No. 12-1226

In the Supreme Court of the United States

PEGGY YOUNG,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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A. The Fourth Circuit's Decision Conflicts with the Text and Purpose of the PDA

As UPS acknowledges (Opp. 3-4), the company provides temporary accommodated work to three classes of drivers: (1) those who experience on-the-job injuries; (2) those who meet the Americans with Disabilities Act's (ADA's) definition of disability; and (3) those whose conditions render them ineligible for Department of Transportation (DOT) certification. But UPS does not provide temporary accommodated work to drivers who request it due to pregnancy. That disparity of treatment violates the plain text of the Pregnancy Discrimination Act (PDA), which 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). See Pet. 9-16.[1]

In response, UPS argues that it "treated petitioner in exactly the same way it treats all employees—regardless of pregnancy—who are unable to perform essential functions of the job as a result of an off-the-job injury or condition." Opp. 10. But that is neither true nor relevant. UPS treats pregnant employees *worse* than two significant categories of workers with "off-the-job injur[ies] or

[1] Because UPS provided accommodated work to three sizeable classes of drivers who are similar to pregnant drivers in their ability to work, the company is incorrect to assert (Opp. 11) that Young's position would require liability whenever an employer "den[ies] some pregnant women benefits that are available to at least one person similar in her 'ability or inability to work.'"

condition[s]": those who have ADA disabilities and those whose conditions render them ineligible for DOT certification. See Pet. 4-5.[2] In any event, as the petition showed (Pet. 11-14), the PDA contains no exception for cases in which an employer has a "pregnancy-blind" reason for refusing to give a pregnant worker an accommodation that it has extended to a nonpregnant employee (*cf.* Opp. 10). The statute simply asks whether the pregnant employee has been "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). By granting accommodated work to nonpregnant employees, while denying it to pregnant workers like Young who are "as capable of doing their jobs as their male counterparts," *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 204 (1991), UPS violated the plain text of the PDA.

UPS argues that our position "violates the 'cardinal rule' that 'a statute is to be read as a whole.'" Opp. 11 (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). Rather, it is UPS's and the Fourth Circuit's interpretation that violates that cardinal rule. UPS argues that "[r]ead as a whole, the PDA merely prohibits employers from using pregnancy as a criterion on which to grant or deny benefits." Opp. 12. But that interpretation reads the

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[2] UPS suggests (Opp. 29-30), that our argument on this point somehow seeks "to second-guess . . . erroneous factual findings." But our argument rests on clear facts in the summary judgment record, none of which were denied by the district court. See Pet. 4-5. Tellingly, UPS cannot point to a single "factual finding" made by the district court in its summary judgment decision that conflicts with the facts as the petition presents them.

PDA's second clause out of the statute. After all, the PDA's first clause, which provides that "[t]he terms 'because of sex' or 'on the basis of sex' include * * * because of or on the basis of pregnancy," 42 U.S.C. § 2000e(k), *by itself* makes clear that employers may not use pregnancy as a criterion on which to grant or deny benefits. If that were all the PDA required, Congress would have had no need to include the second clause, with its "similar in their ability or inability to work" language. *See Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").[3]

This Court has explained that "the second clause was intended to overrule the holding in [*General Electric Co. v.*] *Gilbert*[, 429 U.S. 125 (1976)]." *California Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 285 (1987). UPS's reading of the statute, which would permit employers to deny pregnant workers accommodations that are provided to nonpregnant employees who are similar in their ability to work so long as the employers did so pursuant to a "pregnancy-blind" policy, would not give effect to that intention. As the petition showed (Pet. 12-13), the disability insurance plan this Court upheld in *Gilbert* was "pregnancy-blind" in exactly the same way as UPS's accommodated-work policy was here. Under UPS's reading, the PDA would thus fail to achieve its acknowledged purpose of

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[3] As UPS notes (Opp. 12), this Court has said that "[t]he meaning of the [PDA's] first clause is not limited by the specific language in the second clause," *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 678 n.14 (1983), but it hardly follows that the second clause adds nothing to the first.

overturning *Gilbert*. Far from reading the PDA as a whole, the Fourth Circuit simply disregarded a key provision of the statute.

UPS points (Opp. 14) to three snippets of floor debates surrounding the PDA, snippets that it argues "specifically allow[] employers to treat pregnant employees the same as employees injured off the job." But those brief statements (less than a sentence each) could hardly trump the PDA's plain text or the statute's acknowledged purpose to overrule *Gilbert*. Nor do those statements purport to address the question of accommodated work for pregnant employees; they simply deny that the PDA requires employers to provide medical insurance or disability benefits to pregnant employees unless they provide them to other employees.[4]

The balance of the legislative history makes clear, as does the statutory text, that when employers provide accommodated work for some employees they must provide the same accommodations for pregnant women who are similar

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[4] *See* 123 Cong. Rec. 29,660 (1977) (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 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 (1978) (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.").

in their ability to work. The House Report specifically explained that "[t]he 'same treatment'" required by the PDA "may include employer practices of transferring workers to lighter assignments," and that such practices must be "administered equally for all workers in terms of *their actual ability to perform work*." H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 5 (1978) (emphasis added). The legislative history contains numerous similar statements.[5]

UPS argues (Opp. 15) that our position would provide "preferential treatment" to pregnant workers and "treat pregnancy more favorably than *any* other basis covered by Title VII." But requiring employers to provide pregnant workers the *same* temporary accommodations they provide similarly restricted nonpregnant workers is hardly preferential treatment. Rather, it is the *equal* treatment that the PDA demands. See Pet. 16. If the same standard

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[5] *See* S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977) ("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 treated equally with other employees on the basis of their ability or inability to work."); *id.* at 29,387 (Sen. Javits) ("[T]he bill would prohibit as sex discrimination any personnel practice, fringe benefit program or other employment related action which treats pregnancy or pregnancy-related conditions differently than other conditions which also cause inability to work for limited periods. The bill requires equal treatment when disability due to pregnancy is compared to other disabling conditions."); *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.").

does not apply to other bases covered by Title VII, that is because Congress limited the PDA's "shall be treated the same" language to cases involving "women affected by pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k).[6] Nor is there any basis for UPS's suggestion (Opp. 15) that our position would require broader accommodations for pregnant workers than the ADA provides for workers with disabilities. The ADA requires an employer to provide "reasonable accommodations" to a worker with a disability even if it does not accommodate any other employees. 42 U.S.C. § 12112(b)(5)(A). The PDA, read according to its plain text, requires an employer to accommodate pregnant workers only if, and to the extent that, the employer accommodates similarly restricted nonpregnant employees.

Finally, UPS is reduced to arguing (Opp. 13, 16-17) that Young's claim is barred by Section 703(h) of Title VII, which protects "bona fide seniority or merit system[s]." 42 U.S.C. § 2000e-2(h). UPS has waived that argument. Section 703(h)'s exemption is an affirmative defense that is waived if not specifically pleaded in the answer. *See* Fed. R. Civ. P. 8(c); *Jackson v. Seabord Coast Line R. Co.*, 678 F.2d 992, 1012-1013 (11th Cir. 1982). Yet although UPS's answer lists *twenty-six* purported defenses, it does not once assert that UPS's actions took place pursuant to a bona fide seniority or merit system. DCt. Dkt. 7. Nor did any of UPS's briefing below argue that the company's conduct was protected by Section 703(h)—or even that accommodating Young's

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[6] *AT&T Corp. v. Hulteen*, 556 U.S. 701, 709 n.3 (2009), which did not involve the PDA's "shall be treated the same" language, is inapposite. *Cf.* Opp. 15-16.

pregnancy would violate (as opposed to simply not being provided for by) the company's seniority system. Because UPS waived the issue in the district court, and it was neither raised in nor decided by either of the lower courts, the company may not raise it for the first time here. *See Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-213 (1998).

Had UPS raised the issue, Young would have had powerful responses.[7] Section 703(h) protects some seniority systems that freeze into place the effects of past discrimination. But it does not protect employers where fresh discrimination is written into the terms of the seniority system itself. In *Hulteen*, 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." 556 U.S. 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 712. To the extent that

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[7] Young would have also been able to develop fact-based responses, particularly given Young's relatively high seniority; a UPS manager's testimony that temporary alternative work "typically" does not "displac[e] someone," DCt. Dkt. 76 Att. 20 at 17; the CBA provision requiring the company to grant "[a] light duty request, certified in writing by a physician, * * * in compliance with federal and state laws," *id.*, Att. 27, at 5; and the array of circumstances other than pregnancy in which the company provides accommodated work. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 405 (2002) ("The plaintiff might show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter.").

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 works a fresh violation of the PDA and is not protected by Section 703(h).

B. There is Acknowledged Disagreement in the Circuits

As the petition explained (Pet. 16-17 n.6), commentators have noted a longstanding division in the lower courts regarding the question presented. Although the Fourth Circuit's decision is consistent with the law in the Fifth, Seventh, and Eleventh Circuits,[8] the Fourth Circuit felt "compelled to disagree" (Pet. App. 23a) with the Sixth Circuit's decision in *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996). The Fourth Circuit's decision is also inconsistent with the Tenth Circuit's decision in *E.E.O.C. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000).

UPS argues (Opp. 23) that the Sixth Circuit's subsequent decision in *Reeves v. Swift Transp. Co.*, 446 F.3d 637 (6th Cir. 2006), "limited . . . *Ensley-Gaines* to its facts." Not so. As the petition noted (Pet. 18 n.7), *Reeves* read *Ensley-Gaines* as "primarily deal[ing] with whether a prima facie case had been established." *Reeves*, 446 F.3d at 641 n.1. Even limited to that context, *Ensley-Gaines* conflicts with the Fourth Circuit's decision here. The Fourth Circuit, after all, rejected Young's claim precisely

[8] UPS argues (Opp. 22), that decisions of the Third and Eighth Circuits also accord with that of the Fourth Circuit. But the company acknowledges that those circuits "have not squarely considered and decided the issue." *Id.*

because it concluded that Young had failed to make out a prima facie case. Pet. App. 25a-29a.

Contrary to UPS's statement that "petitioner's claim failed at the pretext stage" (Opp. 27), the Fourth Circuit never reached the pretext question.[9] As the Fourth Circuit acknowledged (Pet. App. 23a), its decision therefore conflicted with *Ensley-Gaines*. It was also inconsistent with the Tenth Circuit's decision in *Horizon/CMS*, 220 F.3d at 1195 n.7, which said that "[e]vidence that pregnant women were treated differently from other temporarily-disabled employees" is sufficient at the prima facie stage.

C. This Case is an Ideal Vehicle

UPS argues that, after the passage of the ADA Amendments Act (ADAAA), "the scenario in this case may never be repeated." Opp. 29. To the contrary, the ADAAA does not require accommodation of the physical limitations that attend an ordinary pregnancy. Although the ADAAA broadens the ADA's definition of disability, it retains the requirement that the condition constitute an "impairment." *See* 42 U.S.C. § 12102(1). Pregnancy is not an "impairment." *See* 29 C.F.R. Pt. 1630 App. § 1630.2(h) ("Other conditions, such as pregnancy, that are not the result of a physiological disorder are

[9] Nor is it true that Young "presented no plausible evidence" of pretext (Opp. 28), such that the Fourth Circuit would have been required to uphold summary judgment even if it had reached the question. Evidence of pretext included the many non-pregnancy situations in which UPS accommodates out-of-work injuries (Pet. 4-5), as well as 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).

also not impairments."). Accordingly, employers need not accommodate an ordinary pregnancy, unaccompanied by an additional impairment (such as preeclampsia), under the ADAAA.

Far from diminishing the significance of this case, the ADAAA underscores it. The Fourth Circuit held that workers who receive ADA accommodations are not a proper comparison class under the PDA. Pet. App. 27a. Prior to the ADAAA's enactment, employers might have voluntarily accommodated many workers who now come within the statute's expanded coverage. If the Fourth Circuit's ruling is allowed to stand, the ADAAA's broadening of the ADA's accommodation requirement will come at the direct expense of pregnant women like Young—a result that conflicts with the text and purpose of the PDA. *See* Amicus Br. 11-14.

UPS makes a labored argument (Opp. 30-33) that Young somehow forfeited the question presented by raising only a disparate treatment, and not a disparate impact, claim below. That is nonsense. Young's claim has always been that, because UPS provides accommodated work to individuals who experience on-the-job injuries, ADA-qualifying disabilities, or conditions that render them ineligible for DOT certification—but not to individuals who request accommodations due to pregnancy—pregnant women are not "treated the same * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). As the statute's use of the phrase "treated the same" makes clear, that claim sounds in disparate treatment. And, as we have shown, it finds support in the text and purpose of the PDA.

In any event, UPS's argument places undue weight on the label to be attached to Young's claim. Whether that claim is labeled a disparate treatment claim, one arising directly under the PDA's second clause, or something else, the question presented in the petition for certiorari is precisely the same question Young has raised throughout this case—and the question actually decided by the court of appeals. See Pet. App. 16a; CA Opening Br. 43-52; DCt. Dkt. 76-1 at 29-30, 34-36. Accordingly, it cannot have been forfeited.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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