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

PETITIONER'S BRIEF

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QUESTION PRESENTED

The Pregnancy Discrimination Act ("PDA") provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). The question presented is:

Whether, and in what circumstances, an employer that provides work accommodations to non-pregnant employees with work limitations must provide work accommodations to pregnant employees who are "similar in their ability or inability to work."

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BRIEF FOR THE PETITIONER

Petitioner Peggy Young respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 707 F.3d 437. The opinion of the district court granting summary judgment (Pet. App. 30a-83a) is reported at 2011 WL 665321.

JURISDICTION

The court of appeals entered judgment on January 9, 2013. Pet. App. 1a. The petition for a writ of *certiorari* was filed on April 8, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), is reprinted at Pet. App. 84a.

STATEMENT

United Parcel Service refused to permit Peggy Young to continue to work during her pregnancy after

her doctor and midwife recommended that she lift no more than 20 pounds. Pet. App. 5a-8a. UPS made this decision pursuant to a company policy that provides accommodated work to three sizeable classes of drivers: those who are injured on the job; those who have a disability as defined by the Americans with Disabilities Act, 42 U.S.C. § 12102; and those who, for medical reasons, do not meet Department of Transportation standards to drive a commercial motor vehicle. Pet. App. 3a-4a. But the company does not provide accommodated work to drivers whose limitations result from pregnancy alone. Pet. App. 4a. Because the court of appeals affirmed the district court's grant of summary judgment to UPS, all facts in the record must be viewed – and all reasonable inferences must be drawn – in favor of Young, the nonmoving party. See *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (*per curiam*).

A. The Pregnancy Discrimination Act

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., prohibits employers from discriminating on the basis of sex in the terms and conditions of employment. See 42 U.S.C. § 2000e-2(a)(1). Because of the close relationship between pregnancy and sex, in 1972 the Equal Employment Opportunity Commission interpreted Title VII's prohibition of sex discrimination to bar discrimination based on pregnancy. See 29 C.F.R. § 1604.10(a) (1973). Based on that interpretation, the EEOC concluded that the statute required employment benefits to "be applied to disability due

to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 C.F.R. § 1604.10(b) (1973).

In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), however, this Court rejected the EEOC's interpretation. *Gilbert* involved a Title VII challenge to an employer's disability insurance plan. See *id.* at 127-128. That plan provided benefits to employees unable to work because of a nonoccupational sickness or accident, but not to those unable to work because of pregnancy. See *id.* at 128-129. Rejecting the plaintiff's challenge, the Court held that the insurance plan was "facially nondiscriminatory" despite its failure to cover pregnancy-based disability. *Id.* at 138. The Court concluded that "pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks." *Id.* at 139. Relying on its decision interpreting the Fourteenth Amendment in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court reasoned that discrimination on the basis of pregnancy is not sex discrimination, because the class of "'nonpregnant persons'" includes "'members of both sexes.'" *Gilbert*, 429 U.S. at 135 (quoting *Geduldig*, 417 U.S. at 496-497 n.20).

Congress adopted the Pregnancy Discrimination Act of 1978 with the acknowledged intent to overturn "both the holding and the reasoning of the Court in the *Gilbert* decision." *Newport News Shipbuilding &*

Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 678 (1983). The PDA added a new subsection to Title VII, Section 701(k), 42 U.S.C. § 2000e(k). That subsection's first clause provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). That clause "reflects Congress' disapproval of the reasoning in *Gilbert*." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284-285 (1987) ("*CalFed*"). The PDA's second clause directs 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). That clause "was intended to overrule the holding in *Gilbert*." *CalFed*, 479 U.S. at 285.[1]

B. UPS's Accommodated Work Policies

As a matter of policy, UPS makes accommodations for three classes of drivers with illnesses or injuries that temporarily prevent them from performing their

[1] The PDA also included a proviso to make clear that the language quoted in text does "not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion." 42 U.S.C. § 2000e(k).

full job duties. Pet. App. 3a-4a. *First*, UPS provides what it calls "temporary alternate work" to "those employees who are unable to perform their normal work assignments due to an on-the-job injury." J.A. 584 (collective bargaining agreement). UPS employees and managers often refer interchangeably to "alternate work" and "light duty." J.A. 630, 653.

The record contains numerous examples of drivers whom UPS accommodated after they experienced workplace injuries that limited their ability to lift. See J.A. 640 (workers with lifting restrictions assigned to sort small packages, do clerical work, and handle paperwork and phones); C.A.J.A. 1528-1535 (filed under seal) (UPS's restricted work register, listing over 20 instances in which employees with lifting restrictions received accommodated work in Young's district). For example, one driver, who held the same "air driver" job as petitioner Young, was temporarily unable to lift packages above approximately 10 pounds after she injured her arm on the job. J.A. 399-402. UPS reassigned her to an inside position in which she "helped gather packages to be readdressed or redirected to a different address." *Id.* at 400. If a package was too heavy for her to lift, she "let someone else know and they came and got the packages off the truck." *Id.* at 401. Another air driver injured her foot on the job; UPS assigned her to a light duty office job, in which she "typed forms and answered the phone and made copies," and "did not lift anything near 20 pounds," until she recovered. *Id.* at 635. And UPS put still another driver, who sprained his ankle on the job, in a light duty position

"where all [he] had to do was answer phones." *Id.* at 655.

Second, UPS offers "light duty work" as a reasonable accommodation to drivers with ADA-qualifying disabilities, whether those individuals acquired their impairments on or off the job. Pet. App. 4a. See J.A. 585.

Third, UPS will temporarily provide an "inside job[ ]" to a driver who "is judged medically unqualified to drive." J.A. 596. The collective bargaining agreement specifically provides for "alternate" or "alternative" work for drivers who are "unable to successfully pass the DOT commercial drivers license (CDL) examination." *Id.* at 590-591. See 49 C.F.R. § 391.45 (DOT requirement of medical examination and certification that a driver is qualified to drive a commercial motor vehicle). The Department of Transportation regulations setting forth the physical qualifications for drivers, 49 C.F.R. § 391.41, list numerous disqualifying conditions that may be acquired outside of the workplace. These include:

- "loss of a foot, a leg, a hand, or an arm," § 391.41(b)(1);
- impairment of a "hand or finger which interferes with prehension or power grasping," § 391.41(b)(2)(i);
- impairment of an "arm, foot, or leg which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle," § 391.41(b)(2)(ii);

- "any other significant limb defect or limitation which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle," *id.*;
- diabetes, § 391.41(b)(3);
- cardiovascular disease, § 391.41(b)(4);
- respiratory dysfunction, § 391.41(b)(5);
- high blood pressure, § 391.41(b)(6);
- "rheumatic, arthritic, orthopedic, muscular, neuromuscular, or vascular disease," § 391.41(b)(7);
- epilepsy, § 391.41(b)(8); and
- vision and hearing impairments, § 391.41(b)(10), (11).

Many of these conditions (notably limb impairments, cardiovascular disease, hypertension, and neuromuscular disease) may limit an individual's ability to lift heavy loads.[2] Indeed, a lifting restriction

[2] See, *e.g.*, American Heart Ass'n, Pulmonary Hypertension, http://goo.gl/W8nvXj (because "[s]trenuous physical activity * * * is associated with serious increases in pulmonary artery pressure," recommending that individuals with hypertension "avoid isometric exercises and activities like heavy lifting"); Cleveland Clinic, Living with Pulmonary Hypertension: Dietary and Lifestyle Changes, http://goo.gl/LGSijp (recommending "[r]estrict[ing] lifting, pushing, or shoving to less than 20 pounds, since these activities increase the pressure in your arteries and lungs").

deriving from one of these conditions (even from, as a UPS manager testified, a "sports injury," see J.A. 80-81) may itself be the reason why a driver becomes ineligible for DOT certification. See 49 C.F.R. § 391.43 Att. (certificate of medical examination form, including lifting among the tasks for which drivers of commercial motor vehicles must be fit). The rules governing medical certification require a medical examiner, before issuing a certificate, to "determine that a driver is medically fit to drive and also able to perform non-driving responsibilities." Fed. Motor Carrier Safety Admin., Medical Examiner Handbook 43. DOT's handbook for medical examiners states flatly that "*[t]here are no work restrictions permitted. The commercial driver must be able to perform all job-related tasks, including lifting, to be certified*." *Id.* at 41 (emphasis in original).

A shop steward in Young's workplace testified that "[w]hen the UPS drivers cannot pass the D.O.T. test, they work light duty in the building." J.A. 636. Although the court of appeals said that "an inside job often involves heavy lifting," Pet. App. 4a, the record contains a number of examples of UPS drivers who were ineligible for DOT certification and received light-duty assignments. One driver, who "lost [her] DOT card due to high blood pressure," was reassigned to a job that involved "scan[ning] packages and ma[king] address corrections, and put[ting] on address labels." J.A. 647. She "did not have to lift the packages, but [she] did have to flip them on the belt." *Id.* Another driver, who injured her ankle during

military service, was (after being unable to continue to perform the standard duties of her driving job) eventually temporarily accommodated by being permitted to scan, but not lift, packages. *Id.* at 446-452. And still another driver, who had a stroke, was reassigned to a clerk's position making phone calls. *Id.* at 397-398. A UPS manager, speaking for the company pursuant to Fed. R. Civ. P. 30(b)(6), testified that DOT-ineligible drivers who receive reassignments typically do not displace any incumbent employees, because "[u]sually there will be positions available that they can just slide into." *Id.* at 261.

The same manager explained why the company provides temporary reassignments to DOT-ineligible drivers. See J.A. 281-282. He noted that "it's very expensive to hire new employees," that there is a "lot of training time involved," and that retaining someone who is temporarily unable to drive provides a "benefit to the company" by "keep[ing] the employee that has a lot of knowledge of the area or route that they normally would deliver." *Id.*

Although UPS provides temporary accommodated work to drivers with on-the-job injuries, ADA disabilities, and DOT-disqualifying conditions, it does not do the same thing for drivers who need workplace accommodations due to pregnancy. See Pet. App. 35a. A shop steward testified that "[t]o the best of [her] knowledge, the *only* light duty requested restrictions that became an issue" in her workplace "were with women who were pregnant." J.A. 504 (emphasis added). Indeed, during negotiations over the collective

bargaining agreement that governs its drivers, UPS *rejected* language, proposed by the Teamsters Union, "that would have provided light duty to all employees who requested light duty as a result of a pregnancy-related condition." J.A. 651. UPS also "rejected other proposals that clearly would have provided alternate work for all UPS employees who temporarily could not perform their regular jobs due to pregnancy-related conditions." *Id.* See also J.A. 358-360.

In the end, UPS would agree to only the following CBA language: "A light duty request, certified in writing by a physician, shall be granted in compliance with state or federal laws, if applicable." J.A. 592. As indicated by its position in this case, UPS does not regard the federal Pregnancy Discrimination Act as requiring it to provide light duty to pregnant drivers, even though the company provides light duty to drivers with similar work limitations. UPS thus interprets the CBA as requiring it to accommodate pregnant drivers only in those states, like California, that have passed separate laws mandating such accommodation. J.A. 360-361, 651-652.

C. Peggy Young's Pregnancy

UPS hired Young in 1999; in January 2002, she began working as a part-time early-morning "air driver." J.A. 658-659. In that job, Young was responsible for "meet[ing] a shuttle from the airport bearing letters and packages for immediate delivery" and delivering them by 8:30 that morning. Pet. App. 4a-5a,

33a. "Young typically finished her work responsibilities by 9:45 or 10 in the morning, and then proceeded to her second job at a flower delivery company." Pet. App. 5a, 33a.

UPS's list of essential job functions purports to require air drivers to be able to "[l]ift, lower, push, pull, leverage and manipulate" packages "weighing up to 70 pounds" and to "[a]ssist in moving packages weighing up to 150 pounds." J.A. 578. But these lifting requirements were not a meaningful part of Young's day-to-day job. Cf. *Garcetti v. Ceballos*, 547 U.S. 410, 424-425 (2006) (noting that "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform"). Because "[a]ir delivery is more expensive by weight than ground delivery," air drivers "often carr[y] lighter letters and packs, as opposed to heavier packages." Pet. App. 31a. Young testified that "[a]lmost all" of the deliveries on her route (the "Annapolis route"), were "of envelopes – such as letters and paychecks – weighing much less than 20 pounds." J.A. 659. Analysis of an eight-month sample of Young's delivery records confirmed that testimony: out of an average of 78 deliveries Young made each week, only 2 involved packages weighing more than 20 pounds, and less than 1 involved a package weighing more than 30 pounds. J.A. 642-645. And Young testified that she shared her route with a more senior driver, who divided up the packages and was willing to deliver the heavy ones herself. J.A. 658-659. See also DCt. Dkt. 76-15 ¶ 5 (another air driver testified that, when

she was pregnant, coworkers were willing to deliver her heavier packages if she was willing to take on some of their deliveries of lighter packages).

In July 2006, Young sought, and UPS granted, an unpaid leave of absence so she could undergo a round of *in vitro* fertilization. Pet. App. 5a. The round was successful, and Young became pregnant. Pet. App. 5a, 39a. In September 2006, Young, who was still on leave, delivered to UPS a note from her OB/GYN, which included the doctor's "recommendation that she not be required to lift greater than 20 pounds for the first 20 weeks of pregnancy and no greater than 10 pounds thereafter." J.A. 580. The next month, she gave her supervisor and UPS's occupational health manager a note from her midwife; that note stated that "[d]ue to her pregnancy it is recommended that she not lift more than 20 pounds." J.A. 682. Young informed her supervisor that she wished to return to work. J.A. 663.

In late October, Young spoke with UPS's occupational health manager. Pet. App. 41a-42a. The manager told Young that "[b]ased on company policy," Young could not continue working in her air driver position "with her 20-pound lifting restriction." Pet. App. 42a. And the manager told Young that UPS would not temporarily reassign her to another position, "because UPS did not give light duty for pregnancy but only for workplace injuries." J.A. 663. Young responded that she could continue to perform her air driver job, because that job, in fact, did not require her to carry heavy packages, and because her

coworkers would help her with any heavy packages that did come along. J.A. 663-664. Young explained "that she was willing to do either light duty or her regular job." Pet. App. 5a. But the occupational health manager refused to allow Young to return to work. Pet. App. 42a. In November, Young spoke to UPS's division manager, who "told her she was 'too much of a liability' while pregnant and that she 'could not come back into the [facility in which she worked] until [she] was no longer pregnant.'" Pet. App. 8a.

As a result, Young was required to go on an extended, unpaid leave of absence, during which she lost her medical coverage. *Id.* at 8a. She did not return to work until June 2006, just short of two months after she gave birth. *Id.* at 43a-44a.

D. Proceedings Below

After exhausting her remedies with the Equal Employment Opportunity Commission (EEOC), Young filed this lawsuit in October 2008 in the United States District Court for the District of Maryland. Pet. App. 8a, 44a. The complaint alleged, *inter alia*, that UPS violated the PDA by failing to provide Young the same accommodations it provided to non-pregnant employees who were similar in their ability to work. J.A. 53.

In February 2011, the district court granted summary judgment to UPS. Pet. App. 30a-83a. The court concluded that UPS's determination not to accommodate Young's lifting restriction turned on

"gender-neutral criteria," because UPS accommodates "only drivers (1) who suffered on-the-job injuries; (2) who were disabled under the Americans with Disabilities Act; or (3) [who] lost their DOT certification to drive." *Id.* at 56a-57a. Because this policy was "gender-neutral," the district court concluded that it did not constitute direct evidence of discrimination. *Id.* Nor could it support an inference "that the employer has animus directed *specifically* at pregnant women," which the court thought necessary to support a *prima facie* case under the analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See Pet. App. 61a.

The Fourth Circuit affirmed. Pet. App. 3a. The court concluded that "UPS ha[d] crafted a pregnancy-blind policy" by "limiting accommodations to those employees injured on the job, disabled as defined under the ADA, and stripped of their DOT certification." Pet. App. 18a. Although Young had argued that UPS's limitation of accommodations to individuals in those three categories violated the PDA's requirement that pregnant women "shall be treated the same" as nonpregnant employees "similar in their ability or inability to work," 42 U.S.C. § 2000e(k), the Fourth Circuit held that the statute's "shall be treated the same" language "does not create a distinct and independent cause of action." Pet. App. 20a-21a.

The court went on to conclude that "a pregnant worker subject to a temporary lifting restriction is not similar in her 'ability or inability to work' to an employee disabled within the meaning of the ADA or

an employee either prevented from operating a vehicle as a result of losing her DOT certification or injured on the job." *Id.* at 27a. Unlike an individual with an ADA-qualifying disability, Young's limitation "was temporary and not a significant restriction on her ability to perform major life activities." *Id.* Unlike "employees guaranteed an inside job or light duty under the CBA provision for drivers who have lost DOT certification," there was "no legal obstacle" preventing Young from working – and unlike at least some of those drivers, who "maintained the ability to perform any number of demanding physical tasks," Young "labored under an apparent inability to perform tasks involving lifting." *Id.* at 27a-28a (footnote and internal quotation marks omitted). Finally, the court stated that "Young is not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury." *Id.* at 28a.

SUMMARY OF ARGUMENT

UPS provides temporary accommodated work to three sizeable classes of drivers with work restrictions: those with on-the-job injuries, those with ADA disabilities, and those with conditions that render them ineligible for DOT certification. But it does not provide accommodated work to drivers who experience similar work restrictions due to pregnancy. That disparity violates the PDA's requirement that "women affected by pregnancy, childbirth, or related

medical conditions shall be treated the same * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

The PDA's import is plain: When two sets of employees experience similar restrictions on their ability to work – one because of pregnancy and the other because of some other condition – the employer must not give any lesser accommodation to the pregnant workers than it gives to the nonpregnant workers. Legislative history and administrative construction further bolster what the statutory text makes clear. The court of appeals, however, strayed from that plain text. That court ruled that an employer is free to deny pregnant workers the accommodations it provides other employees with similar work limitations, so long as the employer does so pursuant to a "pregnancy-blind policy." Under the court of appeals' interpretation, the PDA's second clause (with the "shall be treated the same" language) adds nothing to the statute's first clause (which defines sex discrimination to include pregnancy discrimination). If the court of appeals' "pregnancy-blind" rule were to prevail, the PDA's second clause would not serve its acknowledged function of overturning the holding in *General Electric v. Gilbert*, *supra*.

If Peggy Young's lifting restriction had resulted from an on-the-job injury, an ADA disability, or a condition that rendered her ineligible for DOT certification, the summary judgment record indicates that UPS would have accommodated it. But because her restriction resulted from pregnancy, UPS refused to

do so. UPS accordingly violated the PDA. The statute does not ask whether a pregnant worker is similar to other employees in the *source* of her workplace limitation, and it does not ask *why* the employer has accommodated some workers rather than others. Instead, the statute demands a single, simple basis of comparison – similarity in the ability or inability to work. By refusing to give Young the same accommodations it gave to other drivers with work limitations, UPS failed to treat her the same as others similar in the ability to work. Indeed, given the very large classes of drivers whom UPS accommodates, and the testimony at summary judgment indicating that pregnancy is the *only* condition for which light-duty accommodations became an issue, the violation of the PDA here is especially apparent.

The violation of the PDA is apparent without any inquiry into subjective intent. Indeed, it appears on the face of UPS's acknowledged policies. Accordingly, it is unnecessary to engage in the judicially-crafted burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, *supra*, to decide this case. If the Court does apply *McDonnell Douglas*, however, it should still reverse.

Any argument that Young's claim would impermissibly override UPS's collectively-bargained seniority system is not properly before the Court. In any event, it lacks merit. Providing accommodated work to Young pursuant to the PDA would be consistent with the terms of UPS's collective bargaining agreement. The summary judgment record also indicates

that an accommodation would not have displaced a more senior worker. And if the seniority system were to stand in the way of providing the same treatment the PDA requires, it would not be a bona fide system under this Court's precedents.

ARGUMENT

Because her doctor had advised her against lifting heavy packages, UPS required Peggy Young to take unpaid leave during her pregnancy. But the company would have accommodated a driver with the same lifting restriction if the restriction had resulted from a workplace injury, an ADA-qualifying disability, or a condition that made the driver ineligible for DOT certification. By denying Young the same treatment, simply because her restriction resulted from pregnancy and not one of these conditions, UPS violated the PDA's plain requirement that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. 2000e(k).

This statutory language was crafted to "prevent employers from treating pregnancy and childbirth differently from other causes of disability." S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977). The PDA's sponsors explained that employers often viewed women – and pregnant women in particular – as

"marginal workers" who were unlikely to remain in the workforce, and that this perception lay "at the root of the discriminatory practices" that limited employment opportunities. H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 3 (1978). See also 123 Cong. Rec. 10,582 (1977) (Rep. Hawkins) ("[D]iscrimination against pregnant women is one of the chief ways in which women's careers have been impeded and women employees treated like second-class employees."). They responded to evidence that employers often forced pregnant women out of the workplace – that "'many women become labor-force outcasts upon pregnancy, not by choice, but because of their employers' preconceptions or prejudices.'" *Id.* at 7,541 (Sen. Williams) (quoting Ruth Bader Ginsburg & Susan Deller Ross, *Pregnancy and Discrimination*, N.Y. Times, Jan. 25, 1977). The sponsors expressed particular concern that "[m]any women temporarily disabled by pregnancy ha[d] been forced to take leave without pay." *Id.* at 29,387 (Sen. Javits). For many low-income women, the sponsors believed the result of such practices would be to deny "their children adequate nutrition and health care," force them to rely on public assistance, and perhaps lead them "to feel that their only alternative is an abortion." *Id.* at 7,541 (Sen. Brooke).

The PDA thus seeks to ensure that "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." *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 204 (1991). By treating

Young's pregnancy differently from other causes of disability and requiring her to take unpaid leave, UPS did exactly what the PDA forbids.

A. The PDA Required UPS to Afford Pregnant Workers the Same Accommodations It Afforded Other Employees with Disabling Conditions Who Were Similar in Their Ability to Work

As this Court has explained, "'[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees "shall be treated the same for all employment-related purposes" as nonpregnant employees similarly situated with respect to their ability or inability to work.'" *Johnson Controls*, 499 U.S. 187, 204-05 (quoting *CalFed*, 479 U.S. at 297 (White, J., dissenting)). The import of that clause is plain: When two sets of employees experience similar restrictions on their ability to work – one because of pregnancy and the other because of some other condition – the employer must not give any lesser accommodation to the pregnant workers than it gives to the nonpregnant workers. See *Newport News Shipbuilding*, 462 U.S. at 684 (PDA "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions"). Rather, the two employees "shall be treated the same." 42 U.S.C. § 2000e(k).

Thus, when an employer provides light-duty work to a class of workers who are temporarily unable

to perform their usual job duties due to injury or illness, the plain statutory text requires it to provide the same light-duty work to pregnant workers who are similarly unable to perform those duties. The PDA's legislative history specifically contemplates this application of the statute. The House Report explained that "[t]he 'same treatment'" required by the statute "may include employer practices of transferring workers to lighter assignments," but that any such practice must be "administered equally for all workers in terms of their actual ability to perform work." H.R. Rep. No. 95-948, *supra*, at 5.

The EEOC, which administers and enforces the PDA, has long endorsed this plain-language reading as well. In an appendix to its regulations issued in 1979, just a year after Congress adopted the statute, the Commission stated that "[a]n employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc." 29 C.F.R. Pt. 1604 App. ¶ 5. The appendix specifically addressed the example of accommodation for a pregnant worker's lifting restriction: "If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function." *Id.* And the EEOC's recent enforcement guidance on pregnancy discrimination reaffirms that "[a]n employer may not refuse

to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations." EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues § I.A.5. (July 14, 2014) (hereinafter "EEOC Enforcement Guidance"). By setting forth the view of the administering and enforcing agency, these pronouncements are "entitled to a measure of respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). See *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008). In any event, they merely confirm what is evident from the plain statutory text.

The court of appeals strayed from that plain text. It ruled that, even if an employer does not accommodate pregnancy to the same extent that it accommodates other conditions with a similar effect on the ability to work, the employer cannot be liable if the denial of accommodation stems from "a neutral, pregnancy-blind policy." Pet. App. 27a. See also Pet. App. 18a-24a. In the court of appeals' view, an employer can refuse to provide the same accommodations for pregnancy that it provides for, say, on-the-job injuries, so long as it does not exclude pregnant workers *who also have on-the-job injuries* from receiving accommodations. That position reflects a fundamental misreading of the statute.

The position of the court of appeals would render the PDA's second clause entirely superfluous. After all, the PDA's first clause *itself* prohibits employers from refusing to provide pregnant workers with

on-the-job injuries the same accommodations that it provides nonpregnant workers with those injuries. The first clause defines the term "because of sex" in Title VII to include "because of or on the basis of pregnancy." 42 U.S.C. § 2000e(k). Denying pregnant workers with on-the-job injuries the same accommodations that an employer provides to nonpregnant workers with on-the-job injuries is a clear case of discrimination "because of * * * pregnancy."

The second clause must mean something more. See *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2468-69 (2014) (interpreting statute to avoid surplusage); *Clark v. Rameker*, 134 S. Ct. 2242, 2248-2249 (2014) (same). By providing that pregnant workers "shall be treated the same" as "other persons not so affected but similar in their ability or inability to work," 42 U.S.C. § 2000e(k), the PDA's second clause requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work.[3]

This Court has said that "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 133 S. Ct.

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[3] See also EEOC Enforcement Guidance, *supra*, § I.C.1.b. ("[A]n employer cannot lawfully deny or restrict light duty based on the source of a pregnant employee's limitation.").

1166, 1178 (2013). See also *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330 (2011) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.") (internal quotation marks omitted). That principle is particularly apt here. As this Court has noted, the PDA's two clauses serve distinct functions. The first clause "reflects Congress' disapproval of the *reasoning* in *Gilbert*" – *viz.*, that pregnancy discrimination is not sex discrimination. *CalFed*, 479 U.S. at 284-85 (emphasis added). But the second clause serves a different function: "to overrule the *holding* in *Gilbert*" that a disability insurance program that did not insure against pregnancy complied with Title VII. *CalFed*, 479 U.S. at 285 (emphasis added).

If the court of appeals' "pregnancy-blind" rule were to prevail, the PDA's second clause would not serve its acknowledged function of overruling *Gilbert*'s holding. *Gilbert* held that an employer's failure to cover pregnancy in its disability insurance plan was "facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.'" *Gilbert*, 429 U.S. at 138 (quoting *Geduldig*, 417 U.S. at 496-497). That, of course, is exactly the same sense in which UPS's accommodated-work policy was "neutral" and "pregnancy-blind" – there was no injury or condition for which nonpregnant workers were accommodated and pregnant workers were not. Conversely, the

disability insurance plan at issue in *Gilbert* plainly would have counted as "pregnancy-blind" under the court of appeals' analysis. That plan provided both pregnant and nonpregnant workers coverage for "nonoccupational sickness or accident." *Gilbert*, 429 U.S. at 128. It simply failed to provide coverage for what the Court called the "*additional* risk" of pregnancy itself. *Id.* at 139. The Court concluded that "the failure to compensate [women] for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks." *Id.* The "pregnancy-blind" rule of the court of appeals essentially revives *Gilbert*'s "facially evenhanded" analysis. It thus utterly subverts both the statutory text and expressed congressional intent.[4]

The court of appeals expressly refused to give separate effect to the PDA's second clause. Pet. App. 20a-21a. The court gave two reasons for that refusal: first, that the clause's "placement in the definitional section of Title VII, and grounding within the confines

[4] The "pregnancy-blind" rule would also render lawful other practices that the PDA's sponsors understood as clear violations of the statute, such as the then-common refusal to permit "women to use their sick days when unable to work due to pregnancy or childbirth." 123 Cong. Rec. 10,582 (Rep. Hawkins). Accord *id.* at 29,385 (Sen. Williams). Under the court of appeals' rule, an employer could, in fact, forbid women to use sick days when unable to work due to pregnancy – so long as the employer did not forbid pregnant women who had some *unrelated* illness or injury from using sick days.

of sex discrimination under § 703, make clear that it does not create a distinct and independent cause of action"; and, second, that according the clause its plain meaning would lead pregnancy to be "treated more favorably than any other basis, including non-pregnancy-related sex discrimination, covered by Title VII." *Id.* Neither argument supports the lower court's holding.

First, the PDA's plain text does more than simply provide a definition. To be sure, the first clause simply defines "sex" as including "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). But the second clause by its terms sets forth a substantive rule governing the conduct of employers – pregnant workers "shall be treated the same * * * as other persons not so affected but similar in their ability or inability to work." *Id.* In *Johnson Controls*, 499 U.S. at 205, this Court refused "to read the second clause out of the Act." To the contrary, the Court explained that the PDA's second clause imposes a substantive obligation on employers. See *id.* That conclusion applies equally here.[5]

[5] Similarly, this Court has held that the religion provision of Title VII, which appears in the statute's definitional section in a subsection immediately adjacent to the PDA, 42 U.S.C. § 2000e(j), imposes on an employer a substantive obligation "to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

Second, it is true that the "similar in their ability or inability to work" language does not apply to any other basis covered by Title VII. But that is neither novel nor suspicious. For example, the subsection that immediately precedes the PDA, 42 U.S.C. § 2000e(j), requires reasonable accommodation of religion – a requirement that does not apply to any other basis covered by Title VII. Just as the reasonable accommodation provision responds to unique dynamics of religious discrimination, the PDA's second clause responds to unique dynamics of pregnancy discrimination. In particular, the PDA addresses a context in which a temporary work disability is often transformed into a life-long denial of employment opportunities because of the failure to provide pregnant workers the same consideration as other, more valued employees who are no more able to do the job. This dynamic, which does not apply to the other bases covered by Title VII, was a central focus of congressional discussion. See pp. 18-19, *supra*.[6] Congress addressed the problem by requiring that

[6] See also *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 738 (2003) (describing the "faultline between work and family" as "precisely where sex-based overgeneralization has been and remains strongest"); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 96 Geo. L.J. 567, 577 (2010) (compiling evidence of "the persistence of stereotyped perceptions and decisionmaking with respect to pregnant workers"); Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 Hastings L.J. 1359, 1369-1372 (2008) (compiling experimental evidence that pregnant workers are viewed more negatively than other female workers).

pregnant women be treated the same as other employees who were similar, not in their diagnosis, the cause of their limitation, or their compatibility with a supposedly pregnancy-blind employer policy, but "in their ability or inability to work," 42 U.S.C. § 2000e(k).

Nor would giving separate effect to the PDA's second clause afford "preferential treatment" to pregnant workers. Cf. Pet. App. 23a. To the contrary, it would merely guarantee the equal treatment the statute demands. It would simply require an employer that accommodates nonpregnant employees' work limitations to do the same for pregnant workers who are just as able to do the job. That is what the PDA's plain text dictates, and it accords with the statute's purpose to ensure that pregnant women are treated as "valued, career employees," 123 Cong. Rec. 10,582 (1977) (Rep. Hawkins), rather than as "marginal workers," H.R. Rep. No. 95-948, *supra*, at 3. A contrary rule would authorize employers to treat pregnant workers *worse* than they treat other workers who are no more capable of doing the job. But that is precisely what the PDA's text forbids.

To be sure, when an employer accommodates only a subset of workers with disabling conditions (such as those who experienced on-the-job injuries), the PDA's plain text requires that pregnant workers who are similar in the ability to work receive the same treatment even if still other nonpregnant workers do not receive accommodations. Cf. Pet. App. 22a. But that is the result of the employer's decision to accommodate

only a subset of workers in the first place.[7] So far as the PDA is concerned, an employer is free to accommodate *none* of its workers. If the employer follows that course, pregnant workers are entitled to no better treatment. By contrast, when an employer provides light-duty work to a group of workers who are "similar in their ability or inability to work," pregnant workers must "be treated the same." 42 U.S.C. § 2000e(k).

The court of appeals suggested that the PDA does not entitle pregnant workers to accommodation unless accommodation is available to the entire "universe – male and female – of nonpregnant employees" with similar work limitations. Pet. App. 19a. But that is not a fair reading of the PDA's second clause.[8] The second clause requires that pregnant workers receive the same accommodations "as other persons

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[7] It is hardly novel to regard as discriminatory an employer's decision to treat a group of workers worse than a second, more favored group of workers, even if still a third group of workers is also denied more favorable treatment. Cf. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-367 (3d Cir. 1999) (Alito, J.) (police department that provided medical exemptions to its general no-beard policy unconstitutionally disfavored officers with religious reasons for having beards).

[8] Even if the court of appeals' suggestion correctly stated the law, this Court should still reverse. As the next section makes clear, the evidence at summary judgment was sufficient to support the conclusion that virtually any nonpregnant driver with a lifting restriction would receive an accommodation from UPS.

not so affected but similar in their ability or inability to work." *Id.* The statute's unqualified, generic phrasing – the same "as other persons," not "as all other persons" or "only to the extent that all other persons get the same treatment" – makes clear that when an employer accommodates a group of workers, it must give pregnant workers with similar limitations the same treatment. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 9 (2012) (general words are to be given their general meaning).

An employer may accommodate a group of workers for business reasons, such as to retain valued employees or boost workplace morale, or it may do so because independent legal obligations set a baseline of fair treatment. As the next section shows, UPS's accommodation policies stemmed from a mixture of these motives. Either way, the failure to extend the same accommodations to pregnant women who are similar in their ability to work treats pregnant workers like second-class or marginal workers. The PDA's second clause, by its terms, forbids that result.

B. UPS Treated Young Differently From Three Classes of Drivers with Disabling Conditions Who Were Similar in Their Ability to Work

It is undisputed that UPS provides accommodated work to three sizeable classes of drivers with work limitations: those who experienced injuries on the job;

those whose conditions qualify as disabilities under the ADA; and those whose conditions render them ineligible for DOT certification. A driver in one of these three classes with a lifting restriction, the summary judgment record indicates, would have received a workplace accommodation. And, indeed, the record shows that UPS did accommodate numerous drivers with 10- or 20-pound lifting restrictions. Peggy Young had precisely the same lifting restriction. Yet because that restriction was the result of her pregnancy, UPS refused to accommodate it – either by allowing her to continue driving but trade heavy packages to another driver, or by temporarily reassigning her to a nondriving position that did not require heavy lifting. UPS thus violated the PDA's mandate that pregnant workers "shall be treated the same * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

If UPS had provided accommodated work to drivers in only *one* of these three classes, its actions would have violated the PDA. The company would, after all, have been treating pregnant drivers differently in the terms and conditions of employment than it treated "other persons * * * similar in their ability or inability to work." But UPS did more than that. The three classes of drivers to whom the company provides accommodated work encompass an extremely large fraction of those drivers who need workplace accommodations – with the notable exception of those who need accommodations due to pregnancy. Indeed, a shop steward testified that "[t]o the best of [her]

knowledge, the only light duty requested restrictions that became an issue were with women who were pregnant." J.A. 504. By accommodating drivers in *all three* of those classes, but not pregnant drivers, UPS plainly violated the PDA.

1. On-the-Job Injuries

UPS policy gives light-duty work to those drivers who require accommodation due to on-the-job injuries. See pp. 4-6, *supra*. Had her lifting restriction resulted from an on-the-job injury rather than pregnancy, there is no question that Peggy Young would have received an accommodation that allowed her to continue working. The record contains numerous examples of drivers who received accommodation for lifting restrictions that were virtually identical to Young's but resulted from on-the-job injuries. See pp. 5-6, *supra*. By denying Young the same accommodation, even though she was "similar in the[ ] ability or inability to work," 42 U.S.C. § 2000e(k), UPS violated the PDA.

The court of appeals concluded that "Young is not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury." Pet. App. 28a. That tautological reasoning entirely misses the point. The statute does not ask whether a pregnant worker is similar to other employees in the *source* of her workplace limitation. The statute gives a different basis for comparison. It asks whether a pregnant worker has been treated the

same as other employees who are "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Along that dimension – the only dimension the statute makes relevant – Peggy Young was plainly similar to the many UPS employees with on-the-job injuries who received light duty for their lifting restrictions.[9]

To be sure, UPS may have a good reason for its policy of providing light-duty work to those with on-the-job injuries. Such a policy may keep valued workers on the job, save the company the cost of training new employees, limit workers' compensation

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[9] The EEOC's position is in accord. See EEOC Enforcement Guidance § I.C.1.b. ("[A]n employer cannot lawfully deny or restrict light duty based on the source of a pregnant employee's limitation. Thus, for example, an employer must provide light duty for pregnant workers on the same terms that light duty is offered to employees injured on the job who are similar to the pregnant worker in their ability or inability to work."). In its filings at the petition stage, UPS suggested that the Commission's position does not, in fact, accord with our argument. See Br. in Opp. 26 n.2; UPS Supp. Br. 8. UPS cited an EEOC press release that stated that "an employer that creates light duty positions for its employees with occupational injuries does not have to create such positions as a reasonable accommodation for employees with disabilities who have not been injured on the job." EEOC, Press Release: EEOC Issues Guidance Clarifying Relationship Between Workers' Compensation Laws and Disability Statute, available at http://www.eeoc.gov/eeoc/newsroom/release/9-4-96.cfm (Sept. 4, 1996). But that press release did not purport to address the PDA's requirements. Rather, as its title indicates, it addressed the application of the ADA only. See *id.* The ADA does not contain the PDA's "shall be treated the same" language.

liability, and satisfy the demands of collective-bargaining representatives.[10] Many of these reasons, of course, would also apply to pregnant workers. In any event, as this Court explained in an earlier PDA case, "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. 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." *Johnson Controls*, 499 U.S. at 199.

UPS's terms and conditions of employment do not treat pregnant drivers the same as they treat non-pregnant drivers who are similar in the ability to work. When a driver experiences an on-the-job injury, the company gives the driver an opportunity to remain at work, in a temporary light-duty job, while he or she recovers. But when a driver experiences similar work limitations because of pregnancy, the company does not give her the same accommodation. That disparity, whatever its motivation, treats pregnant drivers as marginal rather than valued workers. It is a violation of the plain terms of the PDA.

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[10] See Leslie M. Batterson *et al.*, *Return-to-Work Programs*, RM/INSIGHT, Vol. 9, No. 1 at 9 (2009) (temporary accommodated work can help "maintain an experienced workforce"; "maintain production, workflow and quality standards"; "stabilize wage and production expenses"; "improve compliance with state and federal employment regulations"; "improve morale and self-esteem"; and "accelerate/improve recovery").

In its filings at the petition stage, UPS argued that the PDA's "legislative history is rife with examples specifically allowing employers to treat pregnant employees the same as employees injured off the job," even if they accommodate workers injured on the job. Br. in Opp. 14. UPS pointed to snippets of three floor statements – snippets that described the PDA as requiring that "disability due to pregnancy must be treated the same as any other non-work-related disability." 123 Cong. Rec. 29,660 (1977) (Sen. Biden). See also *id.* at 29,663 (Sen. Culver) (similar); 124 Cong. Rec. 21,436 (1978) (Rep. Sarasin) (similar). Even if UPS's interpretation of these snippets were correct, the legislative history could not trump the text. And the plain statutory text does not draw any distinction between on-the-job and off-the-job injuries.

In any event, UPS misreads these snippets of the legislative debates. The floor statements of Senators Biden and Culver and Representative Sarasin did not purport to draw or endorse any on-the-job/off-the-job distinction. Rather, they simply stated that an employer that provides no medical or disability benefits to nonpregnant workers has no obligation to provide those benefits to pregnant workers.[11] The statement

[11] See 123 Cong. Rec. 29,660 (Sen. Biden) ("First, the bill does not require employers to provide medical insurance or benefits for its employees. It simply requires that if coverage or benefits are given that disability due to pregnancy must be treated the same as any other non-work-related disability."); *id.* at 29,663 (Sen. Culver) ("The legislation before us today does not mandate compulsory disability coverage. Rather, it requires

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that "disability due to pregnancy must be treated the same as any other non-work-related disability" did not purport to offer a comprehensive summary of the statute's requirements. Rather, it was an evident reference to the facts of *Gilbert*, in which the employer's plan treated pregnancy differently from other "nonoccupational sickness or accident." *Gilbert*, 429 U.S. at 128. Neither Senators Biden and Culver nor Representative Sarasin endorsed the position that UPS takes here – that an employer that provides light duty for workers injured on the job need not provide light duty for pregnant workers who are similar in the ability to work. Such a position would contradict the House Report's clear statement that the statute requires workplace practices, including "employer practices of transferring workers to lighter assignments," to be "administered equally for all workers in terms of their *actual ability to perform work*." H.R. Rep. No. 95-948, *supra*, at 5 (emphasis added).[12]

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those employers who do provide disability coverage to treat pregnancy-related disabilities the same as any other nonwork related disability with regard to benefits and leave policies."); 124 Cong. Rec. 21,436 (Rep. Sarasin) ("[The PDA] would not require any coverage at all where no temporary disability, or sick leave, or health insurance plan is provided. It would not require extending coverage beyond job-related disability if that is all the existing coverage provides.").

[12] For other similar statements in the legislative history, see S. Rep. No. 95-331, *supra*, at 4 ("treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work"); 123 Cong. Rec. 29,385 (1977) (Sen. Williams) ("The central purpose of the bill is to require that women workers be

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More important, it would contravene the plain text of the statute.

2. ADA-Qualifying Disabilities

As the court of appeals acknowledged, "UPS offers light duty work" as a reasonable accommodation to drivers who have "a permanent impairment cognizable under the ADA." Pet. App. 4a. The ADA defines "disability" to include "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). UPS's refusal to accommodate Young occurred before the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553, expanded the definition of disability. But even prior to the ADAAA, numerous medical conditions that imposed lifting restrictions also satisfied the ADA's disability definition. See, *e.g.*, *Gribben v. United Parcel Serv., Inc.*, 528 F.3d 1166, 1171 (9th Cir. 2008) (finding a triable issue that plaintiff's heart condition was an ADA disability based on testimony "that he had labored breathing 'on and off all the time' and that the labored breathing stopped him from doing work that required too much exertion such as jobs that require 'loading or unloading

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treated equally with other employees on the basis of their ability or inability to work."); *id.* at 29,662 (Sen. Cranston) ("Pregnant women who are able to work must be permitted to work on the same conditions as other employees – and when they are not able to work for medical reasons they must be accorded the same rights, leave privileges, and other benefits as other employees who are medically unable to work.").

trailers or sorting' or extended physical activity such as lifting"). Indeed, in some cases 10- to 20-pound lifting restrictions – like the one Young's doctor and midwife imposed – themselves constituted substantial limitations in the major life activities of lifting or working. See, *e.g.*, *Burns v. Coca-Cola Enterprises, Inc.*, 222 F.3d 247, 253 (6th Cir. 2000) (upholding district court's conclusion that plaintiff's back injury, which caused a 23-pound lifting restriction and "precluded him from performing at least 50% of the jobs that he was qualified to perform," substantially limited the major life activity of working).

If her lifting restriction had resulted from an ADA-qualifying disability, UPS would have offered Young accommodated work. But because her restriction resulted from her pregnancy – which is not an "impairment" and thus cannot be an ADA disability, see 29 C.F.R. Pt. 1630 App. § 1630.2(h) – the company refused to provide her the same treatment. That violates the plain text of the PDA.[13]

The court of appeals asserted that Young was not similar to drivers who had ADA disabilities because "her lifting limitation was temporary and not a significant restriction on her ability to perform major

[13] The EEOC's position, again, is in accord. See EEOC Enforcement Guidance, *supra*, § I.A.5. (PDA requires accommodating pregnant worker where "reasonable accommodations (including exceptions to policies) are provided under the ADA to individuals with disabilities who are similar to a pregnant worker in terms of their ability or inability to work").

life activities." Pet. App. 27a. But, once again, the only relevant question under the PDA is whether she was similar to those drivers "in [her] ability or inability to work." 42 U.S.C. § 2000e(k). That Young's restriction was temporary is irrelevant to the PDA. At the time she sought an accommodation, Young's ability to work was the same as that of a driver with an ADA disability that imposed a 20-pound lifting restriction – neither could perform job tasks that required lifting more than 20 pounds. Moreover, even before the enactment of the ADAAA, the ADA required employers to accommodate temporary lifting restrictions if they resulted from long-term or permanent disabilities that were otherwise substantially limiting.[14]

Nor is it relevant whether Young's restriction substantially limited her ability to perform major life activities. Unlike the PDA, which focuses entirely on the effects of a condition on the ability to work, the ADA's concept of "major life activities" includes a range of activities that may have nothing to do with the ability to work. See, *e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (reproduction is a major life activity). Indeed, prior to the ADAAA this Court expressed doubts that working could even be considered a major life activity. See *Toyota Motor Mfg., Ky., Inc.*

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[14] See 42 U.S.C. § 12112(b)(5)(A) (requiring reasonable accommodation "to the known physical or mental limitations" – not *substantial* limitations – "of an otherwise qualified individual with a disability").

v. Williams, 534 U.S. 184, 200 (2002).[15] For purposes of the PDA, the relevant question is whether Young was similar *in the ability to work* to a driver with an ADA disability that imposed a 20-pound lifting restriction – not whether she was similar in the ability to perform *other* life activities.

That UPS provided light duty to workers with ADA disabilities in response to an independent legal mandate does not change this conclusion. The plain text of the PDA says that pregnant workers "shall be treated the same" as nonpregnant workers who are similar in their ability to work. 42 U.S.C. § 2000e(k). That text says nothing about the *reason* an employer provides accommodation to nonpregnant workers. See *Johnson Controls*, 499 U.S. at 199 ("explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination"). It contains no exception for cases in which the employer does so in response to an independent legal obligation. The courts have no power to read an unexpressed exception into the statute's unqualified text. See *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79-80 (1998).

If an employer were exempt from the PDA's same-treatment requirement because it responded to

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[15] The ADA now specifically defines "major life activities" to include "working." 42 U.S.C. § 12102(2)(A).

external legal obligations like the ADA, the consequences would be perverse: Every step taken by Congress and state legislatures to broaden the accommodations provided to nonpregnant employees with work limitations would come at the direct expense of pregnant workers. Prior to the ADA's enactment, many employers voluntarily accommodated workers with disabilities; the ADA made those accommodations mandatory. Prior to the ADAAA's enactment, many employers voluntarily accommodated workers whose conditions fell just outside the ADA's disability definition; the ADAAA made those accommodations mandatory as well. If employer responses to external legal obligations were exempt from the same-treatment requirement, then each of those enactments would have actually *reduced* the duties those employers owed to pregnant workers: The day before the new statutes took effect, the voluntary accommodations set a baseline of treatment that the employers were required to extend to pregnant workers; but the day after, they would no longer be required to provide pregnant workers the same accommodations. That is not a result properly attributed to a statute whose sponsors intended to ensure that pregnant workers are treated as valued rather than marginal employees, see pp. 18-19, *supra* – particularly in the complete absence of textual support.

Indeed, this Court has already concluded that an external legal obligation can set the baseline for the same-treatment required by the PDA. In *CalFed*, *supra*, the Court addressed a California statute that required employers to provide pregnancy leave.

Employers challenged that law on the ground that it required them to provide *better* treatment to pregnant workers than to nonpregnant employees with disabling conditions that had a similar effect on their ability to work. The Court rejected that argument. The Court first concluded that the PDA did not forbid employment practices that (in the narrow circumstances addressed by the California law) grant a special benefit to pregnant women. See *CalFed*, 479 U.S. at 285-290. It then went on to hold that, even if the "shall be treated the same" language required employers to provide nonpregnant employees every benefit that they provide to pregnant workers, there was no conflict between the PDA and the California law: "Employers are free to give comparable benefits to other disabled employees, thereby treating 'women affected by pregnancy' no better than 'other persons not so affected but similar in their ability or inability to work.'" *Id.* at 291 (quoting 42 U.S.C. § 2000e(k)). This aspect of the Court's holding was the only one that Justice Scalia endorsed in his *CalFed* concurrence. See *id.* at 296 (Scalia, J., concurring in the judgment). A necessary premise of the Court's and Justice Scalia's analysis is that independent legal obligations can set a baseline of treatment that the PDA requires to be extended to pregnant and nonpregnant workers equally.[16]

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[16] Moreover, at the time Congress enacted the PDA, "several states mandated employers provide temporary disability benefits but permitted pregnancy to be treated less favorably than

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Regardless of whether the company was acting in response to an external legal obligation, the PDA required UPS to treat pregnant drivers "the same" as it treated drivers with ADA disabilities who were "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). By refusing to accommodate Young's pregnancy, UPS violated that requirement.

3. Conditions Rendering Drivers Ineligible for DOT Certification

In addition to those with on-the-job injuries and ADA disabilities, UPS provides accommodated work to drivers with medical conditions that temporarily render them ineligible to drive a commercial motor vehicle. These conditions include many (such as limb impairments, neuromuscular disease, heart disease, and hypertension) that may impose the same lifting restriction that Young faced. See pp. 6-9, *supra*. UPS states that the alternative jobs it provides to drivers ineligible for DOT certification are "not necessarily the light duty work petitioner requested." Resp. Supp. Br. 5. The company's hedging language is telling. The summary judgment record contains a number of examples of drivers who were temporarily ineligible

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other disabilities," but the committee reports "make clear that employers could no longer make such distinctions – pregnancy would need to be treated like any other disabling condition." Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. Davis L. Rev. 961, 997 (2013).

for DOT certification, and whom UPS accommodated by relieving them of lifting duties. See pp. 8-9, *supra*. These drivers were similar to Peggy Young in their ability or inability to work, but – because pregnancy is not a condition that renders a driver DOT-ineligible[17] – UPS denied her the same treatment. That, again, violated the plain text of the PDA.

The court of appeals gave two reasons for concluding that UPS was not required to treat Young the same as it treated drivers who were ineligible for DOT certification. First, the court said, Young was different because "no legal obstacle stands between her and her work." Pet. App. 27a. Second, the court suggested, drivers ineligible for DOT certification "maintained the ability to perform any number of demanding physical tasks, while Young labored under an apparent inability to perform tasks involving lifting." Pet. App. 28a. These arguments are unavailing.

To begin with, the relevant question under the PDA is whether Young and DOT-ineligible drivers were "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Along *that* dimension, Young was similar to those drivers. Contrary to the court of appeals' suggestion, many of the conditions that render a driver ineligible for DOT certification impose restrictions on lifting, and UPS in fact accommodated a number of DOT-ineligible drivers by reassigning

[17] See 49 C.F.R. § 391.41(b) (listing conditions that disqualify a driver, none of which includes pregnancy).

them to jobs that did not require heavy lifting. See pp. 7-9, *supra*. The PDA required UPS to give the same treatment to Young, who faced similar restrictions on her ability to work.

Moreover, it is not true that all UPS drivers who are ineligible for DOT certification face a "legal obstacle" to continued driving for the company. By law, the DOT's requirements apply only to drivers of trucks that weigh more than 10,000 pounds. See 49 U.S.C. § 31132(1)(A); 49 C.F.R. § 391.41(a)(1)(i). But many UPS drivers, like Peggy Young, operate vans and smaller trucks that are not subject to those DOT requirements. See *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 983 (9th Cir. 2007) (*en banc*). To the extent that the drivers of those smaller vehicles must comply with the DOT requirements, that is the result of UPS's own policy and not any legal mandate. See *id.*

Even if most of the drivers who become ineligible for DOT certification do face a legal obstacle to continuing in their current assignment, that only highlights the discriminatory nature of UPS's policy. After all, the DOT rules simply forbid a medically ineligible individual from operating a covered vehicle. They do not require an employer to find another, nondriving job for a driver who becomes ineligible.[18]

[18] Some drivers rendered ineligible for DOT certification also have disabilities entitling them to accommodation under the ADA. But not all of them do – a point that was especially important during the pre-ADAAA period in which this case

(Continued on following page)

In the American system of at-will employment, when an employee becomes legally ineligible to perform the job for which he or she was hired, the employer is – absent some external legal obligation – perfectly within its rights to fire that worker or place the worker on leave without pay.

By binding itself, in the collective bargaining agreement, to find a temporary alternative position for medically ineligible drivers, UPS has given those drivers a benefit that the law does not require. As a manager testified below, UPS has done so for a simple business reason: By reassigning temporarily ineligible drivers while they work to reacquire their eligibility, UPS keeps valuable knowledge within the company and saves the time and expense of hiring and training new drivers. See p. 9, *supra*. But pregnant drivers are no different in this respect. The very same business reasons would justify temporarily reassigning pregnant drivers. By failing to provide pregnant drivers the same treatment it provides drivers who are ineligible for DOT certification, UPS has demonstrated that it does not "regard [pregnant drivers] as valued, career employees." 123 Cong. Rec. 10,582 (Rep. Hawkins). It has violated both the letter and the purpose of the PDA.

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arose. See, *e.g.*, *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 522-525 (1999) (driver unable to qualify for DOT certification due to hypertension had no ADA disability).

C. Even if This Court Applies the Analysis of *McDonnell Douglas v. Green*, it Should Reverse

As we have shown, the summary judgment record contained sufficient evidence from which a trier of fact could conclude that UPS failed to treat Peggy Young the same as three sizeable classes of drivers who were "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Because the evidence that pregnant and nonpregnant workers were not treated the same appears directly in the record – and, indeed, is reflected in UPS's formal, written policies – there is no need for this Court to resort to the judicially-crafted burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, *supra*. The *McDonnell Douglas* analysis is "a flexible evidentiary standard" that "does not apply in every employment discrimination case." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 511-512 (2002). The "entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring in the judgment). But UPS's violation of the statute is apparent without any inquiry into intent. As with the transfer policy this Court considered in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), UPS's accommodated-work policy "is discriminatory

on its face," and the *McDonnell Douglas* analysis is unnecessary.[19]

Even if this Court does apply the *McDonnell Douglas* analysis, it should still reverse. The court of appeals recognized that Young had satisfied the first three elements of the *prima facie* case: she "fell within the protected class, raised at least a genuine issue of material fact regarding her job performance, and suffered an adverse employment action when she could not continue working." Pet. App. 26a. See *McDonnell Douglas*, 411 U.S. at 802 (setting forth components of the *prima facie* case). The court concluded, however, that Young could not establish "the final element of the prima facie case: whether similarly-situated employees outside the protected class received more favorable treatment than Young." Pet. App. 26a.

But that conclusion rested entirely on the premise that pregnant workers could not be properly compared "to employees accommodated under the ADA, drivers who have lost their DOT certification for medical reasons, and employees injured on the job."

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[19] The EEOC, again, agrees. See EEOC Enforcement Guidance, *supra*, at § I.C.1.c. ("A plaintiff need not resort to the burden shifting analysis set out in *McDonnell Douglas Corp. v. Green* in order to establish a violation of the PDA where there is * * * evidence that a pregnant employee was denied a light duty position provided to other employees who are similar to the pregnant employee in their ability or inability to work.") (footnote omitted).

Pet. App. 27a. For the reasons explained above, that premise conflicts with the plain text of the PDA. See pp. 30-46, *supra*. That text requires courts to compare pregnant workers to others – like the employees in the three categories UPS accommodates – who are "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). That is precisely what the court of appeals refused to do. As a result, the court erred in concluding that Young had failed to establish a *prima facie* case.

Young presented sufficient evidence to defeat summary judgment on the second and third steps of the *McDonnell Douglas* analysis as well. UPS gave one reason for refusing to accommodate Young's lifting restriction – that the company had a policy of accommodating limitations resulting from on-the-job injuries, ADA disabilities, and DOT-disqualifying conditions, but not those resulting from pregnancy. For the reasons explained above, see pp. 20-30, *supra*, the PDA's plain terms are inconsistent with considering that policy to be a "legitimate, nondiscriminatory reason." *McDonnell Douglas*, 411 U.S. at 802. As a result, Young presented sufficient evidence to defeat summary judgment without reaching the pretext stage of the analysis. See *id.* at 802-807.

In any event, the record contains ample evidence of pretext. That evidence includes the large number of circumstances other than pregnancy in which UPS provides accommodated work; a shop steward's testimony that "[t]o the best of [her] knowledge, the only light duty requested restrictions that became an

issue" in her workplace "were with women who were pregnant," J.A. 504; and the statement of Young's division manager that "she was 'too much of a liability' while pregnant and that she 'could not come back into the [facility in which she worked] until [she] was no longer pregnant.'" Pet. App. 8a. Even if this Court considers the *McDonnell Douglas* analysis appropriate here, it should therefore still reverse the grant of summary judgment to UPS.

D. UPS's Collective Bargaining Agreement Does Not Relieve the Company of Liability

In its brief in opposition to the petition for *certiorari* (at 13), UPS argued – for the first time in any paper filed in this case – that Young's claim is barred by Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). Section 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of," *inter alia*, "sex." *Id.* As we explained in our reply brief in support of the petition (at 6-7 & n.7), the Section 703(h) argument, which was neither raised nor decided below, is not properly before this Court. In any event, providing accommodated work to Young would not impermissibly override the company's collectively-bargained seniority system.

First, providing accommodated work to Young pursuant to the PDA would not violate UPS's collective bargaining agreement. The CBA specifically provides that "[a] light duty request, certified in writing by a physician, shall be granted in compliance with state or federal laws, if applicable." J.A. 592. As we have shown, the PDA requires UPS to give pregnant drivers "the same" light-duty accommodations as it gives drivers with on-the-job injuries, ADA disabilities, and DOT-disqualifying conditions who are "similar in the[ ] ability or inability to work." 42 U.S.C. § 2000e(k). Thus, the CBA required the company to grant Young's light-duty request "in compliance with * * * federal law[ ]." It is irrelevant that UPS took the erroneous position that the PDA did not require it to accommodate pregnant drivers with similar work restrictions to those experienced by the drivers whom it did accommodate. By the plain terms of the statute, federal law required it to accommodate those pregnant drivers. And by the plain operation of the CBA, such accommodations did not breach the seniority system.

Second, even absent the CBA's "compliance with state or federal law" provision, granting Young's accommodation request would not have violated UPS's seniority system. For one thing, UPS could have fully accommodated Young without reassigning her to a different position, by simply allowing her to remain in her current assignment and trade heavier packages to willing co-workers. As the testimony at summary judgment showed, that practice of trading packages

was common in Young's workplace. See pp. 11-12, *supra*. Had UPS granted that accommodation, no seniority interests of other employees would have been implicated. And even if the company had temporarily reassigned Young to a non-driving job that did not require heavy lifting, the reassignment would have been unlikely to displace a more senior employee. The testimony at summary judgment indicates that light-duty reassignments at UPS typically did not displace other employees, but instead filled positions that were already open. See p. 9, *supra*; DCt. Dkt. 76, Att. 20 at 17. This case is thus dispositively unlike *Trans World Airlines v. Hardison*, *supra*, in which the record made clear that granting the plaintiff's request to be relieved of Saturday work would have displaced a more senior worker. See *Hardison*, 432 U.S. at 80.

Third, if accommodating Young would have violated UPS's collective bargaining agreement, the agreement would not have established a "bona fide" system protected by Section 703(h). The CBA does not dictate that all job assignments will be made on the basis of seniority. Rather, it makes exceptions to the company's seniority system for three sizeable classes of drivers with work limitations. Cf. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 405 (2002) (exceptions to a seniority system can make it reasonable to override that system). The drivers who benefit from those exceptions experience limitations that are similar to those experienced by pregnant drivers like Young. If the CBA does not permit the company to "treat[ ]" those pregnant drivers "the same," then the CBA by

its terms violates the PDA. As this Court explained in *Hardison*, 432 U.S. at 79, "neither a collective-bargaining contract nor a seniority system may be employed to violate the statute."[20]

Section 703(h) protects some seniority systems that freeze into place the effects of past discrimination. See *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 761 (1976); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 352-353 (1977). It does not protect employers where fresh discrimination appears on the face of the seniority system itself. In *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009), for example, this Court concluded that the employer was protected by Section 703(h) when it "pa[id] pension benefits calculated in part under an accrual rule, *applied only prior to the PDA*, that gave less retirement credit for pregnancy leave than for medical leave generally." *Id.* at 704 (emphasis added). But the Court made clear that it was only because the accrual rule was "a permissible differentiation given the [pre-PDA] law at the time" that the rule complied with "the subsection (h) bona fide requirement." *Id.* at

[20] Where the employer's duty is to provide only reasonable accommodation – as in *Hardison* itself – incompatibility with a seniority system may render the plaintiff's requested accommodation unreasonable. See *Hardison*, 432 U.S. at 81; *US Airways*, 535 U.S. at 402-403. But the PDA does not require reasonable accommodation. It requires that pregnant workers "be treated the same" as nonpregnant workers "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). The employer's own treatment of similarly limited employees thus sets the terms of the treatment it must provide to pregnant workers.

712.[21] A system that had unlawfully "discriminatory terms," by contrast, would not have been "bona fide." *Hulteen*, 556 U.S. at 710. To the extent that UPS's seniority system denies accommodated work to pregnant women while granting it to "persons not so affected but similar in their ability or inability to work," 42 U.S.C. § 2000e(k), it contains discriminatory terms that work a fresh violation of the PDA. It thus is not a bona fide seniority system protected by Section 703(h).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[21] See also *Teamsters*, 431 U.S. at 355 (holding, in race discrimination case, that seniority system was "bona fide" because it "applie[d] equally to all races and ethnic groups").