No. 12-1226

IN THE

Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

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The Equal Employment Advisory Council, National Federation of Independent Business Small Business Legal Center, and Society for Human Resource Management respectfully submit this brief *amici curiae* in support of the position of Respondent before this Court in favor of affirmance.[1]

[1] The parties have consented to the filing of this brief. 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

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

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amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Founded in 1948, the Society for Human Resource Management (SHRM) is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and the United Arab Emirates.

Many of *amici's* members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws and regulations. As potential defendants to Title VII discrimination charges and lawsuits, *amici* have a substantial interest in whether and to what extent Title VII, as amended by the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e(k), provides a right to workplace accommodations on the basis of pregnancy and related medical conditions.

As national representatives whose memberships include many professionals who are responsible for compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC, NFIB and/or SHRM have participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved Title VII questions. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the

business community and the significance of this case to employers generally.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, prohibits workplace discrimination on the basis of race, color, religion, sex or national origin. In response to this Court's ruling in *General Electric Co. v. Gilbert*, 429 U.S. 125, 136 (1976), Congress enacted the Pregnancy Discrimination Act (PDA) to clarify that the term "because of sex" includes discrimination on the basis of "pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e(k). In doing so, Congress merely confirmed that under Title VII, discrimination because of pregnancy, childbirth or related conditions constitutes unlawful discrimination "because of sex."

The Fourth Circuit below therefore was correct in holding that Title VII, as amended by the PDA, does not impose an affirmative obligation on employers to provide *preferential* workplace accommodations solely on the basis of pregnancy, but rather mandates that women affected by pregnancy and related conditions be treated the same as non-pregnant peers, without regard to pregnancy status. Any other construction would contravene the statute's plain text, purposes and intent, and thus should be rejected by this Court.

Although Title VII already imposed on employers an affirmative obligation to reasonably accommodate the sincerely-held religious beliefs of their employees, *see Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), Congress elected not to incorporate such a requirement into the PDA. Indeed, both the plain text of the PDA and its legislative history are devoid of any reference to an affirmative obligation to provide

workplace accommodations, or any suggestion that women affected by pregnancy and related conditions are to be accorded preferential treatment under Title VII. For that reason, no federal court of appeals has accepted Petitioner's contention that the PDA imposes an affirmative duty on employers to provide pregnancy-related workplace accommodations to the same extent as are provided to non-pregnant workers similar in ability or inability to work.

As this Court observed in *California Federal Savings & Loan Association v. Guerra*, the PDA was designed to establish "a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise." 479 U.S. 272, 285 (1987) (citation and internal quotation omitted). In fact, a number of states have gone beyond the PDA's nondiscrimination protections by enacting laws that impose an affirmative duty on covered employers to provide workplace pregnancy accommodations. Federal legislation also has been introduced and currently is pending in Congress that would make it unlawful for an employer to refuse to provide reasonable accommodations "to the known limitations related to the pregnancy, childbirth, or related medical conditions" of an applicant or employee, unless doing so would impose an undue hardship. H.R. 1975, 113th Cong. (2013) at Sec. 2.(1).

Were it true that the PDA already mandates pregnancy accommodations, there would be no need for new laws, either at the state or the federal level, imposing such obligations on employers. The fact that a number of state legislatures and Congress are considering laws that would require workplace reasonable accommodations on the basis of pregnancy and related conditions calls into serious question

Petitioner's contention that such an obligation already exists under the PDA.

Petitioner's construction of the PDA is further undermined by the fact that, unlike other workplace accommodation laws, it does not contemplate any restrictions on the scope of an employer's duty to accommodate pregnant workers. If this Court were to accept Petitioner's view of the PDA, employees who are affected by pregnancy or related conditions would be elevated to a "super-protected" legal status, entitled not only to nondiscriminatory treatment, but to far superior treatment than entire classes of other protected persons.

Both the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, and Title VII's religious discrimination provision, 42 U.S.C. § 2000e(j), require, for instance, that employers implement workplace accommodations that are both reasonable and effective, but only to the extent that doing so would not impose an undue hardship on business operations. Of particular note, in the Title VII religion context, any accommodation that would impose more than a *de minimis* burden constitutes undue hardship. *See Hardison*, 432 U.S. at 84 (footnote omitted).

Petitioner's construction of Title VII, which does not contemplate *any* restrictions or limitations on the right of pregnant workers to workplace accommodations, effectively would allow those employees, as a class, to move to the front of the line for special treatment – a result plainly at odds with the PDA's aim to ensure *equal* treatment.

The EEOC lacks the authority to promulgate substantive regulations interpreting Title VII, and only may issue "suitable *procedural* regulations" as

required to administer the Act. 42 U.S.C. § 2000e-12(a) (emphasis added). Accordingly, the EEOC's interpretations of Title VII are not entitled to controlling deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Instead, the agency's views may be entitled to some measure of respect under *Skidmore v. Swift*, 323 U.S. 134 (1944), but only insofar as they are persuasive.

The EEOC's very recently revised enforcement guidance on pregnancy accommodations purports to impose an affirmative obligation to provide pregnancy-related workplace accommodations to the same extent as are provided to non-pregnant workers "similar in their ability or inability to work." EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* at I.A.5 (July 2014). Because such an interpretation is inconsistent with the plain text of Title VII, as well as the agency's own regulations and longstanding policy interpretations, it is entirely unpersuasive and thus not entitled to any judicial deference.

The EEOC never before, in either its sex discrimination regulation or sub-regulatory guidance, has purported to impose an affirmative obligation on employers to ensure that *all* pregnant employees with work restrictions are accommodated, as long as any other non-pregnant employee, for whatever reason, is provided a similar accommodation. The absence of any such reference in the sex discrimination context is especially stark in light of the fact that the EEOC's religious discrimination regulation explicitly describes, in detail, a covered employer's obligation under Title VII to provide workplace *religious* accommodations to the point of undue hardship.

Because the text and structure of its sex and religion regulatory provisions confirm that the EEOC traditionally has interpreted the PDA as mandating equal, not preferential, treatment, the agency's new policy views as expressed in its recent enforcement guidance are unpersuasive and thus not entitled to *Skidmore* deference.

ARGUMENT

I. INTERPRETING THE PDA TO IMPOSE AN AFFIRMATIVE PREGNANCY ACCOMMODATION REQUIREMENT WOULD CONTRAVENE TITLE VII'S PLAIN TEXT, PURPOSE AND AIMS

This is not a case about unlawful pregnancy discrimination. Petitioner was not discriminated against "because of" pregnancy or a related condition. Rather, she was denied a "light duty" work assignment. Under Respondent's policy at the time, alternative work assignments would be considered for three, facially-neutral categories of employees: those (1) with an actual disability as defined by the Americans with Disabilities Act, (2) who suffered a work-related injury, or (3) who experienced the loss of a Department of Transportation (DOT) driver certification. Because Petitioner failed to qualify for an alternative work assignment under one of those categories, she was not entitled to be placed in a light duty job.

Left without the basis for a traditional discrimination claim, Petitioner urges this Court to construe Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act (PDA), as imposing an affirmative obligation on employers to provide workplace accommodations – such as light duty – to those affected by pregnancy or related

conditions, as long as they do so for any other employee not so affected. Title VII, however, does not go that far. Inasmuch as such an interpretation is inconsistent with the text, meaning, and purposes of Title VII, it is erroneous and should be rejected by this Court.

A. As Amended By The PDA, Title VII Provides That Discrimination Because Of Pregnancy Or Related Conditions Constitutes Unlawful Discrimination "Because Of Sex"

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, prohibits discrimination in the terms, conditions and privileges of employment on the basis of sex. In *General Electric Co. v. Gilbert*,[2] this Court ruled that exclusion of pregnancy from a disability benefits plan was "not gender-based discrimination at all." Congress enacted the Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. § 2000e(k), directly in response to *Gilbert*, amending Title VII's definition of discrimination "because of sex" to include discrimination on the basis of "pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e(k). The PDA also mandates equal treatment of those so affected with respect to the "receipt of benefits under fringe benefit programs." *Id.* Thus, as amended by the PDA, Title VII proscribes treating a woman differently than a non-pregnant person similar in his or her ability to work *because of* pregnancy or a related condition.

Although the PDA requires employers to treat women "affected by pregnancy, childbirth, or related

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[2] 429 U.S. 125, 136 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

medical conditions" the same as other employees in all aspects of employment – including the provision of health insurance and other benefits – it stops short of imposing an affirmative duty on employers to provide pregnancy-related workplace accommodations to the extent that they are not offered categorically to all other employees. *Id.*

1. Section 2000e(k) does not contain a workplace accommodations requirement, even though adjacent Section 2000e(j) does impose such a duty with respect to religion

Section 2000e(k) provides, in relevant part:

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

42 U.S.C. § 2000e(k). The plain text of Section 2000e(k) mandates equal treatment as compared to other non-pregnant persons similarly situated; it does not require that pregnant women be treated the same as (or better than) *all* other persons. Indeed, conspicuously absent from the definition is any reference to an affirmative obligation to provide workplace accommodations, or any suggestion that women affected by pregnancy and related conditions are to be accorded preferential treatment under Title VII.

In contrast, the definition of "religion" – situated just above the PDA-revised definition of sex – does require that reasonable accommodations be made for conflicts between an individual's job responsibilities and sincerely-held religious beliefs. In 1972, Congress amended Title VII to provide that the term "religion" "includes all aspects of religious observance and practice, as well as belief, *unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business*." 42 U.S.C. § 2000e(j) (emphasis added); *see also Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). As this Court has explained, "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Hardison*, 432 U.S. at 74.

Though it amended Section 2000e(k) just six years after adopting the current definition of "religion," Congress chose not to include any language specifying a right to workplace accommodations on the basis of pregnancy and/or related conditions. Nevertheless, Petitioner and her *amici* are steadfast in their view that on its face, Title VII requires that workplace accommodations, such as light duty, be made available to any pregnant worker needing an accommodation, so long as even one other non-pregnant person receives the accommodation. *Amicus* United States contends, for instance, that "when an employer can and does accommodate work limitations for some nonpregnant employees, it must extend the same accommodations to pregnant employees who are similarly limited in their ability to work." Brief for the United States as

Amicus Curiae Supporting Petitioner at 21-22. It goes on to argue:

> The court of appeals elsewhere recognized that respondent's collective bargaining agreement places a heightened obligation on respondent to accommodate employees injured on the job. Title VII places the same "heightened obligation" on respondent to offer the same accommodation to pregnant employees who are similar in their ability or inability to work.

Id. at 22 (citation omitted).

That interpretation simply does not comport with the actual text of Section 2000e(k). "The second problem with this reading is its inconsistency with the design and structure of the statute as a whole. Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, __ U.S. __, 133 S. Ct. 2517, 2529 (2013) (citations omitted). Because Congress did not incorporate into the PDA, as it did elsewhere, a right to workplace accommodations, an employer does not violate the Act by refusing to provide such accommodations for non-discriminatory reasons.

2. Efforts currently are underway to enact complementary federal pregnancy accommodations legislation

Petitioner's interpretation of Title VII is particularly questionable when considered in light of legislation currently pending in Congress that would impose an affirmative obligation on employers to provide workplace accommodations to pregnant workers. The so-called Pregnant Worker's Fairness Act (PWFA) was first introduced in 2012 with the strong backing of

over 100 women's and civil rights advocacy organizations, including A Better Balance, the Equal Rights Advocates, and the National Partnership for Women and Families.[3] The sponsors at the time described PWFA as "critical new legislation" to prevent pregnant women from being forced out of jobs or being denied "reasonable job modifications" that would enable them to continue working while pregnant. Press Release, Rep. Jerrold Nadler, *Reps. Nadler, Maloney, Speier, Davis & Advocates Announce Legislation Protecting Pregnant Workers from Discrimination* (May 8, 2012).[4]

Patterned after the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, the PWFA would make it unlawful for an employer to refuse to provide reasonable accommodations "to the known limitations related to the pregnancy, childbirth, or related medical conditions" of an applicant or employee, unless doing so would impose an undue hardship. H.R. 5647, 112th Cong. (2012) at Sec. 2.(1). The terms "reasonable accommodation" and "undue hardship" would have the same meaning as, and be interpreted consistent with, the ADA. *Id.* at Sec. 5.(5). The PWFA would be enforced by the Equal Employment Opportunity Commission (EEOC), which in addition to promulgating suitable regulations would be required to provide examples of pregnancy-related workplace accommodations sufficient to address "known limitations related to pregnancy, childbirth, or related medical conditions." *Id.* at Sec. 2.(1).

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[3] S. 3565 and H.R. 5647, 112th Cong. (2012). Reintroduced as S. 942 and H.R. 1975, 113th Cong. (2013).

[4] *Available at* http://nadler.house.gov/press-release/reps-nadler-maloney-speier-davis-advocates-announce-legislation-protecting-pregnant (last visited Oct. 29, 2014).

If, as Petitioner and her *amici* insist, Title VII already requires employers to make "reasonable job modifications" and other workplace accommodations for pregnant workers who need them, there would be no need for new federal legislation establishing such an obligation. Nor would there be such a concerted effort to enact new pregnancy accommodations laws at the state level.

3. States have gone beyond the PDA's nondiscrimination protections by enacting specific workplace pregnancy accommodations laws

Although federal law does not currently mandate the practice, a number of states have enacted laws requiring the provision of workplace accommodations on the basis of non-disability related pregnancy or related conditions. *See, e.g.*, Cal. Gov't Code § 12945; Conn. Gen. Stat. § 46a-60(a)(7); La. Rev. Stat. § 23:342; Minn. Stat. § 363A.08(6); N.J. Stat. § 10:5-12(s). Since 1999, for instance, California has required employers with five or more employees to provide pregnancy-related workplace reasonable accommodations upon an employee's request. Cal. Gov't Code § 12945. The law specifies that employers must temporarily transfer a pregnant worker "to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where that transfer can be reasonably accommodated." *Id.*

Similarly, the West Virginia Pregnant Workers' Fairness Act makes it unlawful for a covered employer to, among other things, not make pregnancy-related reasonable accommodations or force an employee to accept an accommodation not of her choosing – such as

placement on an involuntary leave of absence. W. Va. Code § 5-11B-1 *et seq.* The West Virginia PWFA is virtually identical to the federal PWFA.

In a June 2014 report entitled, *Expecting Better: A State-by-State Analysis of Laws That Help New Parents*, the National Partnership for Women & Families (NPWF) pointed to several "shortcomings" of the PDA, including that "some courts" have held that it does not require workplace reasonable accommodations.[5] Highlighting the decision by the Fourth Circuit below, the NPWF asserts that "[t]his decision, and numerous other complaints from pregnant women across the country, has given rise to new momentum *to pass pregnancy accommodation laws federally and at the state and local levels*." *Id.* at 13 (emphasis added). These state-level efforts to adopt workplace pregnancy accommodations laws further undermine Petitioner's claim that Title VII already provides the right to pregnancy accommodations.

B. This Court's Title VII Jurisprudence Confirms The Limited Scope Of The PDA

This Court observed in *California Federal Savings & Loan Association v. Guerra* that "Congress intended the PDA to be a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise." 479 U.S. 272, 285 (1987) (citation and internal quotation omitted). It confirmed that unlike some, more generous state laws, the main purpose of the PDA was to ensure that women are not subjected to discriminatory employment practices

[5] Nat'l P'ship for Women & Families, *Expecting Better: A State-by-State Analysis of Laws That Help New Parents* at 13 (3d ed. June 2014).

because of pregnancy, childbirth or related medical conditions. The PDA was not intended to create any new entitlements for pregnant workers or, as the Fourth Circuit below observed, to confer upon them "'most favored nation' status with others based on their ability to work, regardless of whether such status was available to the universe – male and female – of nonpregnant employees." Pet. App. 19a.

The question presented in *Guerra* was whether Title VII, as amended by the PDA, "preempts a state statute that requires employers to provide leave and reinstatement to employees disabled by pregnancy." *Id.* at 272. Concluding that it does not, the Court observed, "The purpose of Title VII is to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of employees over other employees." *Id.* at 693 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)) (internal quotation omitted). To the extent that the California law simply builds upon the nondiscrimination protections afforded by the PDA, the Court concluded that it merely complements, rather than conflicts with, Title VII.

In resolving that question, the Court explained that Congress's intent in enacting the PDA was to confirm that discrimination because of pregnancy is unlawful, not to mandate special treatment for pregnant workers:

> In contrast to the thorough account of discrimination against pregnant workers, the [PDA's] legislative history is devoid of any discussion of preferential treatment of pregnancy, beyond acknowledgments of the existence of state statutes providing for such preferential treatment. Opposition to the PDA came from those concerned with

> the cost of including pregnancy in health and disability-benefit plans and the application of the bill to abortion, not from those who favored special accommodation of pregnancy.

Guerra, 479 U.S. at 285-86; *see also Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 205 (1991) (the legislative history of PDA "confirms what the language of the PDA compels. Both the House and Senate Reports accompanying the legislation indicate that this statutory standard was chosen to protect female workers from being treated differently from other employees simply because of their capacity to bear children").

Thus, as this Court's prior rulings confirm, the limited scope and straightforward intent of the PDA compel the conclusion that the pregnancy accommodations Petitioner seeks in this case are unavailable to her under Title VII.

II. READING AN AFFIRMATIVE ACCOMMODATION OBLIGATION INTO THE PDA WOULD ELEVATE THOSE AFFECTED BY PREGNANCY AND RELATED CONDITIONS TO "SUPER-PROTECTED" STATUS

Unlike other workplace accommodation laws, Petitioner's construction of the PDA does not contemplate any restrictions on the scope of an employer's duty to accommodate pregnant workers. As such, it elevates employees who are affected by pregnancy or related conditions to a "super-protected" legal status, entitled not only to nondiscriminatory treatment, but to far superior treatment than entire classes of other protected persons.

The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, for instance, requires that reasonable accommodations be made to the known disabilities of qualified individuals with disabilities unless doing so would impose an undue hardship on business operations. 42 U.S.C. § 12112(b)(5)(A). An individual with a disability is qualified if he or she can perform the essential functions of the job with or without reasonable accommodation.

If no reasonable accommodation would enable the individual with a disability to perform the essential functions of the position, then he or she is not "qualified" for ADA purposes. 42 U.S.C. § 12111(8). Thus, if the ability to lift fifty pounds waist to shoulder is an essential function of a particular job, an individual who is unable to perform that essential function even with reasonable accommodation is not "qualified" for ADA purposes. *Id.* Even where an accommodation that is both reasonable and effective is identified, the employer is under no legal obligation to offer it if doing so would impose an undue hardship. Nor must an employer place or retain an individual in a position if doing so would pose a "significant risk" of harm to that person or to others. 42 U.S.C. § 12111(3).

As is the case under the ADA, Title VII requires employers to make reasonable accommodations to an individual's sincerely-held religious beliefs where they conflict with a work requirement, but only to the extent that doing so would not impose an undue hardship. 42 U.S.C. § 2000e(j). In the religion context, this Court has held that any accommodation that would impose more than a *de minimis* burden constitutes undue hardship. *See Hardison*, 432 U.S. at 84 (footnote omitted).

As noted, unlike a number of state laws and federal legislation currently pending in Congress, Title VII does not impose an affirmative obligation on employers to provide workplace accommodations due to non-disabling pregnancy and pregnancy-related conditions. Under Petitioner's construction of the statute, however, employers would be obligated to provide such accommodations whenever a non-pregnant worker who is "similarly" able or unable to perform his job receives workplace accommodations – whether by virtue of the employer's ADA obligations, the terms of a collective bargaining agreement or, as here, a facially neutral and nondiscriminatory employment policy. Worse still, under that interpretation, employers would have to provide the requested accommodation whether or not it is "reasonable" or would impose an undue hardship on the employer's business operations, since the PDA's purported accommodations mandate does not contain those, or any other, functional limitations. As a result, pregnant women would be entitled to leapfrog ahead of entire classes of employees who unquestionably are entitled to workplace accommodations, subject only to the "similar in ability" language noted above. Such a construction is at odds with Title VII's aim to ensure equal treatment, regardless of sex (including pregnancy).

As one EEOC Commissioner pointed out, such an interpretation:

> [A]llows pregnant employees to bypass the requirements of a qualified individual with a disability under the ADA, *thus elevating [them] to a kind of super-status above that of individuals with disabilities. This dilutes the significance of reasonable accommodations and the rights of individuals with disabilities under the ADA.* That

> is an insult to the disability community and their years of working for legislation that ensured them the reasonable accommodations that they are now entitled to receive by law.

Public Statement of Commissioner Constance A. Barker, U.S. EEOC (July 14, 2014) (Mem. Attach. at 2).[6] The same would be true for those entitled to religious accommodations under Title VII.

As noted, the PDA does not contain an undue hardship or any other defense to failing to provide a requested pregnancy accommodation.[7] Thus, as a practical matter, no employer would be able to avoid providing workplace accommodations on the basis of pregnancy or related conditions – such as infertility, abortion, and the like – to any woman requesting them under the PDA, so long as a single ADA or Title VII religion-based reasonable accommodation is made anywhere within the company.

For instance, if an employer excuses an employee from mandatory overtime as a religious accommodation, under Petitioner's interpretation of the PDA, a pregnant worker who is "similar in her ability or inability to work" likewise would be entitled to no overtime as an accommodation. Or if a qualified individual with a disability is permitted (as a result of extreme fatigue associated with the effects of new epilepsy medication) to begin his work shift one hour later than scheduled for a four-week period, the pregnant worker who is similarly affected by fatigue

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[6] *Available at* http://op.bna.com/dlrcases.nsf/id/kmgn-9lznp5/$File/barkerdissent.pdf (last visited Oct. 29, 2014).

[7] Both the proposed PWFA, as well as most state statutes, do place reasonable restrictions on the right to pregnancy accommodations, however.

(and thus similarly unable to make it to work on time) categorically would be entitled to the same accommodation under Petitioner's rationale.

Because a purported right to pregnancy accommodations would not operate in harmony with an employer's obligation to provide reasonable accommodations under either Title VII's religious discrimination provision or the ADA, it is improper, and makes little practical sense, to read such a right into the statute.

III. THE EEOC'S JULY 2014 SUBREGULATORY ENFORCEMENT GUIDANCE ON PREGNANCY ACCOMMODATIONS IS NOT ENTITLED TO JUDICIAL DEFERENCE

On July 14, 2014, the EEOC published its *Enforcement Guidance on Pregnancy Discrimination and Related Issues*,[8] in which it asserts that under the PDA, an employer must provide workplace accommodations to women on the basis of pregnancy or related medical conditions to the same extent as it provides accommodations to other workers who are "similar in their ability or inability to work." *Id.* at I.A.5. Specifically in the context of light duty work, the EEOC "rejects the position that the PDA does not require an employer to provide light duty for a pregnant worker if the employer has a policy or practice limiting light duty to workers injured on the job and/or to employees with disabilities" under the ADA, *id.* at I.C.1.c., a position directly at odds with the decision below and contrary to decisions of every

[8] *Available at* http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last visited Oct. 29, 2014).

federal appeals court to have decided the issue. *See Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Elam* v. *Regions Fin. Corp.*, 601 F.3d 873, 878 (8th Cir. 2010); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006); *EEOC* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1191 (10th Cir. 2000); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312-13 (11th Cir. 1999); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 207-08 (5th Cir. 1998).

The EEOC thus asserts that an employer may not deny a requested "light duty" pregnancy accommodation on the ground that light duty assignments are reserved only for those with ADA-qualifying disabilities or on-the-job injuries. EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* at I.C.1.c. (July 2014). In particular, "if a pregnant worker requests a change that the employer is providing as a reasonable accommodation to a co-worker with a disability, the employer may evaluate the pregnant employee's request in light of whether the change would constitute an 'undue hardship', since this would amount to treating the pregnant employee the same as an employee with a disability whose accommodation request would also be subject to the defense of undue hardship." *Id.* at I.A.5. (footnote omitted).

This is the very argument that the Fourth Circuit rejected below. Rather than wait for this Court's ruling, the EEOC inexplicably has adopted the policy view that to the extent an employer provides even *one* workplace reasonable accommodation such as light duty to an individual with a disability under the ADA, it therefore is obligated under Title VII to do the same with respect to women who are pregnant or affected by pregnancy-related conditions.

Congress intentionally declined to confer upon the EEOC substantive rulemaking authority under Title VII. Instead, it authorized the agency "to issue, amend, or rescind suitable procedural regulations" as required to administer the Act. 42 U.S.C. § 2000e-12(a). Accordingly, the EEOC's interpretations of Title VII are not entitled to controlling deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[9] Rather, they are entitled to some measure of respect under *Skidmore v. Swift*, 323 U.S. 134 (1944), but only to the extent that they are persuasive.

A. The EEOC's Recent Guidance Is Not Entitled To *Skidmore* Deference, Because It Is Inconsistent With The Agency's Own Regulations And Long-standing Interpretations Of The PDA

In *Skidmore v. Swift*, this Court ruled that an agency's interpretations of a statute it is authorized to administer, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts

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[9] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court established the fundamental framework for analyzing certain situations in which a party challenges a federal agency's construction of a statute. Notably, the *Chevron* framework does not apply to judicial review of all agency actions, but only to those for which "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Where such is not the case, the *Chevron* framework does not apply, and the agency's view is, at most, "eligible to claim respect according to its persuasiveness." *Id.* at 221 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

and litigants may properly resort for guidance." 323 U.S. 134, 140 (1944). In determining what level of deference is to be accorded administrative interpretations of statutory law, courts applying *Skidmore* have considered "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (citation omitted), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); *see also Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) ("Under *Skidmore*, we consider whether the agency has applied its position with consistency") (citations omitted). Such an approach "has produced a spectrum of judicial responses, from great respect at one end to near indifference at the other." *Mead*, 533 U.S. at 228 (citations omitted).

1. Unlike the religious accommodations provision that immediately follows it, the EEOC's sex discrimination regulation does not interpret Title VII to impose an affirmative duty to accommodate

The EEOC suggests that its purpose in publishing the new guidance simply is to reaffirm the agency's longstanding view that Title VII entitles pregnant employees to workplace accommodations to the same extent as are provided to non-pregnant employees who are "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Never before, however, has the EEOC purported to impose an affirmative obligation on employers to ensure that *all* pregnant employees with work restrictions are accommodated, as long as

any other non-pregnant employee, for whatever reason, is provided a similar accommodation.

The EEOC's sex discrimination regulation, which was amended after the PDA's enactment, certainly does not go that far, and in fact is silent regarding any affirmative duty to accommodate pregnancy unless doing so would impose an undue hardship. The regulation provides, in relevant part:

> **Employment policies relating to pregnancy and childbirth.**
>
> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities. Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were

> carried to term or where medical complications have arisen from an abortion, are not required to be paid by an employer; nothing herein, however, precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

29 C.F.R. § 1604.10(a), (b); *see also* App. to Part 1604, *Questions and Answers on the Pregnancy Discrimination Act*, Pub. L. No. 95-555, 92 Stat. 2076 (1978). The EEOC's regulation is devoid of any language requiring pregnancy-related workplace accommodations, which strongly suggests that the agency's longstanding interpretation of the PDA has been, until recently, that Title VII stops short of doing so.

Although the EEOC's pregnancy discrimination regulation does not impose a workplace accommodation obligation on employers, such an obligation is expressly set out in the adjacent regulation on religious discrimination:

> (a) Purpose of this section. This section clarifies the obligation imposed by title VII of the Civil Rights Act of 1964, as amended, to accommodate the religious practices of employees and prospective employees. … The legal principles which have been developed with respect to discrimination prohibited by title VII on the bases of race, color, sex, and national origin also apply to religious discrimination *in all circumstances other than where an accommodation is required.*

29 C.F.R. § 1605.2(a) (emphasis added). The regulation goes on to specify that Title VII "makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective

employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business." 29 C.F.R. § 1605.2(b) (footnote omitted).

The text and structure of its sex and religion regulatory provisions confirm that the EEOC traditionally has interpreted the PDA as mandating equal, not preferential, treatment. To the extent that the EEOC's new subregulatory enforcement guidance is inconsistent with the agency's settled regulatory actions and interpretations, it is unpersuasive and thus not entitled to *Skidmore* deference.

2. A review of recent EEOC charge statistics confirms that neither charging parties, nor the agency itself, understood the PDA to provide an affirmative right to pregnancy accommodations

The EEOC regularly publishes statistics outlining the number and types of discrimination charges that are filed each Fiscal Year (October 1 – September 30). Since at least Fiscal Year (FY) 2010, the agency has broken down its charge statistics by issue for each protected category under every law it enforces. Significantly, in Fiscal Years 2010, 2011, and 2012, the EEOC did not receive or record a single discrimination charge alleging failure to accommodate on the basis of sex. EEOC, Enforcement & Litigation Statistics, Bases by Issue FY 2010 – FY 2013.[10] It was not until Fiscal Year 2013 that the agency first observed any activity in this area, noting the receipt of 15 sex-based reasonable accommodation charges, out

[10] *Available at* http://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm (last visited Oct. 29, 2014).

of 93,727 total charges received. *Id.* Those statistics fail to demonstrate that prospective charging parties, or EEOC intake personnel assisting them, understood Title VII to prohibit a failure to accommodate pregnancy.

To the contrary, they suggest that until very recently, the EEOC construed Title VII more narrowly to prohibit unequal and discriminatory treatment because of pregnancy – not to confer the right to preferential accommodations on that basis. Indeed, the intent of the EEOC's July 2014 guidance appears to be, at least in part, to bolster the agency's recent efforts to prioritize Title VII pregnancy accommodations issues and perhaps also to influence the outcome of this case.

B. The Timing And Context Of The July 2014 Guidance Confirms Its Lack Of The Power To Persuade

On December 17, 2012, a majority of the EEOC Commissioners approved the agency's Strategic Enforcement Plan (SEP) for Fiscal Years 2013 – 2016, which identifies six national enforcement priorities, including to address "emerging and developing" legal issues.[11] The EEOC describes that category as follows:

> **3. Addressing Emerging and Developing Issues.** As a government agency, the EEOC is responsible for monitoring trends and developments in the law, workplace practices, and labor force demographics. Under this SEP, the EEOC will continue to prioritize issues that may be emerging or developing. Given the EEOC's

[11] *Available at* http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited Oct. 29, 2014).

> research, data collection, and receipt of charges in the private and public sectors, and adjudication of complaints and oversight in the federal sector, the agency is well-situated to address these issues.
>
> Swift and responsive attention to demographic changes (*e.g.* the aging of the workforce), recently enacted legislation, developing judicial and administrative interpretations and theories, and significant events (*e.g.* the attacks of 9/11) that may impact employment practices can prevent the spread of emerging discriminatory practices by promoting greater awareness and facilitating early, voluntary compliance with the law.
>
> *For example, the Commission recognizes that elements of the following issues are emerging or developing*: 1) certain ADA issues, including coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat … ; 2) *accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA)*; and 3) coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply.

U.S. EEOC Strategic Enforcement Plan for Fiscal Years 2013 – 2016 at III.B.3. (emphasis added).

By the EEOC's own admission, whether and to what extent employers have an obligation to affirmatively accommodate pregnancy and related conditions is an "emerging or developing" legal issue – and thus is far from settled. *Id.* Because the July 2014 guidance follows the Commission's decision to designate Title VII pregnancy accommodations as an "emerging" legal

issue, it appears to be more a *post hoc* rationalization designed to bolster the agency's new enforcement priorities than an informed interpretation of the statute based on longstanding agency policy and enforcement principles.

Also, the EEOC published its revised guidance on July 14, 2014, thirteen days after this Court granted certiorari in this case. The timing of the EEOC's actions alone suggest that the guidance is designed as much to influence this Court and other policymakers as to express the agency's "informed judgment" regarding the proper interpretation of Title VII.

The Commission itself was deeply divided regarding the propriety of publishing the July 2014 guidance, with only three of the five sitting Commissioners voting in favor of doing so. Pointing to the lack of legal support underlying the agency's expressed policy views – particularly regarding its interpretation of the obligation to provide pregnancy accommodations – the two dissenting Commissioners not only voted against issuing the new guidance, but also took the unusual step of publishing written statements that decry the agency's decision to, among other things, "jump ahead of the U.S. Supreme Court" on that question. Public Statement of Commissioner Constance A. Barker, U.S. EEOC at 2 (July 14, 2014).

The EEOC's motivations in publishing the July guidance are questionable, at best, and certainly do not satisfy the *Skidmore* test. Accordingly, the agency's new interpretation is not entitled to any measure of judicial deference and should be disregarded by this Court.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit below should be affirmed.

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