No. 12-1226

IN THE
# SUPREME COURT OF THE UNITED STATES

PEGGY YOUNG,

*Petitioner,*

*v.*

UNITED PARCEL SERVICE, INC.,

*Respondent.*

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FOURTH CIRCUIT*

## BRIEF OF BIPARTISAN STATE AND LOCAL LEGISLATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are bipartisan lawmakers from Delaware, Georgia, Illinois, Maryland, Missouri, New Jersey, New York, Pennsylvania, Rhode Island, West Virginia, Wisconsin, as well as Philadelphia and New York City, committed to supporting America's working families. Recognizing that women's wages are critical to the economic security of their constituents, *Amici* introduced or supported legislation in their jurisdictions to ensure that pregnant workers can continue to work throughout their pregnancies if they wish. These bills expressly direct employers to provide reasonable accommodations to pregnant workers who need job modifications. The *Amici* parties' interest in this case is protecting the rights of their constituents. A list of the individual signatories is set forth in the Appendix to this brief.

## SUMMARY OF ARGUMENT

Many women can continue working through their pregnancies with no issue, but some women find that certain job activities, such as heavy lifting or standing for long periods, become more difficult. The Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k), requires employers to offer such women reasonable accommodations—the same types of accommodations that federal, state, and local law

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than counsel for *amici curiae* made a monetary contribution to its preparation or submission. All parties consented to the filing of *amicus curiae* briefs in this matter.

already makes clear must be provided to employees with disabilities. Federal court decisions, like the one below, have erroneously suggested otherwise.

To fill the gap created by judicial misinterpretations of the PDA, Republican and Democratic legislators have passed commonsense legislation requiring workplace accommodations that enable pregnant women to stay employed. Keeping women who want to work on the job promotes financially stable, healthy families. It also benefits communities by bolstering the economy and reducing reliance on public assistance.

In sum, the Fourth Circuit's decision adopts a view inconsistent with the text of and the policies underlying the PDA, and in response to similarly flawed federal court decisions, *Amici* have been forced to enact legislation they would have previously thought unnecessary. The Fourth Circuit's ruling must be overturned to restore the true meaning of the PDA.

## ARGUMENT

### I. Providing Reasonable Accommodations to Pregnant Workers with a Medical Need Strengthens Working Families and Benefits Businesses.

The PDA mandates that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." 42

U.S.C. § 2000e(k). In other words, "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job." *UAW v. Johnson Controls*, 499 U.S. 187, 204 (1991) (explaining second clause of the PDA).

Despite the promise of the PDA, pregnant workers seeking accommodations are sometimes forced to choose between their health and their paycheck as a result of court decisions (such as those below) misconstruing the PDA's plain language. In actuality, pregnant workers could maintain both their health and their paychecks with modest adjustments such as bathroom breaks, water breaks, and seating arrangements.

Pitting pregnant workers' health against their income can have devastating consequences. A family that is expecting a child cannot afford to lose a paycheck. Thus, some women who are denied accommodations may feel compelled to engage in workplace tasks that are contrary to their medical provider's advice, which increases health risks and may increase health care costs for employees and employers. Nat'l Women's Law Ctr. & A Better Balance, *It Shouldn't Be a Heavy Lift: Fair Treatment for Pregnant Workers* 13 (2013), http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf (employer denied pregnant worker's request to sit on a stool while she ran the cash register; she continued to work for economic reasons, but the pressure from standing caused bleeding and premature labor pains that forced the woman to take an unpaid leave of absence for the remainder of her pregnancy).

Women are the primary breadwinners in 41% of American families and the co-breadwinners in 64% of families. Sara Jane Glynn, Ctr. for Am. Progress, *The New Breadwinners: 2010 Update* 2 (2012), http://cdn.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/breadwinners.pdf. Low-wage women workers are even more likely to be their families' primary breadwinners. At a time when American families are struggling to make ends meet, workplace accommodations allow these breadwinners to continue to collect a paycheck.

Businesses also benefit when workers receive accommodations and can continue to perform their jobs. The Job Accommodation Network (JAN), a technical assistance provider to the Department of Labor's Office of Disability Employment Policy, has studied the impact and cost of accommodating employees in the workplace pursuant to the Americans with Disabilities Act. It found that employers that offer employees accommodations enjoyed improved recruitment and retention of employees, increased employee commitment, increased productivity, reduced absenteeism, and improvements in workplace safety (and the resulting reduction in workers' compensation and other insurance costs). Beth Loy, JAN, *Workplace Accommodations: Low Cost, High Impact* 4–5 (2013), http://askjan.org/media/downloads/LowCostHighImpact.pdf.

Ninety percent of employers in the JAN study reported that workplace accommodations allowed them to retain valued employees, and 61% said that providing the modification "eliminated costs associated with training a new employee." *Id.* at 5.

Training new employees drains resources. It costs an employer 150% of a salaried employee's yearly salary to replace him or her. Jodie Levin-Epstein, Ctr. for Law and Soc. Policy, *Getting Punched: The Job and Family Clock: It's Time for Flexible Work for Workers of All Ages* 9 (2006), http://www.clasp.org/resources-and-publications/files/0303.pdf. For an hourly employee, turnover costs the employer anywhere from 50% to 75% of the employee's annual pay. *Id.*

Accommodating pregnant workers is likely to cost businesses less than disability accommodations. Pregnancy is by definition temporary. Further, relatively few workers give birth each year—only 1.6% of the total number of employed people and 4.7% of women of childbearing age. Nat'l Women's Law Ctr., *Fact Sheet: Pregnant Workers Make Up a Small Share of the Workforce and Can Be Readily Accommodated: A State-By-State Analysis* (2013), http://www.nwlc.org/sites/default/files/pdfs/state_by_state_analysis.pdf. A significantly smaller share of those workers need accommodations to remain at work.

Some employers may be unaware of the benefits that flow from accommodating pregnant workers. For example, UPS maintains a policy that provides light duty to three classes of workers—disabled employees, employees injured on the job, and employees who have lost their Department of Transportation certification—but not to pregnant workers. As a result, Petitioner Young was denied a light duty assignment when she became pregnant. She was forced on unpaid leave during her pregnancy and lost important income and health

insurance benefits. Her lawsuit affords this Court an opportunity to reaffirm commonsense principles of fairness and to ensure that pregnant mothers like Young are able to keep their paychecks during a critical time in family life, just as Congress intended.

## II. The Fourth Circuit's Decision and Similar Decisions in Other Federal Courts Contravene the Text of the PDA and Harm State and Local Governments.

Applying an overly narrow interpretation of the PDA, the Fourth Circuit erred when it held that the PDA did not require UPS to provide light duty to pregnant employees even though this accommodation was available to three other groups of employees.

Numerous other decisions have likewise narrowly read the PDA and denied pregnant workers modest accommodations, such as light duty and water breaks, when similar accommodations were provided to other employees. *See, e.g., Serednj v. Beverly Healthcare LLC*, 656 F.3d 540 (7th Cir. 2011) (employer's practice of accommodating disabled workers and those injured on job, but not pregnant workers, did not violate PDA); *Wiseman v. Wal-mart Stores, Inc.*, No. 6:08-cv-01244 (D. Kan. July 23, 2009) (refusal to allow pregnant worker to carry water bottle did not violate PDA even though employer accommodated disabled employees).

This analysis is not supported by the text of the PDA, which requires employers to provide pregnant workers the same benefits that are

provided to workers "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). By extending light duty accommodations to some employees, but not to pregnant employees, the policy treats pregnant employees as second-class. This is exactly the type of pregnancy discrimination that the PDA forbids.

Decisions misinterpreting the PDA also hurt the economy and unnecessarily burden state and local governments. Pushed out of the workforce, expectant mothers—who would otherwise be contributing to the economy by purchasing supplies to prepare for the arrival of a child—have no income to spend. Moreover, pregnant workers deprived of income and employer-sponsored benefits may be forced to rely on government assistance, including welfare and Medicaid, rather than on the benefits they could earn if granted accommodations. *See, e.g.,* Nat'l Women's Law Center & A Better Balance, *supra,* at 11 (supermarket worker with a lifting restriction was sent home and onto disability insurance, which ended a month before she gave birth; she lost her health insurance and had to go on Medicaid).

## III. Legislators From Both Sides of the Aisle Have Sought to Restore the Plain Meaning of the PDA within their Jurisdictions by Introducing and Passing Laws Reaffirming Pregnant Workers' Rights to Workplace Accommodations.

At least twelve states and several municipalities have passed laws requiring some

employers to provide reasonable accommodations to pregnant workers.[2] Similar bills were introduced in numerous jurisdictions in the past year, such as Georgia, Missouri, New York, Pennsylvania, Rhode Island, Wisconsin, and the District of Columbia. These measures, which aim to fill the gap created by courts' inappropriately narrow reading of the PDA, often receive overwhelming bipartisan support. Recently, legislators reached across the aisle to unanimously pass pregnancy accommodation measures in Delaware, Illinois, and West Virginia. New Jersey's law was adopted with just a single dissenting vote.

Generally, such remedial legislation simply requires that employers provide reasonable accommodations to women with work-related limitations arising out of pregnancy or childbirth—

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[2] The jurisdictions include Alaska, California, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maryland, Minnesota, New Jersey, Texas, and West Virginia as well as New York City, Philadelphia, and Central Falls and Providence, Rhode Island. Alaska Stat. § 39.20.520 (2013); Cal. Gov't Code § 12945 (Deering 2012); Conn. Gen. Stat. § 46a-60(a)(7) (2011); S.B. 212, 147th Gen. Assemb. (Del. 2014); Haw. Code R. § 12-46-107 (LexisNexis 1990); 775 Ill. Comp. Stat. 5/2-102 (2014); La. Rev. Stat. Ann. § 23:342 (1997); Md. Code Ann., State Gov't § 20-609 (LexisNexis 2013); H.F. 2536, 88th Leg., 2014 Sess. Law Ch. 239 (Minn. 2014); N.J. Stat. Ann. § 10:5-12(s) (West 2013); Tex. Loc. Gov't Code Ann. §180.004 (West 2001); W. Va. Code §§ 5-11B-1 to -7 (2014); New York City, N.Y., N.Y.C. Admin. Code § 8-107(22) (2013); Phila., Pa., Code § 9-1128 (2014); Central Falls, R.I., Ordinance Creating The Gender Equity in the Workplace Act (to be codified at Central Falls, R.I., Rev. Ordinance § 12-5); Providence, R.I., Ordinance in Amendment of the Code of Ordinances of the City of Providence Section 16-57 (to be codified at Providence, R.I., Code of Ordinances § 16-57).

just as the law already clearly requires employers to provide reasonable accommodations for disabilities. That is, this legislation restores the intent and purpose of the PDA.

State and local measures also reduce confusion created by federal courts' misreading of the PDA and help preempt unnecessary litigation by making employers' obligations and employees' rights crystal clear. Nationwide, pregnancy discrimination complaints are on the rise. Between 1997 and 2011, pregnancy discrimination charges filed with the EEOC and state fair employment practices agencies rose from 3,977 to 5,797, peaking at 6,285 in 2008. U.S. Equal Emp't Opportunity Comm'n, *Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1997–2011*, http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm (last visited Sept. 7, 2014). In California, however, where a pregnancy accommodation law has been in place since 2000, the number of pregnancy discrimination claims filed with the California Department of Fair Employment and Housing decreased between 1997 and 2011. Noreen Farrell et al., Equal Rights Advocates, *Expecting a Baby, Not a Lay-Off: Why the Federal Law Should Require the Reasonable Accommodation of Pregnant Workers* 25 (2012), http://www.equalrights.org/wp-content/uploads/2013/02/Expecting-A-Baby-Not-A-Lay-Off-Why-Federal-Law-Should-Require-the-Reasonable-Accommodation-of-Pregnant-Workers.pdf.

Constituent stories motivated legislators across the country to take action to restore the meaning of the PDA. For example, Delaware legislators in both parties were shocked to learn

about pregnant women like Nicole Villanueva who was not permitted to work even though she was eager to and only required a modest accommodation. *See Villanueva v. Christiana Care Health Servs., Inc.*, No. Civ.A. 04-258-JJF (D. Del. Jan. 23, 2007). In Illinois, a pregnant warehouse worker was denied an accommodation, and her supervisor told her to choose either her job or her baby. In New York City, a pregnant retail worker was rushed to the emergency room when she fainted on the job because her supervisor would not permit her to drink water. Nat'l Women's Law Ctr. & A Better Balance, *supra*, at 12.

Legislators should not be forced to convene to reestablish basic protections that were incorporated into the PDA in 1978. This Court must correct the narrow reading of the Act by the Fourth Circuit and numerous federal courts and make clear that the PDA has prohibited treating pregnant workers worse than other employees for many years.

## CONCLUSION

For the reasons set forth above, the judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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# APPENDIX

## LIST OF AMICI

The *Amici* are state and local lawmakers who have introduced, sponsored or supported legislation to reaffirm the Pregnancy Discrimination Act and ensure that employers grant pregnant women the same types of accommodations provided to others in the workplace. These *Amici* are listed below.

Senator Diane B. Allen (R-7)
New Jersey Senate

Delegate Jason Barrett (D-61)
West Virginia House of Delegates

Council Member Cindy Bass (D-8)
Philadelphia City Council

Senator Daniel Biss (D-9)
Illinois General Assembly

Senator Colin Bonini (R-16)
Delaware General Assembly

Councilwoman Blondell Reynolds Brown
(D-At-Large)
Philadelphia City Council
Majority Whip

Delegate Al Carr (D-18)
Maryland General Assembly

Representative Kelly Cassidy (D-14)
Illinois General Assembly

Senator Catherine Cloutier (R-5)
Delaware General Assembly

Delegate Bonnie Cullison (D-19)
Maryland General Assembly

House Majority Leader Barbara Flynn Currie (D-25)
Illinois General Assembly

Representative Sara Feigenholtz (D-12)
Illinois General Assembly

Council Member Julissa Ferreras (D-21)
New York City Council

Delegate Barbara Evans Fleischauer (D-51)
West Virginia House of Delegates

Representative Mary E. Flowers (D-31)
Illinois General Assembly

Representative Robyn Gabel (D-18)
Illinois General Assembly

Representative Eric Genrich (D-90)
Wisconsin State Assembly

Senator Gayle L. Goldin (D-3)
Rhode Island General Assembly

Councilman William K. Greenlee (D-At-Large)
Philadelphia City Council
Majority Deputy Whip

Delegate Nancy Peoples Guthrie (D-36)
West Virginia House of Delegates

Senator Bethany A. Hall-Long (D-10)
Delaware General Assembly

Senator Kemp Hannon (R-6)
New York State Senate

Representative Greg Harris (D-13)
Illinois General Assembly

Delegate Tom Hucker (D-20)
Maryland General Assembly

Senator Toi W. Hutchinson (D-40)
Illinois General Assembly

Delegate Ariana Kelly (D-16)
Maryland General Assembly

Senator Liz Krueger (D-28)
New York State Senate

Senator David G. Lawson (R-15)
Delaware General Assembly

Senator Ernesto B. Lopez (R-6)
Delaware General Assembly

Delegate Charlene Marshall (D-51)
West Virginia House of Delegates

Assemblywoman Shelley Mayer (D-90)
New York Assembly

Senator Karen McConnaughay (R-33)
Illinois General Assembly

Deputy Minority Whip Stacey Newman (D-87)
Missouri House of Representatives

Senator Nan Orrock (D-36)
Georgia State Senate

Delegate Don Perdue (D-19)
West Virginia House of Delegates

Senator Karen Peterson (D-9)
Delaware General Assembly

Senator Brian G. Pettyjohn (R-19)
Delaware General Assembly

Delegate Meshea Poore (D-37)
West Virginia House of Delegates

Delegate Kirill Reznik (D-39)
Maryland General Assembly

Deputy Majority Leader Deborah Rose (D-49)
New York City Council

Delegate Stephen Skinner (D-67)
West Virginia House of Delegates

Senator Matt Smith (D-37)
Senate of Pennsylvania

Delegate Isaac Sponaugle (D-55)
West Virginia House of Delegates

Senator Heather Steans (D-7)
Illinois General Assembly

Assemblymember Phil Steck (D-110)
New York Assembly

Senator Lena Taylor (D-4)
Wisconsin State Senate

Council Member James Vacca (D-13)
New York City Council

Senator Chris Walters (R-8)
West Virginia Senate

Senate Majority Leader Loretta Weinberg (D-37)
New Jersey Senate

Representative Ann Williams (D-11)
Illinois General Assembly