPA’s waiver requirements were “designed to protect older workers’ rights and not to take them away.”²²¹ In short, Congress intended the OWBPA to operate as a vehicle to protect older employees,²²² whom it viewed as more susceptible to (or at risk for) being manipulated or even coerced into signing away their ADEA protections.²²³

However, Congress also noted the importance of *not* limiting employees’ free choice.²²⁴ For example, the Senate Committee on Labor and Human Resources emphasized that Congress would “perform a valuable service to employees by enacting legislation which preserves employee options and choices but at the same time ensures that those choices are truly voluntary and informed.”²²⁵ The House Committee on Education and Labor similarly explained that “certain specific protections must be provided by employers to employees at the time a waiver is offered yet retain the right and opportunity . . . for employees to decide for themselves whether they wish to exchange their right to sue for additional benefits.”²²⁶

220. H.R. REP. NO. 101-664, at 88 (1990); *see also id.* at 24 (“Some observers contend that requiring supervision and other protections for older workers who are asked to waive their rights is excessively paternalistic . . .”).

221. *Id.* at 54; *see also* S. REP. NO. 101-263, at 64 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1569 (“[The OWBPA] is touted by its supporters as a vehicle to protect employees.”).

222. S. REP. NO. 101-263, at 64; *see also id.* at 33 (“[G]roup termination and reduction programs . . . require additional protection for individuals from whom a waiver is sought.”).

223. According to Congress, this greater susceptibility of older workers existed for two reasons. First, Congress observed that these workers are often discharged as part of larger, less individualized reductions-in-force and thus “would not reasonably be expected to know or suspect that age may have played a role in the employer’s decision, or that the program may be designed to remove older workers from the labor force.” H.R. REP. NO. 101-664, at 22–23; *see also id.* at 54 (“Group termination and reduction programs stand in stark contrast to the individual separation . . . [E]mployees affected by these programs have little or no basis to suspect that action is being taken based on their individual performance or characteristics.”). Second, Congress believed that it was “reasonable to assume that many employees would be coerced by circumstances into accepting significant compromises” of their ADEA claims because they had typically modest annual incomes (“only \$15,000.00”), difficulty obtaining a new job (“less than a 50/50 chance of ever finding new employment”), and “little or no savings.” *Id.* at 23; *see* Craig Robert Senn, *Knowing and Voluntary Waivers of Federal Employment Claims: Replacing the Totality of Circumstances Test With a “Waiver Certainty” Test*, 58 FLA. L. REV. 305, 340–41 (2006) (discussing the reasons that older workers are more susceptible to waiver-related manipulation and coercion).

224. S. REP. NO. 101-263, at 60 (“The employees, of course, are free to accept the offer or reject it.”).

225. *Id.*

226. H.R. REP. NO. 101-664, at 90.

In a similar vein, Congress also offered explanations as to how four of the OWBPA's seven basic requirements would further this purpose of having older workers make informed choices. Specifically:

(A) for requirement (1) above (that the waiver be part of an agreement "that is written in a manner calculated to be understood" by the employee), Congress explained: "[We] expect[] that courts will pay close attention to the language used in the agreement, to ensure that the language is readily understandable to individual employees regardless of their education or business experience."²²⁷

(B) for requirement (2) above (that the waiver "specifically refers to rights or claims arising under" the ADEA), Congress reasoned: "This degree of clarity and specificity increases the chances that individuals will know their rights upon execution of a waiver."²²⁸

(C) for requirement (5) above (that the employee "is advised in writing to consult with an attorney prior to executing the agreement") Congress explained: Given the complexity of issues involved, "it is vitally important that the employee understand the magnitude of what he or she is undertaking. Legal counsel is in the best position to help the individual reach that understanding."²²⁹

(D) for requirement (6) above (that the employee "is given a period of at least 21 days within which to consider the agreement"), Congress reasoned: "An employee who is terminated needs time . . . to learn about the conditions of termination, including any benefits being offered by the employer. Time also is necessary to locate and consult with an attorney if the employee wants to determine what legal rights may exist."²³⁰

Congress offered almost identical explanations for the OWBPA's substitute requirement and additional requirement when waivers are offered to a "group or class of employees" as part of a reduction-in-force. Specifically, for substitute requirement (a) above (requiring a consideration or review period of "at least 45 days"), Congress explained: "[M]ore time is needed to review options, understand the program, and consult with an attorney before signing away potentially valid legal claims. Given that these programs often involve large numbers of employees and complex financial arrangements, . . . individuals must be given at least 45 days . . ."²³¹ For additional requirement (b) above (that "the employer . . . inform[] the individual

227. S. REP. NO. 101-263, at 32-33; H.R. REP. NO. 101-664, at 51.

228. S. REP. NO. 101-263, at 32; H.R. REP. NO. 101-664, at 51.

229. H.R. REP. NO. 101-664, at 52.

230. S. REP. NO. 101-263, at 33; H.R. REP. NO. 101-664, at 51.

231. S. REP. NO. 101-263, at 33.

in writing . . . as to . . . the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program”), Congress reasoned:

[E]mployers must provide detailed, written information . . . describing the group termination program.

....

The Committee believes that collectively these informational requirements will permit older workers to make more informed decisions in group termination and exit incentive programs. The principal difficulty encountered by older workers in these circumstances is their inability to determine whether the program gives rise to a valid claim under the ADEA. In many circumstances, an older worker will have no information at all regarding the scope of the program or its eligibility criteria. The informational requirements set forth in the bill are designed to give all eligible employees a better picture of these factors.²³²

II. PROPOSING A NEW INFORMATIONAL PATERNALISM UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAW

Given the divergent histories of Title VII and the ADA and their treatment by the courts, there is no uniform, consistent approach to applicant-specific paternalism under our federal employment discrimination laws.²³³ Instead, the validity of an excluded applicant’s employment discrimination claim regrettably depends on a single factor or variable: the protected characteristic at issue. The “favored” characteristic (a Title VII characteristic) yields a viable claim, per the Supreme Court’s rejection of applicant-specific paternalism for BFOQ defense purposes in *Dothard* and *Johnson Controls*. But the “disfavored” characteristic (an ADA disability)

232. *Id.* at 33–34; *see also id.* at 32 (stating that the need for adequate information is especially acute in the context of large termination programs); H.R. REP. NO. 101-664, at 22–23 (“The problem is particularly acute in large-scale terminations and layoffs, where an individual employee would not reasonably be expected to know or suspect that age may have played a role in the employer’s decision, or that the program may be designed to remove older workers from the labor force.”); *id.* at 53 (“In this setting, older workers are unlikely to be aware of possible patterns of discrimination in the program itself, or of the nature of the remedies to which they might be entitled.”); *id.* at 54 (“[E]mployees affected by these programs have little or no basis to suspect that action is being taken based on their individual performance or characteristics.”).

233. *See* Anita Silvers, Michael E. Waterstone & Michael Ashley Stein, *Disability and Employment Discrimination at the Rehnquist Court*, 75 *MISS. L.J.* 945, 972 (2006) (observing that paternalism is expressly disallowed for gender but allowed for disability).

produces a losing claim, per the Court's acceptance of applicant-specific paternalism for direct threat defense purposes in *Echazabal*.

The hypothetical situations #1 and #2 posed at the beginning of the Article provide a nice example of this varying treatment and legal protection. There, Sheila and Bill were similarly situated—both were the best-qualified applicants for the jobs at issue at Company A and Company B, respectively, but both were excluded based on these employers' paternalistic purpose of protecting them from job-related safety and/or health risks attributable to a federally protected characteristic (namely, Sheila's gender and pregnancy and Bill's epilepsy).

Notwithstanding these similarities, only Sheila retains the power to balance the job's benefits against its safety and/or health risks and then choose whether to pursue and accept the job. Only Sheila has a viable federal employment discrimination claim based on her paternalistic exclusion from the job. In contrast, solely because Bill happens to be disabled rather than a pregnant woman, he does not retain that power to balance the job's benefits against its safety and/or health risks, nor does he have a viable federal employment discrimination claim based on his paternalistic exclusion from the job.

Another example of this inconsistent treatment and legal protection can be seen if we switch the facts (and protected characteristics at issue) in *Johnson Controls* and *Echazabal*. In other words, assume that:

- (a) in *Johnson Controls*, the women applicants had hepatitis C and were paternalistically excluded by the employer due to its concern about documented, increased risks to their health when exposed to lead at the battery manufacturing plant; and
- (b) in *Echazabal*, the plaintiff had been a woman and was paternalistically excluded by the employer due to its concern about documented, increased risks to her (or her unborn child's) health when exposed to toxins at the oil refinery.

With that simple switch of federally protected characteristics and applying the divergent standards for applicant-specific paternalism under the ADA and Title VII, the plaintiffs in *Johnson Controls*—now with the characteristic of disability at issue—would have lost, rather than won. And *Echazabal*—now with the characteristic of gender at issue—would have won, rather than lost.

A. Informational Paternalism as a Substitute Approach

The new, middle-ground approach proposed in this Article—informational paternalism—brings needed uniformity and consistency to legal protection in

the area of applicant-specific paternalism under federal employment discrimination law. It treats Sheila and Bill identically by affording viable federal employment discrimination claims to both of them under Title VII and the ADA, respectively. And it yields identical results in cases like *Johnson Controls* and *Echazabal*, regardless of which federally protected characteristic may be at issue.

Specifically, informational paternalism contains two key features:

- (a) *Prohibition of applicant-specific paternalism.* Under federal employment discrimination law, an employer engages in an unlawful employment practice when it paternalistically excludes an applicant because of job-related safety and/or health risks posed to that individual due to his or her federally protected characteristic(s); and
- (b) *Job-related risk notification.* When applicant-specific paternalism is prohibited pursuant to (a), an employer must notify the applicant (in writing and before he or she begins employment) of known job-related safety and/or health risks (if any) that are attributable to any known federally protected characteristic of the applicant.

As to the first feature, it is important to understand the relationship between its blanket prohibition of applicant-specific paternalism and the BFOQ defense (under Title VII and the ADEA) as well as the direct threat defense (under the ADA). This first feature purposefully restricts its prohibition to exclusions based on risks posed to that individual in order to make a clear point: this feature coexists with, and does not displace or otherwise affect, the BFOQ and direct threat defenses. For example, in *Dothard*-like factual circumstances in which an employer excludes an applicant because his or her sex would create job-related safety and/or health risks to institution-essential third parties (the prisoners in *Dothard*), the BFOQ defense would still apply. Similarly, in factual circumstances in which an employer excludes an applicant because his or her disability would create job-related safety and/or health risks to “other individuals in the workplace” (such as other co-workers or customers), the direct threat defense would still apply. Given that the first feature only prohibits exclusions based on risks posed to that individual, it does not displace either defense. Both employers would prevail on the respective Title VII and ADA employment discrimination claims in these circumstances.

As to the second feature, it is significant to note the triggering circumstances for an employer’s risk notification obligation. This second feature intentionally references known job-related risks and known federally protected characteristics in order to make another clear point: This notification obligation attaches only if an employer is aware of both an applicant’s federally protected characteristic and job-related risks that are attributable

to that characteristic. For example, in *Johnson Controls*-like and *Echazabal*-like circumstances in which an employer is clearly aware of the applicant's federally protected characteristic and job-related risks, the employer is required to provide the job-related risk notification to that applicant. Otherwise, if an employer lacks knowledge in one or both of these areas (for example, if Chevron had not known about Echazabal's hepatitis C condition, or if Johnson Controls had not known about the lead-based exposure risks to women), then the risk notification obligation is inapplicable.

Together, these two features are justified because they: (a) reflect a longstanding philosophy shared by Congress and the Supreme Court regarding workplace paternalism; (b) serve to fully advance federal antidiscrimination policy; and (c) embrace Congress's and the OSHA's shared philosophy regarding the proper means of protecting workers in the context of their employment-related decisions.

B. Defending the "Prohibition of Applicant-Specific Paternalism" Feature

The first feature of informational paternalism is its blanket ban on an employer's paternalistic refusal to hire an applicant because of job-related safety and/or health risks posed to that individual due to his or her federally protected characteristic(s). This prohibition would be applicable under each federal employment discrimination law, including the ADA.

The "prohibition of applicant-specific paternalism" feature is warranted for two reasons: It reflects a longstanding philosophy shared by Congress (per the ADA and the OWBPA) and the Supreme Court that rejects an employer's applicant-specific protective purpose as an unacceptable basis for excluding an applicant, and it serves to fully advance federal employment discrimination policy.

1. Congress's and the Supreme Court's Philosophy Regarding Workplace Paternalism

The first feature of informational paternalism is wholly consistent with Congress's and the Supreme Court's longstanding philosophy regarding workplace paternalism. As evidenced by Congress through the ADA and the OWBPA and the Supreme Court in its *Dothard* and *Johnson Controls* decisions, both institutions share the same philosophy in this area. This philosophy has two clear parts:

- (a) *Primary philosophy*: an employer's narrower, paternalistic purpose of protecting merely an individual applicant from job-related risks

attributable to his or her federally protected characteristic(s) is *not an acceptable basis* for excluding that applicant; but

(b) *Secondary philosophy*: an employer's broader, business-based purpose of protecting other individuals connected to the workplace (e.g., customers or other co-workers) from job-related risks attributable to an applicant's federally protected characteristic(s) is an acceptable basis for excluding that applicant.

Thus, the effect of the primary philosophy is to allow a job applicant to retain decisionmaking power when his or her job performance and federally protected characteristic(s) combine to expose merely that individual to safety and/or health risks. In contrast, the consequence of the secondary philosophy is to allow an employer to assume that decisionmaking power when an applicant's job performance and federally protected characteristic(s) combine to expose others individuals to such risks.

a. Legislative and Judicial Evidence of the Primary Philosophy

First, from the legislative perspective, Congress clearly embraced this primary philosophy when enacting the ADA. In fact, this primary philosophy simply reflects Congress's rejection of applicant-specific paternalism and overprotective employer practices under the ADA.

To be sure, the purpose of the ADA is to protect disabled individuals in the employment arena. Congress openly hailed the fact that the ADA established "necessary civil rights protections"²³⁴ for these individuals, whom it considered "underprivileged and disadvantaged"²³⁵ and "historically . . . isolate[d] and segregate[d]" by society.²³⁶ But, recognizing that employers can go too far in an effort to protect these disabled applicants, Congress expressly listed "overprotective rules and policies . . . [and] exclusionary qualification standards and criteria" among the forms of unlawful discrimination.²³⁷

Fortunately, in the ADA's legislative history, Congress provided a clear picture of an employer that has crossed this unlawfully overprotective line—namely, one that excludes a disabled applicant based on paternalistic views or concerns regarding his or her safety and/or health. For example, the House Committee on Education and Labor warned that employers must not make "employment decisions . . . based on paternalistic views about what is best

234. H.R. REP. NO. 101-485, pt. 2, at 40, *reprinted in* 1990 U.S.C.C.A.N. 303, 322.

235. *Id.* at 31.

236. 42 U.S.C. § 12101(a)(2) (2006).

237. *Id.* § 12101(a)(5).

for a person with a disability.²³⁸ Similarly, this Committee and the House Committee on the Judiciary, respectively, emphasized that job-related decisions must not disqualify an otherwise qualified applicant based on paternalistic concerns for the disabled person's own safety²³⁹ or otherwise foreclose employment opportunities based on paternalistic concerns about what is best for the person with a disability.²⁴⁰ Senator Edward Kennedy also highlighted this picture of an employer that had unlawfully crossed the "overprotective" line when he said: "Under the ADA, an employer may not deny a person an employment opportunity based on paternalistic concerns regarding the employee's health."²⁴¹ Thus, when enacting the ADA, Congress openly manifested its view that an employer's paternalistic purpose of protecting an individual disabled applicant from job-related risk is not an acceptable basis for excluding that applicant.

Second, from the judicial perspective, the Supreme Court also clearly embraced the primary philosophy in its *Dothard* and *Johnson Controls* decisions. Indeed, this primary philosophy straightforwardly represents the Court's rejection of applicant-specific paternalism under Title VII. For example, in *Dothard*, the majority bluntly characterized gender-based job exclusions aimed only at protecting individual women applicants as "exercise[s] in 'romantic paternalism.'"²⁴² Moreover, the *Dothard* majority proceeded to reject "the argument that a particular job is too dangerous for women"²⁴³ and instead insisted that "[m]ore" be "at stake" than applicant-specific dangers and "risks of employment" in order to justify these sex-based job exclusions under Title VII's BFOQ defense.²⁴⁴ Similarly, while dissenting, Justices Marshall and Brennan created unanimity on the Court's rejection

238. H.R. REP. NO. 101-485, pt. 2, at 74.

239. *Id.* at 72; *id.*, pt. 3, at 42, reprinted in 1990 U.S.C.C.A.N. 445, 465.

240. *Id.*, pt. 3, at 34.

241. 136 CONG. REC. 17,377 (1990) (statement of Sen. Kennedy). See *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1067 (9th Cir. 2000) ("The term 'direct threat' is 'used hundreds of times throughout the ADA's legislative history' . . . In nearly every instance in which the term appears, it is accompanied by a reference to the threat to 'others' or to 'other individuals in the workplace.' Not once is the term accompanied by a reference to threats to the disabled person himself."); Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279, 1346-47 (2001) ("The legislative history reinforces this unmistakable statutory language with repeated declarations that an employer may not exclude a person with a disability for her own good. . . . [T]he legislative history is larded with statements opposing such a paternalistic standard."); Tara Jones, *The Threat-to-Self Defense and the Americans With Disabilities Act*, 27 S. ILL. U. L.J. 539, 565 (2003) ("Congress has repeatedly expressed its disagreement with paternalistic discrimination.").

242. *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) (citing *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

243. *Id.*

244. *Id.*

of applicant-specific paternalism, as they (a) agreed that “possible harm to women is an unacceptable reason for disqualifying women”²⁴⁵ and (b) observed that “[t]he Court properly rejects [the] proffered justifications for denying women jobs as prison guards. It is simply irrelevant here that a guard’s occupation is dangerous and that some women might be unable to protect themselves adequately.”²⁴⁶

In addition, almost two decades after its *Dothard* decision, the Supreme Court did not hesitate to again reject applicant-specific paternalism in *Johnson Controls*. For example, the *Johnson Controls* court emphasized that “danger to a woman herself does not justify discrimination,”²⁴⁷ and it then reiterated its view from *Dothard* that more must be at stake than applicant-specific dangers and risks of employment in order to justify rejecting women applicants under the BFOQ defense.²⁴⁸ Thus, in addition to Congress, the Supreme Court has also clearly embraced the view that an employer’s paternalistic purpose of protecting individual women applicants from job-related risks is not an acceptable basis for excluding those applicants.

As a final point regarding the primary philosophy, it is important to highlight disparate treatment as the concrete rationale behind Congress’s and the Supreme Court’s shared animosity towards—and rejection of—applicant-specific paternalism. After all, Congress labeled such paternalism as “perhaps the most pervasive form of discrimination for people with disabilities”²⁴⁹ So, the key question is: Given that a truly paternalistic employer possesses good-faith, benign intent (rather than a malevolent intent), how is it acting unlawfully under federal employment discrimination law when it engages in applicant-specific paternalism? What legal wrong is this employer committing that should be prohibited and remedied?

The answer is simple: disparate treatment. The employer that engages in applicant-specific paternalism is treating a person with a federally protected characteristic (such as disability under the ADA or gender under Title VII) differently and less favorably than a person without that

245. *Id.* at 342 (Marshall, J., concurring in part and dissenting in part).

246. *Id.* at 341.

247. *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 202 (1991).

248. *Id.* See Hubbard, *supra* note 241, at 1349 (“In gender and age discrimination cases, the Supreme Court has refused to allow an employer to exclude classes of employees based solely on the employer’s concern that the employees themselves faced some risk of harm.”); Silvers, Waterstone & Stein, *supra* note 233, at 958 (“[T]he ruling in *Johnson Controls* firmly established that . . . [w]hen the potential hazards were to their own well-being, women retained the autonomy of choosing whether to undergo those risks unless employers could also demonstrate that the hazards interfered with job performance.”).

249. H.R. REP. NO. 101-485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 356.

characteristic because it is seizing the disabled or woman applicant's decisionmaking power as to employment-related choices. Thus, this employer is disfavoring the disabled and women applicants: It has co-opted these disabled and women applicants' decisionmaking power regarding the jobs at issue, while allowing the nondisabled and male applicants to retain their decisionmaking power.

From the legislative perspective, both the ADA and the OWBPA evidence this rationale for Congress's rejection of applicant-specific paternalism. When enacting the ADA, Congress openly forbade employers from making any employment decisions based on paternalistic views about what is best for a person with a disability²⁵⁰—for example, decisions that would disqualify an otherwise qualified applicant,²⁵¹ foreclose employment opportunities to the applicant,²⁵² or otherwise deny that person an employment opportunity.²⁵³ By stating that employers *cannot* make these employment decisions, Congress simultaneously highlighted (through a simple process of elimination) who can, and must, make those decisions: the disabled applicant. Furthermore, Senator Kennedy summarized this rationale for Congress's rejection of applicant-specific paternalism when he noted that the individual's own risk "is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician."²⁵⁴ Thus,

250. *Id.*

251. *Id.* at 72; *id.*, pt. 3, at 42, *reprinted in* 1990 U.S.C.C.A.N. 445, 465.

252. *Id.*, pt. 3, at 34.

253. 136 CONG. REC. 17,377 (1990) (statement of Sen. Kennedy).

254. *Id.* See *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1069 (9th Cir. 2000) ("[I]t should come as no surprise that [Congress] would enact legislation [i.e., ADA] allowing the same freedom of choice to disabled individuals."); *id.* at 1072 ("Conscious of the history of paternalistic rules that have often excluded disabled individuals from the workplace, Congress concluded that disabled persons should be afforded the opportunity to decide for themselves what risks to undertake."); Jones, *supra* note 241, at 570–72 ("History teaches that discriminating against one group of individuals in employment because of the possible harm it may entail has been viciously struck down over time. It makes sense to treat the disabled similarly to other groups, and allow the disabled to accept an elevated level of risk . . . Both the EEOC and the Supreme Court now need to acknowledge that preventing the disabled from making similar decisions constitutes discrimination and should be barred."); D. Aaron Lacy, *Am I My Brother's Keeper: Disabilities, Paternalism, and Threats to Self*, 44 SANTA CLARA L. REV. 55, 90 (2003) ("[T]he central purpose of the ADA was to bring people with disabilities out of a subordinate state and onto the same level as all other individuals. This includes allowing people with disabilities to take risks that are more severe because of a person's disability."); *id.* at 92 ("The EEOC threat-to-self regulation allows employers to force people with disabilities to forbear from making free and autonomous choices, even against their own wishes, and thus discriminates against a person with a disability in occupations which the employer believes are more harmful to the person with a disability. On the other hand, employers do not force nondisabled adults to forbear in this manner."); Scott E. Schaffer, *Echazabal v. Chevron USA, Inc.: Conquering the Final Frontier of Paternalistic Employment Practices*, 33 CONN. L. REV. 1441, 1475–76 (2001) ("[I]t is time to treat the disabled similarly to other groups and permit them to

the ADA illustrates Congress's reasoning that applicant-specific paternalism is legally "wrong" because it allows for an employer's targeted, inappropriate seizure of decisionmaking power from (and thus disparate treatment of) disabled applicants.

Similarly, when enacting the OWBPA, Congress emphasized the importance of preserving (rather than co-opting) an individual's decisionmaking power regarding employment-related choices. The purpose of the OWBPA is to protect those who are at least forty years old in the employment arena. Congress touted the OWBPA as an important vehicle to protect older employees,²⁵⁵ whom it viewed as susceptible to (or at risk for) being manipulated or even coerced into signing away their ADEA protections.²⁵⁶ But, as it had noted under the ADA, Congress also recognized that a vehicle to protect older workers in the ADEA waiver context can go too far.

Importantly, in the OWBPA's legislative history, Congress offered a clear illustration of a protective vehicle that has crossed this unacceptable line—specifically, one that strips an employee of his or her decisionmaking power regarding the employment-related choice of whether to sign the waiver at issue. For example, Congress emphasized the overall importance of not limiting employees' free choice²⁵⁷ under the OWBPA. Similarly, Congress highlighted that it would "perform a valuable service to employees by enacting legislation which preserves employee options and choices but at the same time ensures that those choices are truly voluntary and informed."²⁵⁸ Again emphasizing the importance of preserving an older worker's decisionmaking power under the OWBPA, Congress noted that "certain specific protections must be provided

voluntarily accept the elevated level of risk that leads to fuller participation in the workforce."); Silvers, Waterstone & Stein, *supra* note 233, at 972 ("The ADA was trying to get at refusals to give an even break to classes of disabled people . . . Surely no even break is afforded when workers with disabilities who seek equal opportunity to work must abandon being autonomous simply to assuage employers' concerns about their safety . . . [D]eprivation of autonomy, and the concomitant ability to seek one's own good as one sees it, seems a high price to extract from just the latter group [i.e., disabled employees] . . ."); cf. Alexandra G. White, Note, *Paralyzing Discord: Workplace Safety, Paternalism, and the Accommodation of Biological Variance in the Americans With Disabilities Act*, 63 LA. L. REV. 509, 572 (2003) ("It is no less discriminatory to deny a disabled individual the right to make an informed decision to put himself in danger, regardless of the medical certainty of danger, than it is to deny an entire class of women the same right based on generalized or stereotypical assumptions.").

255. H.R. REP. NO. 101-664, at 54 (1990) ("The legislation is designed to protect older workers' rights . . .").

256. S. REP. NO. 101-263, at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1539 ("The Committee believes that collectively these informational requirements will permit older workers to make more informed decisions in group termination and exit incentive programs.").

257. *Id.* at 60 ("Employees are free to accept the offer or reject it.").

258. *Id.*

by employers to employees at the time a waiver is offered yet retain the right and opportunity . . . for employees to decide for themselves whether they wish to exchange their right to sue for additional benefits.”²⁵⁹

Consequently, when enacting the OWBPA, Congress had a philosophical choice to make regarding the means by which older workers should be protected. Congress’s first option was to protect older workers in the ADEA waiver context via means that would actually take away their decisionmaking power. For example, Congress could have: (a) flatly prohibited any signed waiver from including federal age discrimination claims under the ADEA, thereby automatically preserving those claims for older workers for potential monetary recovery via settlement or litigation; or (b) established a fixed monetary amount (such as \$15,000 or a sum certain per year employed) that the employer at issue must pay to the older worker in exchange for a waiver of an ADEA claim.

In contrast, Congress’s second option was to protect these older workers via other means, such as information-related waiver requirements, that would still preserve their decisionmaking power regarding employment choices. Congress opted for this choice, thereby reiterating the core rationale for its rejection of applicant-specific paternalism under the ADA—namely, the importance of preserving, rather than inappropriately seizing, decisionmaking power from workers at issue.

From the judicial perspective, both the *Dothard* and *Johnson Controls* decisions are replete with language that evidences this same reasoning that applicant-specific paternalism is legally untenable because it allows for an employer’s targeted, inappropriate seizure of decisionmaking power from (and thus disparate treatment of) applicants. For example, the *Dothard* majority bluntly observed that “the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.”²⁶⁰ Similarly, while dissenting, Justices Marshall and Brennan agreed on this specific point and again created unanimity regarding the importance of preserving a woman applicant’s decisionmaking power under Title VII:

[A]s the Court holds, “the argument that a particular job is too dangerous for women” is refuted by the “purpose of Title VII to allow the individual woman to make that choice for herself.” Some women, like some men, undoubtedly . . . do not wish to serve as

259. H.R. REP. NO. 101-664, at 90.

260. *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977).

prison guards, but that does not justify the exclusion of all women from this employment opportunity.²⁶¹

In addition, the Court in *Johnson Controls* highlighted this same rationale for its rejection of applicant-specific paternalism under Title VII. Specifically, the Court left no confusion on this issue when it explained that the decision to become pregnant and decisions attendant to pregnancy are choices to be made by the woman, not her employer.²⁶² In fact, the Court opted to conclude its opinion—and perhaps risk overkill—by again highlighting the importance of preserving decisionmaking power from women applicants: “It is no more appropriate for the courts than it is for individual employers to decide whether a woman’s reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make.”²⁶³

The “prohibition of applicant-specific paternalism” feature of my proposed informational paternalism dovetails with this primary philosophy of Congress and the Supreme Court that rejects the idea of removing an employee’s decisionmaking power. The reason is obvious: The scope of the first feature’s blanket prohibition and the primary philosophy’s prohibition is identical. Specifically, the first feature’s blanket prohibition applies only when an employer paternalistically excludes an applicant because of job-related safety and/or health risks posed to that individual due to his or her federally protected characteristic(s). The primary philosophy shares this same applicant-specific scope, as it categorizes an employer’s paternalistic purpose of protecting merely an individual applicant from job-related risks attributable to his or her federally protected characteristic(s) as an unacceptable basis for excluding him or her. Simply put, the “prohibition of applicant-specific paternalism” feature is the primary philosophy.

261. *Id.* at 341 (Marshall, J., concurring in part and dissenting in part) (citation omitted).

262. *Int’l Union v. Johnson Controls*, 499 U.S. 187, 206–07 (1991) (“Decisions about the welfare of future children must be left to the parents . . . rather than to the employers who hire those parents.”).

263. *Id.* at 211. See *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1068–69 (9th Cir. 2000) (“[C]ongress’s decision in the Title VII context to allow all individuals to decide for themselves whether to put their own health and safety at risk”); *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969) (“Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the [BFOQ] exception Congress intended to renege on that promise.”); Jonah Gelbach, Jonathan Klick & Lesley Wexler, *Passive Discrimination: When Does It Make Sense to Pay Too Little?*, 76 U. CHI. L. REV. 797, 823 (2009) (“Many scholars and judges view Title VII as fostering individual employee choice and counteracting employers’ impulse to apply group stereotypes to individuals.”).

By mirroring this primary philosophy, this first feature also embraces Congress's and the Supreme Court's rationale for rejecting applicant-specific paternalism—specifically, to address and rectify disparate treatment as the legal wrong that occurs when a paternalistic employer selectively seizes the decisionmaking power of applicants with a federally protected characteristic, while allowing those without that characteristic to retain this decisionmaking power. Like Congress and the Supreme Court, the “prohibition of applicant-specific paternalism” feature demands that all applicants—regardless of the federally protected characteristic they may possess—equally retain the power to balance a job's benefits against its safety and/or health risks and then choose whether to pursue and accept it. For example, this first feature would require that the plaintiffs in *Johnson Controls* (who were female and capable of becoming pregnant) and *Echazabal* (who had hepatitis C) equally retain this decisionmaking power. Similarly, in Situations #1 and #2 posed at the beginning of this Article, this first feature would demand that Sheila (who is pregnant) and Bill (who has epilepsy) equally retain this decisionmaking power.

The tempting counterargument against this first feature of informational paternalism is the Supreme Court's *Echazabal* decision. As discussed above, the *Echazabal* Court concluded that the EEOC's expanded direct threat regulations—which allowed an employer to reject a disabled applicant solely because of job-related risks to his or her own safety—were reasonable²⁶⁴ and made sense under the ADA.²⁶⁵ Consequently, one could credibly argue that this decision's allowance of applicant-specific paternalism under the ADA runs counter to the “prohibition of applicant-specific paternalism” feature.

However, the Court wrongly decided *Echazabal* for three distinct reasons.²⁶⁶ First, the Court did not rest its decision upon—nor was it presented with—any legally sufficient and accurate concern of employers that could serve to justify the EEOC's expanded direct threat regulations. Specifically, *Chevron*

264. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 87 (2002).

265. *Id.* at 84.

266. As an initial rebuttal to the *Echazabal* counterargument, one could attempt to minimize the Court's decision as a straightforward and procedural application of the *Chevron* regulatory deference standard. While convenient, this characterization of *Echazabal* is overly narrow and too quickly brushes aside the more substantive aspects of the decision. Indeed, the Court decided *Echazabal* in the regulatory deference context; but, in so doing, it nonetheless was required to make (and made) substantive judgments regarding workplace paternalism. For example, consider the Court's ultimate conclusion that the EEOC's expanded direct threat regulations made sense under the ADA. *Id.* at 84–87. That conclusion reflects a substantive judgment regarding the merit and viability of the proffered justifications for those regulations. In light of these substantive judgments by the Court, it would not be appropriate to characterize its *Echazabal* decision as a simple, formulaic regulatory deference case.

had urged that these regulations were reasonable because they allow employers “to avoid [1] time lost to sickness, [2] excessive turnover from medical retirement or death, [3] litigation under state tort law, and [4] the risk of violating the national Occupational Safety and Health Act of 1970.”²⁶⁷

The *Echazabal* Court rested its decision only on the justification based on the Occupational Safety and Health Act and wholly failed to discuss the first three justifications.²⁶⁸ Before turning to the Court’s reliance on this fourth justification, it is important to understand why it completely skipped the other enumerated justifications. The reason is clear—the Court’s own established precedent had rejected the first three justifications as legally insufficient under federal employment discrimination law.

As to the first and second justifications (the time lost to sickness of disabled workers and excessive turnover from medical retirement or death of disabled workers), they collectively represent an employer’s fear regarding the extra or increased costs of employing disabled workers. This fear is the ADA equivalent of an employer’s fear regarding the extra or increased costs of employing women—or, as the *Johnson Controls* court characterized it, “a fear that hiring fertile women will cost more.”²⁶⁹ Yet, in *Johnson Controls*, the Court unequivocally rejected this very “extra cost” justification under Title VII: “The extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender. . . . We merely reiterate our prior holdings that the incremental cost of hiring women cannot justify discriminating against them.”²⁷⁰

By analogy, the same is true under the ADA: The extra cost of employing disabled workers (whether from additional time lost to sickness or from excessive turnover from medical retirement) is a legally inadequate justification for disability-based discrimination. In fact, in *Echazabal*, the Ninth Circuit made this precise point. Speaking to the extra cost justification for the EEOC’s expanded regulations, the court correctly observed that neither a fear that hiring a disabled individual will cost more nor the extra cost of

267. *Id.* at 84.

268. *Id.* at 84–85.

269. *Int’l Union v. Johnson Controls*, 499 U.S. 187, 210 (1991).

270. *Id.* at 210–11 (referring to its decision in *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 716–18 & n.32 (1978)); see also *EEOC v. Ind. Bell Tel. Co.*, 256 F.3d 516, 523–24 (7th Cir. 2001) (“[A]rguments that expense justifies discriminatory conduct met their Waterloo in *Manhart*.”); *id.* at 524 (“[T]he Supreme Court held that neither health nor cost considerations could support the employer’s policy [in *Johnson Controls*]; Title VII entitles women to work without regard to the potentially higher costs that employers might experience.”).

employing disabled individuals would in itself provide an affirmative defense to a discriminatory refusal to hire those individuals.²⁷¹

As to the third justification (litigation under state tort law), it is little more than the ADA equivalent of an employer's fear regarding potential tort liability resulting from a pregnant female's on-the-job injury that we saw in *Johnson Controls* and that the Court rejected in the Title VII context.²⁷² The Court rebuffed this very tort liability justification under Title VII for two significant reasons. First, the Court viewed this employer fear regarding tort liability as a mere variant or subset of the broader fear regarding extra cost, which it had rejected as a justification for sex-based discrimination under Title VII. Second, the Court persuasively proposed that state tort liability for prenatal injury would likely be federally preempted by Title VII, because it would "punish employers for *complying* with Title VII's clear command."²⁷³

By analogy and for identical reasons, the same is true under the ADA: State tort liability for a disabled worker's on-the-job injury is a legally inadequate justification for disability-based discrimination. First, as discussed above, an employer's broader fear regarding the extra cost of employing a disabled worker (and the subset fear regarding state tort liability) is simply a legally insufficient basis to exclude him or her under the ADA. Second, such state tort liability would likely be federally preempted by the ADA. Otherwise, the imposition of tort liability as to injured disabled workers would place employers in a no-win situation: (a) if an employer complies with the ADA's clear command of not excluding a worker because of his or her disability (and any job-related risks that they pose to themselves), then it would run afoul of state tort law; and (b) if an employer complies with state tort law by excluding this disabled worker to avoid negligence-based liability, then it would run afoul of Title VII.²⁷⁴ Indeed, in *Echazabal*, the Ninth Circuit reiterated this exact point regarding the ADA's likely preemption of state tort liability: "[G]iven that the ADA prohibits employers from refusing to hire individuals solely on the ground that their health and safety may be threatened by the job, state tort law would likely be preempted if it interfered with this requirement."²⁷⁵

Given that these first three proffered justifications for the EEOC's expanded direct threat regulations were clear losers, the *Echazabal* Court was left with the fourth and final justification—potential liability under the

271. *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1070 (2000).

272. *Johnson Controls*, 499 U.S. at 208.

273. *Id.* at 209.

274. *Id.*

275. *Echazabal*, 226 F.3d at 1070.

Occupational Safety and Health Act. Concluding that this “concern with [the Act] . . . [is] enough to show that the regulation is entitled to survive [as] reasonable,”²⁷⁶ the *Echazabal* Court reasoned that an “employer would be asking for trouble” if it hired a disabled applicant who posed a direct threat to his or her own safety.²⁷⁷ Thus, the Court viewed as an open question whether an employer would be liable under the Act if it had taken all measures within its power to eliminate, reduce, and/or abate the dangers and hazards of a particular job but still hired a disabled worker who “knowingly consented to the particular dangers the job would pose to him [or her].”²⁷⁸

Stated simply, the *Echazabal* Court’s conclusion rests on an inaccurate view of the reach and scope of the Occupational Safety and Health Act of 1970. The Act’s reach is not so broad as to demand a 100 percent danger-free or risk-free workplace; instead, the Act only requires employers to act reasonably in eliminating, reducing, and/or abating known dangers and hazards of a position. For example, in the Act’s findings and purpose section, Congress clearly stated that its intent was “to assure *so far as possible* every working man and woman in the Nation safe and healthful working conditions”²⁷⁹ In addition, Congress mandated that employers comply with “occupational safety and health standards” that “require[] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes [that are] *reasonably necessary or appropriate* to provide safe or healthful employment and places of employment.”²⁸⁰ Similarly, Congress stated that the standards regarding job-related exposure to toxic materials or harmful physical agents must set forth protective measures that “*most adequately assure*[], *to the extent feasible*, . . . that no employee will suffer material impairment of health or functional capacity even if such employee had regular exposure to the hazard . . . for the period of his working life.”²⁸¹ Consistent with these statutory provisions, both the courts and the Occupational Safety Health Review Commission (the federal administrative agency that adjudicates

276. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 84 (2002).

277. *Id.* at 85.

278. *Id.* at 84–85.

279. 29 U.S.C. § 651(b) (2006) (emphasis added); see also *id.* § 651(b)(7) (“The Congress declares it to be its purpose and policy . . . to preserve our human resources . . . by providing medical criteria which will *assure insofar as practicable* that no employee will suffer diminished health, functional capacity, of life expectancy as a result of his work experience” (emphasis added)).

280. *Id.* §§ 652(8), 654(a)(2) (emphasis added); see also 29 C.F.R. § 1910.2(f) (2010) (defining “standard” as one that “requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, *reasonably necessary or appropriate* to provide safe or healthful employment and places of employment” (emphasis added)).

281. 29 U.S.C. § 655(b)(5) (emphasis added).

disputes regarding OSHA citations) have consistently reiterated this view that the Act does not require a 100 percent danger-free workplace.²⁸²

Consequently, potential liability based on the Occupational Safety and Health Act for a disabled worker's on-the-job injury is a legally inaccurate justification for disability-based discrimination. If an employer takes all reasonably necessary, appropriate, and feasible job-related measures to eliminate, reduce, and/or abate the dangers and hazards of a position, then it would not be risking contravention of the Act if it then hires a disabled worker whose condition creates unique, particular dangers to him or her. There is no open question under the Act as to the employer's potential liability. For example, assume that Chevron in *Echazabal* had taken all reasonably necessary, appropriate, and feasible job-related measures to eliminate, reduce, and/or abate the dangers and hazards regarding worker exposure to toxins on its oil platforms. In this type of situation, the job is as safe and hazard-free as objectively practicable; no other job-related measure is available to the employer that would render the job safer and less hazardous. So, in these circumstances, does Chevron (or any other similarly situated employer) switch from OSHA-compliant to OSHA-violative when it hires Echazabal, whose disability creates unique, particular dangers to him? No. After all, those dangers are not job-specific and are not capable of elimination, reduction, and/or abatement by any job-related measure. Instead, those dangers are worker-specific and

282. See, e.g., *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 641-42 (1980) (plurality opinion) (“[W]e think it is clear that the statute was not designed to require employers to provide absolutely risk-free workplaces whenever it is technologically feasible to do so . . . Rather, both the language and structure of the Act, as well as its legislative history, indicate that it was intended to require the elimination, as far as feasible, of significant risks of harm . . . By empowering the Secretary [of Labor] to promulgate standards that are ‘reasonably necessary or appropriate to provide safe or healthful employment and places of employment,’ the Act implies that . . . the Secretary must make a finding that the workplaces in question are not safe. But ‘safe’ is not the equivalent of ‘risk-free.’”); *Pratt & Whitney Aircraft v. Sec’y of Labor*, 649 F.2d 96, 103-04 (2d Cir. 1981) (referencing *American Petroleum* and citing the Supreme Court’s above-quoted language with approval); *Cardinal Indus., Inc.*, 14 BNA OSHC 1008, 1011 (No. 82-427, 1989) (“The Act contemplates that employers will be attentive to the safety and health of their employees, and will read OSHA standards with their protective purpose in mind. But the Act does not require . . . employers to assume that standards are drafted to create risk-free workplaces.”); *Anoplate Corp.*, 12 BNA OSHC 1678, 1681 (No. 80-4109, 1986) (referencing *American Petroleum* and citing the Supreme Court’s above-quoted language with approval); *Harris Graphics Corp.*, No. 84-1191, 1985 WL 44743, at *5 (OSHRC Oct. 19, 1985) (ALJ) (“[A] safe workplace is not defined as risk-free.”); *U.S. Steel Corp.*, No. 79-1998, 1981 WL 19215, at *6 (OSHRC Jan. 7, 1981) (“[U]nder the recent Supreme Court decision in [*American Petroleum*], affirming the moderate balanced approach to employee safety originally intended by drafters of the Act, an employer is simply not obligated to provide a risk-free work environment.”); *Fitzpatrick-Schiavone*, No. 79-3943, 1980 WL 10401, at *7 (OSHRC Sept. 12, 1980) (ALJ) (“[A] ‘safe’ workplace is not the equivalent of a ‘risk-free’ workplace.” (citing *American Petroleum*, 448 U.S. 607)).

worker-created and thus “beyond employer elimination, reduction, and/or abatement per the Act’s requirements.”²⁸³

The second distinct reason that the Supreme Court wrongly decided *Echazabal* involves an unintended red herring—specifically, its view that a reasonable, legal difference exists between impermissible paternalism towards broad “classes” of applicants and permissible paternalism towards individual, specifically at-risk applicants.²⁸⁴ Based on this distinction, the Court approved the EEOC’s expanded direct threat regulations as falling into the latter category, as they “demand[ed] . . . particularized enquiry into the harms the employee would probably face”²⁸⁵ and “requir[ed] that judgments based on the direct threat provision be made on the basis of individualized risk assessments.”²⁸⁶ Using this same distinction, the Court viewed its *Dothard* and *Johnson Controls* decisions as falling into the former category and “beside the point,” as they were concerned with paternalistic judgments based on the broad category of gender.²⁸⁷

Admittedly, the ADA’s requirement of an employer’s particularized and individualized inquiry regarding a disabled applicant’s impairment and job-related capabilities is not only a distinction from Title VII but also a distinction that alleviates concerns regarding an employer’s blanket, paternalistic

283. Similarly, consider employers that have jobs with inherent dangers and hazards that cannot be fully eliminated, reduced, and/or abated (such as a chainsaw operator, a skyscraper construction worker, a tree removal climber, a roofer, or a handler of hazardous chemicals or toxic waste). These employers are not “asking for trouble” under the Act simply because they have such inherently dangerous or hazardous jobs. Instead, if these employers have taken all reasonably necessary and appropriate and feasible job-related measures to reduce these inherent dangers and hazards of such positions, they would not be subject to liability under the Act.

284. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85–86 (2002); see also Lacy, *supra* note 254, at 87 (“In other words, the Court argued that two types of paternalism existed: good paternalism and bad paternalism, and the ADA was enacted to eradicate bad paternalism. The Court reasoned that . . . the EEOC regulation constituted the good type of paternalism, because it requires an individualized inquiry into the threat of harm to the employee instead of allowing the use of generalized stereotypes against an entire class of people with disabilities.”); Russell Powell, *Beyond Lane: Who Is Protected by the Americans With Disabilities Act, Who Should Be?*, 82 DENV. U. L. REV. 25, 35 (2004) (“While the ADA was enacted to prevent employer paternalism in the form of discrimination, the [*Echazabal*] Court reasoned that the threat-to-self defense reflected a different and acceptable form of paternalism.”).

285. *Echazabal*, 536 U.S. at 85–86.

286. *Id.* at 86 n.5 (referencing the requirement of individualized assessments of an individual’s present ability to safely perform the essential functions of the job); see also *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 731 (5th Cir. 2007) (“The employer must make an ‘individualized assessment of the individual’s present ability to safely perform the essential functions of the job.’” (citing *Echazabal*, 536 U.S. at 86)); *Darnell v. Thermafiber, Inc.*, 417 F.3d 657, 660 (7th Cir. 2005) (“The determination that [the applicant] poses a direct threat must be premised upon . . . ‘an expressly individualized assessment of the individual’s present ability to safely perform the essential functions of the job.’” (citing *Echazabal*, 536 U.S. at 86)).

287. *Echazabal*, 536 U.S. at 85 n.5.

judgments or prejudices against the “broad category”²⁸⁸ of disability. The *Echazabal* Court did not err on this point. Nonetheless, the Court failed to see that this distinction is without a legal difference in the context of applicant-specific paternalism, because it focuses only upon the means of a disabled applicant’s exclusion, rather than the unlawful end result of that exclusion.

Undoubtedly, the *Echazabal* Court’s differentiation between (a) impermissible, “class”-based paternalism and (b) permissible, “individual”-based paternalism considers only the *means* by which an employer excludes a disabled applicant—via individualized inquiry or broad stereotype. Inexplicably, however, the Court’s distinction flatly overlooks the real problem here—namely, the unlawful end result of disparate treatment of disabled applicants that occurs regardless of the means. For example, as discussed above, both Congress (in the ADA and the OWBPA) and the Court (in its *Dothard* and *Johnson Controls* decisions) repeatedly emphasized that applicant-specific paternalism was illegal because its end result was an employer’s targeted, inappropriate seizure of decisionmaking power from (and thus disparate treatment of) applicants with a federally protected characteristic such as disability or sex. From a legal perspective, the *Echazabal* Court fails to see that it is irrelevant how the decisionmaking power of a disabled applicant like *Echazabal* is seized by an employer. It only matters *that* an employer disparately seizes it. Similarly, from the practical perspective of the excluded, disabled applicant, it is irrelevant how an employer excludes him or her from a job whether by individualized inquiry or by broad stereotype. It only matters that the employer excluded him or her, because the end result, regardless of the means, is the unlawful, discriminatory act that causes severe wage-related and other losses.

In addition, and as discussed below in Part II.B.2, Congress enacted the ADA with an antidiscrimination purpose and policy that was just as broad and comprehensive as those of Title VII and the ADEA. Yet, despite this equally broad and comprehensive purpose, the *Echazabal* Court’s acceptance of permissible, individual-based paternalism serves only to excuse one concrete form of disparate treatment under the ADA. Such disparate treatment is not excused under any other federal employment discrimination statute. Consequently, far from being “beside the point,”²⁸⁹ the Supreme Court’s *Dothard* and *Johnson Controls* decisions—in addition to Congress’s enactment of the ADA and the OWBPA—show that the *Echazabal* Court had restrictive tunnel vision as to only the means of

288. *Id.* at 85–86.

289. *Id.* at 85 n.5.

excluding disabled job applicants, rather than a broader, more appropriate view regarding the real problem and unlawful end result of those exclusions—disparate treatment.²⁹⁰

The third distinct reason that the Supreme Court wrongly decided *Echazabal* is that, contrary to over a generation of Supreme Court precedent, it permitted an employer's good-faith or benign intent to justify intent-based discrimination. Ultimately, the Court's approval of the EEOC's expanded direct threat regulations allows an employer, such as Chevron, to disparately exclude disabled applicants based on benign intent—for example, the good-faith purpose of eliminating OSHA liability concerns or, even more admirable, the purpose of protecting disabled applicants from job-related risks.

Of course, a key problem with this result is that, for almost forty years now, the Court has consistently rejected nonmalevolent (including good-faith and benign) intent as an unacceptable justification for employment discrimination. For example, in its 1971 decision in *Griggs v. Duke Power Co.*,²⁹¹ the Court first noted that an employer's "good intent or absence of discriminatory intent does not redeem employment procedures" that are otherwise discriminatory under Title VII.²⁹² Similarly, in its *Johnson Controls* decision, the Court unequivocally rejected any argument that intent-based discrimination under Title VII could be justified by an employer's good-faith or benign purpose:

Whether an employment practice involves disparate treatment through explicit facial discrimination does *not* depend on *why* the employer discriminates but rather on the explicit terms of the discrimination. . . . The *beneficence* of an employer's purpose does *not* undermine the conclusion that an explicit gender-based policy is sex discrimination . . . and thus may be defended only as a BFOQ.²⁹³

290. Cf. Lacy, *supra* note 254, at 56 ("This [*Echazabal*] holding allows employers to treat people with disabilities differently from other minorities . . ."); *id.* ("The ADA was enacted to bring people with disabilities out of their subordinated class and onto the same level as others in society. However, the Court's decision in *Echazabal* seems to counteract this initial purpose . . ."); Silvers, Waterstone & Stein, *supra* note 233, at 965–66 ("[T]he ADA was intended to do more than provide just an individualized inquiry. Rather, the overreaching goal of this civil rights statute was to prevent discrimination against people with disabilities. This aspiration included protection against workplace policies that impose employers' narrow ideas of their employees' good and thereby deprive competent disabled individuals of employment opportunities.").

291. 401 U.S. 424 (1971).

292. *Id.* at 432.

293. *Int'l Union v. Johnson Controls*, 499 U.S. 187, 199–200 (1991) (emphasis added); see also *id.* at 188 ("[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.").

Based on this view, the *Johnson Controls* court predictably rejected the Seventh Circuit's assumption that the fetal-protection policy at issue was lawful because the asserted reason for the gender-based exclusion (protecting women's unconceived offspring) was ostensibly benign²⁹⁴ and then held that the well-intentioned policy nonetheless constituted "sex discrimination forbidden under Title VII."²⁹⁵ In comparison, the *Echazabal* decision represents a simply contradictory proposition under the ADA—namely, that an employer's good intent, absence of discriminatory intent and beneficence of purpose (such as its intent of protecting a disabled applicant from job-related risks) is a viable excuse for disability-based discrimination against that applicant under the ADA. This proposition of sanctioning well-intentioned discrimination against applicants with federally protected characteristics flatly ignores the Court's longstanding precedent on this issue.²⁹⁶

b. Legislative and Judicial Evidence of the Secondary Philosophy

In addition, Congress and the Supreme Court mutually embraced the secondary philosophy, which categorizes an employer's broader, business-based purpose of protecting other individuals connected to the workplace

294. *Id.* at 198.

295. *Id.* at 200.

296. Additionally, the *Echazabal* decision leads to a bizarre result regarding a person's employment decisions: He or she has the right to make "smaller" decisions but lacks the right to make "larger" ones. Of course, some of a person's job-related decisions involve larger or more important issues (such as whether to accept the job or promotion in the first place), whereas others involve smaller or less important issues (such as whether to sign a waiver in exchange for severance pay). One would expect that a worker's right to make decisions on the smaller or less important issues would translate to a right to make decisions on the larger or more important issues as well.

The *Echazabal* decision rejects that reasonable expectation. For example, when enacting the OWBPA, Congress dealt with an older worker's decision on a smaller or less important issue—whether to sign a waiver that includes federal age discrimination claims under the ADEA. Congress made the clear choice to preserve (rather than seize) that worker's decisionmaking power on this smaller or less important issue. See *supra* notes 255–259 and accompanying text (discussing Congress's OWBPA-based emphasis on preserving rather than co-opting an older worker's decisionmaking power). In contrast, when deciding *Echazabal*, the Supreme Court dealt with a disabled worker's decision on a larger or more important issue—whether to accept a risky job. By allowing applicant-specific paternalism, the Supreme Court allowed employers to seize that worker's decisionmaking power on this larger or more important issue.

Thus, the *Echazabal* decision raises a simple question: If federal law so vigilantly protects an individual's decisionmaking power for the smaller or less important issue of waiving a federal employment discrimination claim, why would it not do the same for the larger or more important issue of obtaining that employment in the first place? After all, a worker cannot exercise his or her decisionmaking power as to the former (which occurs on the back end of the employment relationship) if he or she is not afforded decisionmaking power as to the latter (which occurs on the front end of the employment relationship).

(such as customers or other co-workers) from job-related risks attributable to an applicant's federally protected characteristic(s) as an acceptable basis for excluding him or her.

First, from the legislative perspective, Congress manifested this secondary philosophy when enacting the ADA. In fact, this secondary philosophy simply reflects Congress's permission of an employer's "other individuals"-specific protective purpose via the ADA's direct threat defense. Specifically, in the ADA's express language and legislative history, Congress provided a clear picture of an employer whose protective practices were lawful, rather than crossing an overprotective line—namely, one that excludes a disabled applicant based upon concerns for the safety and/or health of others in the workplace. For example, the ADA's defenses section expressly makes the direct threat defense available when the safety and/or health of other individuals in the workplace would be at risk due to an applicant's disability.²⁹⁷ Similarly, the ADA defines "direct threat" only in terms of "significant risk[s] to the health or safety of others"²⁹⁸ In the ADA's legislative history, Congress also consistently described the direct threat defense as being applicable when an applicant's disability posed job-related risks to "other individuals in the workplace," "others in the workplace," "others," or "other coworkers or customers."²⁹⁹ Thus, Congress clearly viewed an employer's "other individuals"-specific protective purpose as a legitimate basis for excluding disabled applicants under the ADA's direct threat defense.

Second, from the judicial perspective, the Supreme Court also manifested the secondary philosophy in its *Dothard* and *Johnson Controls* decisions. As with Congress's and the ADA's direct threat defense, this secondary philosophy is a straightforward reflection of the Supreme Court's permission of an employer's "other individuals"-specific protective purpose via Title VII's BFOQ defense. For example, in *Dothard*, the Court demanded that more be at stake than applicant-specific dangers and risks of employment in order to justify sex-based job exclusions under Title VII's BFOQ defense.³⁰⁰ Instead, insisting upon an employer's broader purpose of protecting institution-essential third parties for a viable BFOQ defense, the *Dothard* court concluded that Alabama's regulation (which excluded

297. 42 U.S.C. § 12113(b) (2006).

298. *Id.* § 12111(3).

299. See *supra* notes 150–152 and accompanying text (discussing the legislative history of the ADA's direct threat defense).

300. *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977).

women applicants from correctional counselor positions in all-male prisons) permissibly stemmed from an “other individuals”-specific protective purpose:

The likelihood that inmates would assault a woman because she was a woman would pose a *real threat* . . . to the basic control of the penitentiary and *protection of its inmates and . . . other security personnel*. The employee’s very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor’s responsibility.³⁰¹

Similarly, in *Johnson Controls*, the Court reiterated these principles from *Dothard* and quickly rejected any Title VII BFOQ defense as to the fetal-protection policy at issue. According to the Court, this policy simply did not stem from any broader purpose to protect “other individuals” in the workplace (such as customers or co-workers), as the Court instead found that unconceived fetuses were “neither customers nor third parties” whose safety was an essential part of Johnson Controls’ business.³⁰²

In contrast, the Court approvingly highlighted both *Dothard* and *Western Air Lines* as cases in which viable and proper BFOQ defenses applied due to the requisite broader purpose of protecting institution-essential third parties—specifically, the inmates in *Dothard* and the passengers on the plane in *Western Air Lines*.³⁰³ As a result, the Supreme Court plainly considered an employer’s “other individuals”-specific protective purpose to be a legitimate basis for excluding applicants under the BFOQ defense.

The “prohibition of applicant-specific paternalism” feature of my proposed informational paternalism blends seamlessly with this secondary philosophy of Congress and the Supreme Court. As discussed above, this first feature purposefully restricts its prohibition to an employer’s paternalistic exclusions based on risks posed to that individual in order to make a clear point: This feature coexists with, and does not displace or otherwise affect, the BFOQ and direct threat defenses. Thus, this first feature and the secondary philosophy cover two different scenarios. On the one hand, the prohibition covers the narrower, applicant-specific scenario in which an employer excludes a person merely because of job-related safety and/or health risks posed to that individual due to his or her federally protected

301. *Id.* at 335 (emphasis added).

302. *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 203–04 (1991); *see also supra* note 116 (discussing the *Johnson Controls* decision).

303. *Id.* at 203. *See* Silvers, Waterstone & Stein, *supra* note 233, at 958 (“The ruling in *Johnson Controls* firmly established that to justify excluding women from workplace opportunities because of their sex, employers had first to prove such exclusions actually prevented women from harming third parties.”).

characteristic(s). On the other hand, the secondary philosophy covers the broader, “other individuals”-specific scenario in which an employer excludes an applicant to protect other individuals connected to the workplace from job-related risks attributable to an applicant’s federally protected characteristic(s). Consequently, the “prohibition of applicant-specific paternalism” feature complements—rather than compromises—this secondary philosophy and its foundational direct threat and BFOQ defenses.

2. Federal Employment Discrimination Policy

Beyond reflecting Congress’s and the Supreme Court’s longstanding philosophy regarding workplace paternalism, the “prohibition of applicant-specific paternalism” feature is also justified on policy grounds. Specifically, this first feature serves to fully advance (rather than compromise) federal antidiscrimination policy in three distinct ways.

First, this first feature dispels (rather than promotes) the troubling presumption, stereotype, and myth that a disabled person is incapable or less than fully capable of thoughtful, rational decisionmaking as to employment-related choices. Both the ADA’s express language and legislative history demonstrate Congress’s clear purpose of addressing inaccurate employer notions regarding a disabled applicant’s job-related abilities. For example, in the ADA’s findings section, Congress expressly recognized that disabled persons have been “subjected to a history of purposeful unequal treatment, . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals”³⁰⁴

Moreover, in the ADA’s legislative history, Congress repeatedly emphasized the problematic reality of disability-based discrimination. For example, the House Committee on Education and Labor perceptively observed “the major categories of job discrimination faced by people with disabilities include . . . [a] refusal to hire based on presumptions, stereotypes and myths”³⁰⁵ Similarly, the committee also recognized that discrimination against people with disabilities “often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies”³⁰⁶ as well as “stereotypical assumptions, fears and myths not truly indicative of the ability of such individuals to participate in and contribute to society.”³⁰⁷

304. 42 U.S.C. § 12101(a)(7) (2006).

305. H.R. REP. NO. 101-485, pt. 2, at 33 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 315.

306. *Id.* at 30.

307. *Id.* at 40.

Consequently, when enacting the ADA, Congress made clear that the ADA targets and prohibits employment decisions based on these presumptions, stereotypes, and myths. Specifically, the Committee on Education and Labor explained:

[Employers] are required to make employment decisions based on facts applicable to individual applicants or employees, not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do.

The Act is premised on the obligation of employers to consider people with disabilities as individuals and to avoid prejudging what an applicant or employee can or cannot do on the basis of that individual's appearance or any other easily identifiable characteristic, or on a preconceived and often erroneous judgment about an individual's capabilities based on "labeling" of that person as having a particular kind of disability.³⁰⁸

Similarly, the House Committee on the Judiciary showed equal hostility towards an employer's disability-based discrimination as it observed that many of the problems faced by disabled people are the result of discriminatory policies based on "unfounded, outmoded stereotypes and perceptions"³⁰⁹ The Committee also found that stereotypes and misconceptions about the abilities and inabilities of persons with disabilities continue to be pervasive and that discrimination occurs against persons with disabilities because of "stereotypes, discomfort, misconceptions, and fears about increased costs and decreased productivity."³¹⁰

The allowance of applicant-specific paternalism under the ADA's direct threat defense (per *Echazabal* and the EEOC's regulations) frustrates this congressional purpose of targeting employer presumptions, stereotypes, and myths regarding the abilities of disabled applicants. In fact, it sadly promotes and reinforces two inaccurate employer notions: (a) that a disabled person is incapable or less than fully capable of thoughtful, rational decisionmaking

308. *Id.* at 58.

309. *Id.*, pt. 3, at 25, reprinted in 1990 U.S.C.C.A.N. 445, 448; see also *id.* at 45 ("A person with a disability must not be excluded, or found to be un-qualified, based on stereotypes or fear."); *id.* ("Decisions are not permitted to be based on generalizations concerning the employee's disability but rather must be based on the facts of the individual case.")

310. *Id.* at 31; see also *id.*, pt. 2, at 71 (making the same statement); Craig Robert Senn, *Perception Over Reality: Extending the ADA's Concept of "Regarded As" Protection Under Federal Employment Discrimination Law*, 36 FLA. ST. U. L. REV. 827, 835-38 (2009) (highlighting this and other ADA language and legislative history to illustrate that the ADA's "regarded as" protection "reflects the central congressional philosophy that employer perception or stereotype is an appropriate justification for imposing employment discrimination liability, even when that perception or stereotype is erroneous or inaccurate").

as to employment choices; and (b) that the employer itself (which has not lived with that person's disability) is somehow more capable or better suited to balance the job's benefits against its safety and/or health risks and then make the best decision on behalf of the disabled applicant.

For example, consider the facts in both *Echazabal* and Situation #2 described in the Introduction above. In each case, the disabled job applicant (Echazabal with hepatitis C and Bill with epilepsy) fully understood the job-related safety and/or health risks that were attributable to the applicable disability. Then, after balancing the job's benefits (monetary and otherwise) against its safety and/or health risks, Echazabal and Bill each chose to pursue the risky, new job (the oil platform position and the heavy machinery assembly line position, respectively). However, under the ADA's direct threat defense following *Echazabal*, both Chevron and Company B can seize the respective applicant's decisionmaking power and then substitute its own decision. By doing so, both employers have essentially made the following statement to these disabled applicants:

You had the chance to make a rational decision regarding this job and your disability. You could not do it. Apparently, you are unable to make a correct job-related decision in these circumstances, and we are trumping your choice because we know better than you what the best decision is here.

Consequently, both Chevron and Company B hold—and act upon—two regrettable presumptions, stereotypes, and myths. First, these employers assume that their disabled applicants cannot make thoughtful, rational decisions regarding whether to accept a risky job. Second, these employers also assume that they can make those decisions more rationally than their disabled applicants. Thus, the allowance of applicant-specific paternalism perpetuates what the ADA was designed to dispel: employer notions that disabled applicants cannot do it, cannot do it correctly, and/or cannot do it as well as someone who is not disabled.³¹¹

311. See Ann Hubbard, *The Myth of Independence and the Major Life Activity of Caring*, 8 J. GENDER RACE & JUST. 327, 354 (2004) (“[*Echazabal*] effectively ‘endorsed the unjustified paternalism and stereotyping that Congress expressly sought to eliminate [when it enacted] the ADA.’ Why this ‘employer knows best’ approach for disabled employees, but not for non-disabled women employees?” (quoting NATIONAL COUNCIL ON DISABILITY, *Chevron v. Echazabal: The ADA’s “Direct Threat to Self” Defense*, (Feb. 27, 2003), available at <http://www.ncd.gov/newsroom/publications/2003/directthreat.htm>)); Lacy, *supra* note 254, at 68 (“[P]aternalism . . . is based on the insulting assumption that people with disabilities are not able to make their own decisions and lead their own lives as nondisabled people are allowed to do.”); *id.* at 90 (“The EEOC’s [direct threat] rule seems to view people with disabilities as incapable of making decisions as to what is best for them.”); *id.* at 92 (“The EEOC regulation relied on by *Chevron* . . . allows employers to treat people with disabilities as children by forcing them to forbear in certain ways, for their own

The “prohibition of applicant-specific paternalism” feature does just the opposite: It dispels these employer presumptions, stereotypes, and myths that disabled applicants are incapable or less than fully capable of rational decisionmaking and that employers are better-suited arbiters to make decisions on these applicants’ behalf. As Judge Easterbrook noted in his dissent from the Seventh Circuit’s Title VII decision in *Johnson Controls*, “[n]o legal or ethical principle compels or allows [an employer] to assume that women are less able than men to make intelligent decisions about the welfare of the next generation . . . and that the only acceptable level of risk is zero.”³¹² The same is true in the ADA context: Employer assumptions regarding the decisionmaking capabilities of disabled applicants are not compelled or allowed. Moreover, with its blanket prohibition of applicant-specific paternalism, this first feature simultaneously requires that all applicants, including the disabled, equally retain their decisionmaking power regarding whether to pursue and accept a risky job and that all employers defer to decisions of their applicants regarding such jobs. With these employers removed from the actual decisionmaking process of their disabled applicants, the employers are more likely to embrace the view that these applicants can do it, can do it correctly, and/or can do it as well as someone who is not disabled. Consequently, this first feature promotes the ADA’s purpose of targeting and dispelling employer presumptions, stereotypes, and myths regarding the abilities of their disabled applicants.

The second way in which the “prohibition of applicant-specific paternalism” feature fully advances federal antidiscrimination policy is that it eliminates a convenient smoke screen (or escape hatch) that malevolently intentioned employers may use to avoid ADA liability. When an employer discriminates against a person because of a federally protected characteristic, its intent can range from completely benevolent (“We only wanted to protect you from job-related risks that are attributable to your disability or sex.”) to entirely malevolent (“We dislike you and do not want you working for us because you are disabled or female.”).

good, regardless of their own wishes in the matter.”); Schaffer, *supra* note 254, at 1485 (“Society must assume the disabled are no more masochistic than those without disabilities, and are therefore able to make intelligent decisions about the trade-offs for themselves and their families when accepting positions that expose them to risk.”); Silvers, Waterstone & Stein, *supra* note 233, at 973 (“Not recognizing paternalistic employment practices as discriminatory when disabled workers alone are subjected to them encourages stereotyping disabled people as incompetent, incapable of deciding their good for themselves, and embeds the idea that they are inauthentic workers.”).

312. *Int’l Union v. Johnson Controls, Inc.*, 886 F.2d 871, 913 (7th Cir. 1989) (Easterbrook, J., dissenting).

While the Supreme Court has consistently noted that even an employer's 100 percent benevolent intent is sufficient to trigger liability under federal employment discrimination law,³¹³ it is the malevolently motivated employers that pose a significant risk of repeated, unlawful employment discrimination. After all, if left unchecked, these malevolent discriminators would seek to reject—and likely would reject—each and every disabled applicant or female applicant simply because it dislikes those characteristics.

The allowance of applicant-specific paternalism under the ADA's direct threat defense (per *Echazabal* and the EEOC's regulations) affords a potentially convenient escape hatch for these malevolent discriminators to avoid ADA liability. Indeed, courts have recognized this possibility in the comparable Title VII context. For example, the Fifth Circuit in *Weeks* perceptively observed that purportedly paternalistic reasons "could be used as a smoke screen by any employer bent on discriminating against women."³¹⁴ The court in *Johnson Controls* also alluded to this possibility when it recognized that an employer's asserted "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities."³¹⁵

To illustrate this point, consider again *Echazabal* and Situation #2 described in the Introduction above. In each case, neither Chevron nor Company B was said to possess any malevolent intent towards Echazabal because of his hepatitis C condition or towards Bill because of his epilepsy. Instead, both employers were described as benevolently aiming to protect their disabled applicant from job-related safety and/or health risks and/or nonmalevolently aiming to protect themselves from feared OSHA- or tort-based liability.

Now, vary the facts. Assume that both Chevron and Company B were malevolent discriminators that lacked any benevolent (or nonmalevolent) intent and merely excluded Echazabal and Bill because of a concealed, flat dislike of disabled workers. Despite this disability-based animus, the jarring point is that Chevron and Company B could still escape ADA liability via a pretextual direct threat defense after *Echazabal*. These two employers would only need to determine if any medically documented safety and/or health risks are uniquely attributable to Echazabal's and Bill's respective disabilities

313. See *supra* notes 293–295 and accompanying text (discussing the Supreme Court's views regarding this issue in *Griggs* and *Johnson Controls*).

314. *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (1969).

315. *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991). Cf. Kathleen Amerkhanian, Note, *Direct Threat to Self: Who Gets to Decide?*, 34 U. TOL. L. REV. 847, 866 (2003) ("When the EEOC first issued its interpretive regulations, including a 'direct threat to self' provision as a defense for employers, the disabled rights community protested. Protesters were concerned that allowing an employer to defend itself on such basis would allow the employer great latitude to come up with pretextual reasons to avoid hiring the disabled.").

and if so, assert that they excluded these disabled applicants based on those risks per the ADA's direct threat defense. If and when successful, these malevolent discriminators are then free to discriminate against other disabled applicants in the future. Consequently, the allowance of applicant-specific paternalism can provide an effective and convenient pretext to malevolent discriminators to cover up their animus-based motive and purpose.

In contrast, the "prohibition of applicant-specific paternalism" feature achieves the opposite result: It eliminates this pretext provided to malevolent discriminators. Simply put, this first feature's blanket prohibition disallows employers from excluding applicants based on applicant-specific intent, thereby removing the above-referenced escape hatch that currently exists under the ADA's expanded direct threat defense. Thus, even if we vary the facts of *Echazabal* and Situation #2 so that Chevron and Company B are malevolent discriminators, the prohibition captures and deters them, rather than affording them a potentially successful pretext they can use to escape liability. Additionally, this first feature's capture of these malevolent discriminators has a significantly broad impact: not only does it protect the interests of the particular, individual plaintiff, but it also protects the interests of future disabled applicants whom these employers would have excluded if not otherwise deterred.³¹⁶

The third and final way in which the "prohibition of applicant-specific paternalism" feature fully advances federal antidiscrimination policy is that it treats equally (rather than disparately) persons with disabilities and persons with other federally protected characteristics (sex, race, color, religion, national origin, or age of at least forty years old). As discussed above, when an employer engages in applicant-specific paternalism, the validity of an excluded applicant's employment discrimination claim currently depends on a single factor or variable: the protected characteristic at issue. The favored characteristic (a Title VII characteristic) yields a viable claim. But the disfavored characteristic (an ADA disability) produces a losing claim.

Thus, allowing applicant-specific paternalism under the ADA's direct threat defense (per *Echazabal* and the EEOC's regulations) creates a caste or class system within federal employment discrimination law: Those who are disabled are relegated to an inferior or nonpreferred position in the system because they have no legal protection from applicant-specific paternalism; but those who

316. Cf. Senn, *supra* note 310, at 857–58 (“[T]he impact of the [ADA’s] ‘regarded as’ protection is much broader than any one particular plaintiff This ‘regarded as’ protection also guards the interests of the subsequent multitudes of prospective plaintiffs whom [an employer] will accurately perceive as possessing those respective traits.”).

possess any other federally protected characteristic(s) are elevated to a superior or preferred position in the system because they have that legal protection.³¹⁷ So, in Situations #1 and #2 described in the Introduction above, Bill (as a disabled applicant with epilepsy) would hold this inferior or nonpreferred position in the caste system, whereas Sheila (as a female applicant) would hold the superior or preferred position. Similarly, Echazabal (as a disabled applicant with hepatitis C) would hold the lower, nonprotected position, whereas the plaintiffs in *Johnson Controls* (as female applicants) would hold the higher, protected position in the system.

Of course, Congress did not intend any such caste system, or preference for one federally protected characteristic over another, under federal employment discrimination law. Instead, Title VII, the ADEA and the ADA share equally broad and comprehensive antidiscrimination purposes and policies. For example, as to Title VII, Congress highlighted its expansive desire to meet a national need by eradicating significant areas of discrimination on a nationwide basis³¹⁸ and broadly eliminating discriminatory employment practices by business.³¹⁹ Similarly, when amending Title VII almost twenty years ago by passing the Civil Rights Act of 1991,³²⁰ Congress reiterated that by enacting Title VII, it had “made clear that it intended to prohibit *all* invidious consideration of sex, race, color, religion, or national origin in employment decisions.”³²¹ As to the ADEA, Congress stated the comparably comprehensive goal and purpose of “outlin[ing] a national policy against discrimination in employment on account of age”³²² Congress reiterated this aim in the statement of findings and purpose within the ADEA itself, declaring its aim “to prohibit arbitrary age discrimination in employment.”³²³

317. Cf. *id.* at 859 (“[J]urisdictions that refuse to recognize [the ‘regarded as’] protection outside the ADA context (1) elevate only the ADA to the ‘superior’ or ‘preferred’ position and (2) relegate Title VII and the ADEA to the ‘inferior’ or ‘non-preferred’ position.”).

318. H.R. REP. NO. 88-914, at 18 (1963), *reprinted at* 1964 U.S.C.C.A.N. 2391, 2393.

319. *Id.*

320. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.). In part, the Civil Rights Act of 1991 “expanded the remedies available to . . . plaintiffs by permitting, for the first time, the recovery of compensatory and punitive damages.” *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848 (2001); *see also* 42 U.S.C. § 1981a(a)–(b) (2006) (providing compensatory and punitive damage remedies under Title VII, subject to certain conditions and monetary caps).

321. H.R. REP. NO. 102-40, pt. 2, at 17 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 710; *see also id.*, pt. 1, at 14, *reprinted in* 1991 U.S.C.C.A.N. 549, 552 (characterizing Title VII broadly as a “mandate that discrimination on the basis of race, gender, national origin, or religion has no place in employment decisions”).

322. H.R. REP. NO. 90-805, at 7 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2220.

323. 29 U.S.C. § 621(b) (2006).

And, as to the ADA, Congress highlighted the Act's equally lofty and broad goals, as it stated that the ADA's purpose was to create a clear and comprehensive national mandate against disability-based discrimination and clear, strong, consistent, enforceable standards to battle that discrimination.³²⁴ Consequently, the allowance of applicant-specific paternalism creates a preference-based, caste system that overlooks Congress's equally comprehensive antidiscrimination purposes for Title VII, the ADEA, and the ADA.³²⁵

The "prohibition of applicant-specific paternalism" feature abolishes this caste system that is clearly contrary to Congress's intent. With its blanket ban on applicant-specific paternalism under each and every federal employment discrimination law, this first feature treats equally (rather than disparately) both Bill and Sheila in my hypothetical situations, and both Echazabal and the female applicants in *Johnson Controls*. Each of these applicants receives the same legal protection from applicant-specific paternalism and its resulting disparate treatment, rather than having Bill and Echazabal relegated to inferior or nonpreferred positions just because they possessed the disfavored federally protected characteristic. Thus, by equally treating each federally protected characteristic as favored and thus eliminating the caste system that disfavors disabled applicants, this first feature reflects Congress's aim of comparably broad and comprehensive federal antidiscrimination protections.

C. Defending the Job-Related Risk Notification Feature

The second feature of my proposed informational paternalism is its requirement that an employer provide written notice to an applicant (before he or she begins employment) regarding known job-related safety and/or health risks (if any) that are attributable to any known federally protected characteristic of the applicant. This uniform notification requirement is also applicable under each federal employment discrimination law.

This "job-related risk notification" feature reflects Congress's and the Occupational Safety and Health Administration's philosophy regarding the protection of workers in the context of their employment decisions. As evidenced by the OWBPA and the federal regulations accompanying the Occupational

324. 42 U.S.C. § 12101(b)(1)–(2).

325. See Senn, *supra* note 310, at 855–59 (highlighting this and other Title VII, ADEA and ADA language and legislative history and arguing for an extension of the ADA's "regarded as" protection to Title VII and the ADEA based on their equally comprehensive goals and purposes and equally broad antidiscrimination policies).

Safety and Health Act of 1970, both Congress and the OSHA share the following philosophy:

“Protection through information” philosophy: the proper and acceptable means by which to protect a worker in the context of employment decisions is to provide relevant information that aids his or her decisionmaking process (rather than to infringe upon or seize his or her decisionmaking power).

By embracing information and education as the means to protect workers, this shared philosophy represents a middle ground regarding worker protection: It avoids the two extremes of affording absolutely zero means of protection and affording overprotective and paternalistic means of protection (seizure of the worker’s decisionmaking power).

From a legislative perspective, Congress clearly embraced this “protection through information” philosophy when enacting the OWBPA. On a more general level, the Senate Committee on Labor and Human Resources emphasized that Congress would “perform a valuable service to employees by enacting legislation [the OWBPA] which preserves employee options and choices but at the same time ensures that those choices are *truly voluntary and informed*.”³²⁶ Thus, as mentioned above, Congress refused to protect older workers in the ADEA waiver context via means that would actually take away their decisionmaking power. Instead, Congress aimed to protect these workers via means that would actually inform and educate them as to their waiver-related decisions.

On a much more specific level, Congress codified two types of information-related measures that furthered its purpose of educating older workers before they make waiver-related decisions: substantive waiver requirements and procedural waiver requirements. As to the first type of information-related measures, the OWBPA imposes two waiver requirements that flatly demand that older workers be given certain substantive factual and/or legal information that is relevant to their waiver-related decisions. These two substantive waiver requirements are: (a) the additional requirement in reduction-in-force scenarios that the employer inform the individual in writing as to the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program;³²⁷ and (b) the basic requirement that the waiver specifically refer to rights or claims arising under the ADEA.³²⁸

326. S. REP. NO. 101-263, at 60 (1990) (emphasis added), reprinted in 1990 U.S.C.C.A.N. 1509, 1565.

327. 29 U.S.C. § 626(f)(1)(H)(ii).

328. *Id.* § 626(f)(1)(B).

Consequently, this substantive information serves to educate older workers with the very layoff-related data that could suggest a disparate impact on older workers and with the precise name of the federal employment discrimination law that may be at play.

The clear education-based purpose of these two substantive waiver requirements was not coincidence; instead, it was a premeditated choice that plainly evidences Congress's "protection through information" philosophy. For example, Congress emphasized an information-related explanation and rationale for the first requirement mentioned above, as it observed that these informational requirements will permit older workers to make more informed decisions in group termination and exit incentive programs. The informational requirements are designed to give all employees a better picture of these factors.³²⁹

In addition, Congress highlighted a similar education-based justification for the second requirement mentioned above, as it explained that "[t]his degree of clarity and specificity [regarding inclusion of ADEA claims within the waiver] increases the chances that individuals will know their rights upon execution of a waiver."³³⁰

As to the second type of information-related measures, the OWBPA also imposes three waiver requirements that mandate that older workers be given certain process-related protections that can assist in their waiver-related decisions. These three procedural requirements are: (a) the basic requirement that the employee be advised in writing to consult with an attorney prior to executing the agreement,³³¹ (b) the basic requirement that the employee be given a period of at least twenty-one days within which to consider the agreement (and the related substitute requirement in reduction-in-force scenarios that this period be expanded to at least forty-five days),³³² and (c) the basic requirement that the waiver be part of an agreement "that is written in a manner calculated to be understood by the employee."³³³ These process-related protections—from being advised to seek legal counsel to having at least three (if not more) weeks in which to review a clearly drafted agreement—afford older workers a better chance to become educated regarding both the ADEA and any viable legal claims that they may possess under the Act.

329. S. REP. NO. 101-263, at 34 ("The Committee believes that collectively these informational requirements will permit older workers to make more informed decisions in group termination and exit incentive programs."). See *supra* note 232 (presenting additional legislative history confirming the education-related purpose for this substantive waiver requirement).

330. S. REP. NO. 101-263, at 32; H.R. REP. NO. 101-664, at 51 (1990).

331. 29 U.S.C. § 626(f)(1)(E).

332. *Id.* § 626(f)(1)(F)(i)–(ii).

333. *Id.* § 626(f)(1)(A).

Similarly, the education-based purpose of these three procedural requirements was not accidental, but instead reflects Congress's "protection through information" philosophy. For example, Congress stressed the following education-based justification for the first requirement mentioned above:

Given the complexity of issues involved and the inherently unequal bargaining position of the parties, the Committee expects the employer to encourage employees to consult with counsel to determine what legal rights they may have. . . . [I]t is vitally important that the employee understand the magnitude of what he or she is undertaking. Legal counsel is in the best position to help the individual reach that understanding.³³⁴

Similarly, Congress emphasized a nearly identical information-related explanation and rationale for the second requirement mentioned above: "The employee needs time to learn about the conditions of termination, including any benefits being offered by the employer. Time also is necessary to locate and consult with an attorney if the employee want[s] to determine what legal rights may exist."³³⁵ In situations in which the forty-five day review requirement is applicable, Congress similarly observed that because these programs involve large numbers of employees and complex financial arrangements, "more time is needed to review options, understand the program, and consult with an attorney before signing away potentially valid legal claims."³³⁶ Finally, Congress again highlighted an education-based justification for the third requirement mentioned above: "The Committee expects that courts will pay close attention to the language used in the agreement, to ensure that the language is readily understandable to individual employees regardless of their education or business experience."³³⁷

From the federal regulatory perspective, the OSHA's federal regulations accompanying the Occupational Safety and Health Act of 1970 also reflect this "protection through information" philosophy. As discussed above, the Act obligates an employer to take all reasonably necessary, appropriate, and feasible job-related measures to mitigate or eliminate the dangers and hazards of a position. Importantly, however, for dangers and hazards that are inherent to the job or otherwise unable to be eliminated by the employer,³³⁸ the OSHA's federal regulations highlight information-related requirements

334. H.R. REP. NO. 101-664, at 52.

335. S. REP. NO. 101-263, at 33; *see also* H.R. REP. NO. 101-664, at 51 (using almost identical language).

336. S. REP. NO. 101-263, at 33.

337. *Id.* at 32-33; H.R. REP. NO. 101-664, at 51.

338. *See supra* note 283 and accompanying text (describing examples of jobs with inherent job-related dangers and hazards that cannot be fully eliminated, reduced, and/or abated).

that serve to educate applicable workers as to the relevant safety and/or health risks.

On a general level, in the “Hazard Communication” (HazCom) regulations applicable to jobs that involve exposure to toxic and hazardous substances,³³⁹ the OSHA stressed that its regulatory purpose was (a) “to ensure that . . . information concerning [these substances] hazards is transmitted to . . . employees”³⁴⁰ and (b) “to address comprehensively the issue of . . . communicating information concerning hazards . . . to employees.”³⁴¹ Similarly, in the “Guidelines for Employer Compliance” accompanying these HazCom regulations,³⁴² the OSHA reiterated its education-based purpose for these regulations: “The Hazard Communication Standard (HCS) is based on a simple concept—that employees have both a need and a right to know the hazards and identities of the chemicals they are exposed to when working. . . . The HCS is designed to provide employees with the information they need.”³⁴³

On a much more specific level, the OSHA’s HazCom regulations create precise information-related requirements that further this education-based purpose. For example, these regulations explicitly require that employers provide hazard-related information to at-risk employees by means of a hazard communication program³⁴⁴ that must—among other requirements—provide employees with effective information and training on hazardous chemicals in their work area.³⁴⁵ Furthermore, the OSHA stresses in its HazCom regulations that effective information and training requires employers to inform employees regarding any operations in their work area where hazardous chemicals are present³⁴⁶ and to train employees regarding the physical and health hazards of the chemicals in the work area and measures they can take to protect themselves.³⁴⁷ Finally, the OSHA reiterated its information-related

339. 29 C.F.R. § 1910.1200 (2010).

340. *Id.* § 1910.1200(a)(1).

341. *Id.* § 1910.1200(a)(2).

342. *Id.* § 1910.1200 app. E.

343. *Id.*

344. *Id.* § 1910.1200(b)(1); *see also id.* § 1910.1200(e)(1) (“Employers shall develop, implement, and maintain . . . a written hazard communication program”); *id.* § 1910.1200 app. E § 4 (“All workplaces where employees are exposed to hazardous chemicals must have a written plan which describes how the [HazCom] standard will be implemented in that facility.”).

345. *Id.* § 1910.1200(h)(1); *see also id.* § 1910.1200 app. E § 4(C) (“Each employee who may be ‘exposed’ to hazardous chemicals when working must be provided information and trained”). In addition, an employer’s HazCom program must also cover “labels and other forms of warning” for these hazardous substances, *id.* § 1910.1200(f), and “material safety data sheets” for those substances, *id.* § 1910.1200(g). *Id.* § 1910.1200(e)(1).

346. *Id.* § 1910.1200(h)(2)(ii).

347. *Id.* § 1910.1200(h)(3)(ii)–(iii).

explanation and rationale for these HazCom requirements when it noted that effective information and training is a critical part of the HazCom program, finding that “through effective information and training, workers will . . . understand the risks of exposure to the chemicals in their workplaces as well as the ways to protect themselves. A properly conducted training program will ensure comprehension and understanding.”³⁴⁸

Thus, both the OWBPA and the federal regulations accompanying the Occupational Safety and Health Act of 1970 evidence Congress’s and the OSHA’s shared “protection through information” philosophy. In each context, Congress and the OSHA opted to impose information-related measures that serve to educate a worker before he or she makes an employment-related decision. In the OWBPA context, the now-informed older worker can make the appropriate decision: either sign the waiver in exchange for severance pay or reject the waiver and preserve his or her ADEA federal age discrimination claim for possible litigation. In the OSHA context, the now-informed at-risk worker can also make the appropriate decision: retain the risky job and perform it properly so as to minimize those risks or leave the job because of those risks.

The “job-related risk notification” feature reflects this “protection through information” philosophy. Like both the OWBPA and the OSHA’s federal regulations, this second feature institutes an information-related requirement that serves to educate an applicant regarding known job-related safety and/or health risks (if any) that are attributable to any known federally protected characteristic of the applicant. As under the OWBPA and the OSHA’s federal regulations, the now-informed, at-risk applicant or worker can now make the appropriate decision to accept or reject a job based on its applicable risks. By using information and education as the means to protect

348. *Id.* § 1910.1200 app. E § 4(C) (“In general, the most important aspects of training under the HCS are to ensure the employees are aware that they are exposed to hazardous chemicals . . .”).

Other OSHA standards and regulations also impose information-related requirements that serve to educate workers as to relevant job-related risks. For example, in the “Process Safety Management of Highly Hazardous Chemicals” regulations, the OSHA requires that “[e]ach employee presently involved in operating a process [involving a highly hazardous chemical] . . . shall be trained in an overview of the process The training shall include emphasis on the specific safety and health hazards . . . and safe work practices applicable to the employee’s job tasks.” *Id.* § 1910.119(g)(1)(i). In support of this training requirement, the OSHA again offered an information-related explanation and rationale:

All employees . . . involved with highly hazardous chemicals need to fully understand the safety and health hazards of the chemicals and processes they work with Training conducted in compliance with . . . the [HazCom] standard[] will help employees to be more knowledgeable about the chemicals they work with However, additional training in subjects such as operating procedures . . . and other areas pertinent to process safety and health will need to be covered by an employer’s training program.

Id. § 1910.119 app. C § 6.

these at-risk applicants, this second feature achieves the same middle ground regarding worker protection as Congress and the OSHA: It offers much more than zero means of protection but justifiably stops short of overprotective and paternalistic means of protection.

Some employers may contend that this second feature's risk notification requirement imposes an undue burden on them. However, the scope of an employer's responsibility under this second feature is straightforward and manageable for three reasons. First, an employer's risk notification obligation does not apply to every job applicant for every job. Instead, the circumstances in which the risk notification requirement is triggered are much more modest. As mentioned above, this risk notification obligation attaches only if an employer is aware of both an applicant's federally protected characteristic and job-related risks that are attributable to that characteristic. If an employer lacks knowledge in at least one of these areas (or if a job simply poses zero safety and/or health risks attributable to a federally protected characteristic), then the risk notification obligation is inapplicable.³⁴⁹

Second, even when the risk notification obligation is applicable, the employer's required notice or disclosure is not extensive and does not demand complicated medical detail. Instead, this includes the bare bones of notice: nothing more than the two requisite bases of the known federally protected characteristic of the applicant and the known job-related risks that are attributable to that characteristic. For example, the facts of *Johnson Controls* show

349. Given these modest triggering circumstances for the risk notification requirement, one could argue that employers may simply take an "ignorance is bliss" approach to avoid triggering the risk notification obligation. However, employers are unlikely to take that approach for two reasons. First, and as discussed *infra*, employers likely already aim to learn about job-related safety and/or health risks for bona fide legal reasons (such as compliance with the Occupational Safety and Health Act of 1970 and/or the avoidance of potential liability under state tort law) and compelling moral ones. Consequently, if given the choice, employers would seem likely to opt for avoiding potentially significant federal and/or state liability, rather than sticking their heads in the sand to prevent the triggering of a modest notice requirement. Second, and specific to employer conduct under the ADA, employers likely want to continue using, where applicable, ADA-approved pre-employment medical examinations. Specifically, the ADA permits employers to require a postoffer but pre-employment medical examination of applicants, subject to certain limitations. 42 U.S.C. § 12112(d)(3) (2006). However, employers can only use these examinations for the confined purpose of determining "the ability of an applicant to perform job-related functions." *Id.* § 12112(d)(2)(B). While these medical examinations do serve to inform employers of applicable applicant impairments and any resulting job-related risks, these employers are concerned with a larger picture—namely, that of employing those who can perform the essential functions of the position without risk to co-workers or company property. Consequently, if again given the choice, employers would seem likely to opt for continued use of the ADA-approved pre-employment medical examinations that might allow them to avoid unqualified workers who could expose co-workers and company property to significant risk, rather than taking an "ignorance is bliss" approach to prevent the triggering of this modest notice requirement.

that the employer easily would have satisfied this modest risk notification requirement. Before implementing its exclusionary fetal-protection policy, *Johnson Controls* had adopted a simple “policy of warning.”³⁵⁰ Under that policy, Johnson Controls provided a written statement to women applicants for the lead-based exposure jobs, which advised of the risk of having a child while she was exposed to lead and stated that “medically speaking, [it was] just good sense not to run that risk if you want children and do not want to expose the unborn child to risk, however small”³⁵¹ Consequently, this policy and accompanying written disclosure adequately touch the two requisite bases of the second feature’s risk notification requirement—notice regarding the known federally protected characteristic and the known risks pertaining to that characteristic. Johnson Controls would have had to do nothing else.

Similarly, the facts of *Echazabal* also show that Chevron easily could have satisfied this minimal risk notification requirement. Based on the pre-employment physical examinations of Echazabal by Chevron’s physicians, Chevron had learned that he had elevated levels of liver enzymes and hepatitis C³⁵² and that his condition would be aggravated by continued exposure to toxins at the refinery.³⁵³ Consequently, Chevron withdrew its employment offers on these grounds.³⁵⁴ Under these facts, Chevron could simply have provided the following written disclosure to Echazabal in order to meet the second feature’s risk notification requirement:

Mr. Echazabal: It has come to our doctors’ attention during your pre-employment physical that you have hepatitis C and elevated liver enzymes.

The oil refinery job for which you received a conditional offer of employment would expose you to various solvents, chemicals, and toxins, and our doctors have indicated that you are likely to aggravate your condition and damage your liver, perhaps irreparably, if you perform this job and expose yourself to those toxins.

You are free to decide whether or not you still wish to assume this job in light of these safety and health risks.

This disclosure totals less than one hundred words and demonstrates the manageable—rather than unduly burdensome—scope of an employer’s risk notification obligation under the second feature.

350. *Int’l Union v. Johnson Controls*, 499 U.S. 187, 191 (1991).

351. *Id.*

352. *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1065 (9th Cir. 2000).

353. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 76 (2002).

354. *Echazabal*, 226 F.3d at 1065.

Lastly, the second feature's risk notification requirement likely blends with current employer practices regarding disclosure of job-related risks to workers. To one degree or another, prudent employers likely already notify their workers as to job-related safety and/or health risks, whether for the purpose of complying with or avoiding potential liability under the Occupational Safety and Health Act of 1970 or state tort law and/or protecting these workers out of a noble sense of moral obligation. For example, as to compliance with the Occupational Safety and Health Act of 1970, employers are already required to maintain a hazard communication program and "provide employees with effective information and training on hazardous chemicals in their work area."³⁵⁵ Similarly, as to compliance with state tort law, employers likely already provide risk-based information and disclosures to their employees so as to minimize exposure to a state negligence or other tort-based cause of action. In fact, the *Johnson Controls* court highlighted the legal utility that such a risk-based disclosure could have under state tort law. Specifically, the Court observed that if the employer fully informs the applicant of the risk, and the employer has not otherwise acted negligently, the basis for holding an employer liable seems remote at best³⁵⁶ and that a negligence finding would be very unlikely as to employers like Johnson Controls, which had complied with the lead standard developed by the OSHA and warned its female employees about the damaging effects of lead.³⁵⁷

Consequently, for employers whose current OSHA-based, tort-based, and/or morality-based practices already include risk-based disclosures to workers, the second feature's risk notification requirement simply becomes part and parcel of those practices. For those employers whose current practices do not include these risk-based disclosures, the risk notification obligation imposes only a modest responsibility that can yield significant benefits to the employer under federal workplace safety law and state tort law.³⁵⁸

355. 29 C.F.R. § 1910.1200(h)(1) (2010).

356. *Int'l Union v. Johnson Controls*, 499 U.S. 187, 208 (1991).

357. *Id.*; see also *Spees v. James Marine, Inc.*, 617 F.3d 380, 394 (6th Cir. 2010) ("JMI's risk of tort liability in this situation would be remote if it 'fully inform[ed]' Spees of the risk inherent to welding while pregnant and did not otherwise act negligently." (citing *Johnson Controls*, 499 U.S. at 208)); Jones, *supra* note 241, at 569–70 ("It is a well-accepted principal [sic] of law that if an individual consents to participation in a potentially dangerous activity, he has accepted the risk and waived his right to sue for damages Therefore, if a situation similar to *Echazabal* occurs, the employer will not be held liable unless the employee was not informed of the harm.").

358. The most reasonable consequence of an employer's failure to comply with the second feature's risk notification requirement (aside from its exposure to tort-based liability under state law) would likely be the imposition of a civil monetary penalty under the applicable federal employment discrimination law. This approach would be consistent with other federal employment-related laws (such as Title VII, the ADA, the Occupational Safety and Health Act of 1970, and the Family and

In sum, the “prohibition of applicant-specific paternalism” feature of informational paternalism is warranted because it reflects a longstanding philosophy shared by Congress (per the ADA and the OWBPA) and the Supreme Court that rejects an employer’s applicant-specific protective purpose as an unacceptable basis for excluding an applicant, and further serves to fully advance federal employment discrimination policy. In addition, the “job-related risk notification” feature embraces a clear philosophy shared by Congress (per the OWBPA) and the OSHA (per its federal workplace safety regulations) that seeks to protect workers by providing them with information relevant to their employment-related decisions (rather than by seizing their decisionmaking power).

CONCLUSION

At present, our federal employment discrimination laws lack uniform and consistent legal protection when an employer engages in applicant-specific paternalism. Under Title VII, the courts and the EEOC reject such paternalism, demanding that the applicant alone decide whether to pursue and accept a job that poses risks related to his or her sex, race, color, religion, or national origin. But, under the ADA, the courts and the EEOC allow applicant-specific paternalism, permitting an employer to seize decisionmaking power from the disabled applicant. Consequently, the validity of the excluded applicant’s employment discrimination claim regrettably depends on a single factor or variable: the protected characteristic at issue. The favored characteristic (a Title VII characteristic) yields a viable claim, but the disfavored characteristic (an ADA disability) produces a losing claim.

Embodying an effective middle-ground approach to protecting workers in the context of their employment-related decisions, my proposed informational paternalism represents a significant improvement in federal

Medical Leave Act (FMLA) of 1993) that use such penalties or fines as the consequence when an employer fails to comply with applicable notice-related requirements. See Title VII, 42 U.S.C. § 2000e-10(a)–(b) (2006) (requiring employers to post a notice describing Title VII and imposing a fine of not more than \$100 for noncompliance with that requirement); ADA, *id.* § 12115 (requiring employers to post a notice describing the ADA in the manner of Title VII’s notice and fine provisions); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 657(c)(1), 658(b), 666(i) (2006) (requiring employers to post a notice describing the Occupational Safety and Health Act protections as well as citations issued to them by the OSHA and imposing a civil penalty of up to \$7000 for each violation); FMLA, *id.* § 2619 (requiring employers to post a notice describing the FMLA and imposing a civil money penalty not to exceed \$100 for noncompliance); see also 29 C.F.R. §§ 1903.2(a)–(d), 1903.16(a)–(d) (setting forth OSHA regulations reiterating these posting requirements and civil penalties); *id.* § 825.300(a)(1) (setting forth FMLA regulations reiterating these posting requirements and money penalties).

employment discrimination law on several fronts. First, as to job applicants, this new approach jealously and equally guards the decisionmaking power of each individual regardless of the particular federally protected characteristic(s) that he or she may possess and, in so doing, avoids disparate treatment of disabled job applicants. Next, as to employers, informational paternalism provides a bright-line, easy-to-understand prohibition and, in practice, removes significant burdens that employers may currently shoulder as part of their applicant-related decisional process—namely, the burdens of attempting to identify and weigh job-related health risk(s) posed to disabled job applicants under the ADA. Finally, as to the courts and the EEOC, this new approach brings uniform and consistent legal protection in the area of applicant-specific paternalism that is reflective of their own antidiscrimination philosophies.