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

SUPPLEMENTAL BRIEF OF PETITIONER

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In his brief in response to this Court's invitation, the Solicitor General agrees that "the question presented is important and recurring." U.S. Br. 8. He also agrees that "the court of appeals erred in concluding that petitioner failed to establish a prima facie case." *Id.* at 14. Indeed, the Solicitor General agrees that "a majority of the courts of appeals (including the court of appeals in this case) to have considered claims similar to petitioner's have erred in interpreting Title VII's requirement that employers treat employees with pregnancy-related limitations as favorably as nonpregnant employees who are similar in their ability or inability to work." *Id.* at 8. And he also agrees that "the Sixth and Tenth Circuits do differ from the court below in their analysis of whether a plaintiff in petitioner's position has established a prima facie case." *Id.* at 17.

Based on these points alone, this Court should grant the petition for *certiorari*. The government's unwarranted (and extremely hedged) statements that Young's claim "apparently" would have failed in the Sixth Circuit, and that "it is unclear" whether Young's claim would have succeeded in the Tenth (*id.* at 19)—and its suggestion that this Court should wait for indefinite, uncertain, and irrelevant future events—do not undermine the case for granting the petition.

A. The Solicitor General's Brief Underscores the Error of the Court of Appeals

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). By providing accommodated work to employees who have lifting restrictions due to on-the-job injuries, ADA-qualifying disabilities, or conditions that render them ineligible for Department of Transportation certification, but denying accommodated work to employees whose restrictions stem from pregnancy, UPS violated that statutory command. See Pet. 9-16; Reply to Br. in Opp. 1.

The court of appeals resisted that conclusion on the ground that UPS's accommodated-work policies were "pregnancy-blind"—that is, that UPS would not deny accommodated work to a pregnant employee who also, for example, had an on-the-job injury. Pet. App. 18a. As we showed in our petition and reply brief, that position directly conflicts with the PDA's text, legislative history, and acknowledged purpose. See Pet. 9-16; Reply Br. 1-8.

The Solicitor General decisively agrees with our position on that point. As the Solicitor General's brief explains, "[i]n enacting the PDA, Congress did not distinguish among employees based on the *source* of their work limitations." U.S. Br. 13. Rather, "Congress distinguished among employees based on the work-related *effect* of their work limitations." *Id.* Under the correct analysis, the Solicitor General explains, "the court of appeals was wrong with respect to employees with temporary lifting restrictions resulting from on-the-job injuries," and "it appears that the courts below erred in finding no genuine issue of material fact about whether drivers who lose their DOT certifications are similar to petitioner in their ability to work." *Id.* at 14-15.

The Solicitor General thus contends that "the court of appeals erred in concluding that petitioner failed to establish a prima facie case." *Id.* at 14. Indeed, he submits that "most of the courts of appeals to have considered this issue have erred in interpreting the PDA by ignoring the textual requirement that a court compare pregnant employees to other employees 'not so affected but similar in their ability or inability to work.'" *Id.* at 20 (quoting 42 U.S.C. § 2000e(k)). And the Solicitor General observes that the Fourth Circuit's holding here—like the holdings of the Fifth, Seventh, and Eleventh Circuits on which that court relied—is also inconsistent "with the longstanding position of the EEOC." *Id.* at 15.

As the Solicitor General explains, "the question presented is important to many women in the workplace and to their families." *Id.* at 20. Review of that question is necessary to reaffirm the primacy of the statutory text and the views of the agency that enforces Title VII.

B. The Solicitor General's Brief Acknowledges the Disagreement in the Circuits

In our petition and reply brief, we showed that there is a longstanding division in the lower courts regarding the question presented. Pet. 16-21; Reply to Br. in Opp. 8-9. Indeed, that division has become even more firmly entrenched since the initial briefing on the petition for *certiorari*.

In affirming summary judgment to UPS, the Fourth Circuit expressly aligned itself with the decisions of the Fifth, Seventh, and Eleventh Circuits—and declared itself "compelled to disagree" with the Sixth Circuit's decision in *Ensley-Gaines v. Runyon*,

100 F.3d 1220 (6th Cir. 1996). See Pet. App. 23a. (As we showed in our petition, Pet. 18-19, the Fourth Circuit's decision was also inconsistent with the law in the Tenth Circuit.) In its brief in opposition, UPS questioned the continuing vitality of *Ensley-Gaines* in the Sixth Circuit. Opp. 23. But in its more recent decision in *Latowski v. Northwoods Nursing Center*, 549 Fed. Appx. 478, 484-485 (6th Cir. 2013), the Sixth Circuit expressly relied on *Ensley-Gaines* in ruling in favor of a pregnant worker, Latowski, who had sought an accommodation for her 50-pound lifting restriction. Latowski presented evidence that her employer provided light-duty work to employees with similar lifting restrictions who had been injured on the job. "Although these employees differed from Latowski because their medical conditions were work-related," the Sixth Circuit concluded that "they were similarly situated in their ability to work" and thus that "Latowski ha[d] presented sufficient evidence to establish a prima facie case of pregnancy discrimination." *Id.* The Sixth Circuit accordingly reversed the district court's grant of summary judgment to the employer. See *id.* at 488. *Latowski* resolves any doubt about whether *Ensley-Gaines* remains good law in the Sixth Circuit, and it underscores the need for this Court to intervene to resolve the conflict in the circuits.

The government acknowledges that "the Sixth and Tenth Circuits do differ from the court below in their analysis of whether a plaintiff in petitioner's position has established a prima facie case." U.S. Br. 17. But it suggests that the Court should deny the petition because Young's "claim apparently would not fare any better in the Sixth Circuit than it did in the Fourth," and because "it is unclear whether she could

ultimately prevail in the Tenth Circuit." *Id.* at 19. The government says that the Sixth and Tenth Circuits might have concluded that UPS's policy of granting accommodated work only to those injured on the job (and so forth) makes out a prima facie case of discrimination—but that those courts may have nonetheless concluded that the same "pregnancy-blind" policy that established the prima facie case would itself constitute legitimate, nondiscriminatory reasons that would rebut that case. See *id.* at 18-20.

It is notable what the government does *not* say here. First, the government does *not* say that Young's claim would have failed had the lower courts applied the interpretation of the PDA that the Solicitor General's brief itself endorses. To the contrary, that brief explicitly *rejects* the position it ("apparently," though "it is unclear") attributes to the Sixth and Tenth Circuits. The Solicitor General explains that a policy of providing accommodated work only to those injured on the job cannot in and of itself constitute a legitimate, nondiscriminatory reason that rebuts a prima facie case under the PDA: "Because a policy that treats employees with limitations resulting from on-the-job injuries more favorably than employees with comparable limitations resulting from pregnancy presents a prima facie case of discrimination, an employer cannot rebut such a prima facie case merely by pointing to the existence of the policy." U.S. Br. 14 n.3.

Second, and more important, the government is incorrect to insinuate ("assert" is too strong a word, given the government's hedging) that Young's claim would have failed in the Sixth and Tenth Circuits. Even if the proof structure of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies to a

claim like Young's[1]—and even if the "pregnancy-blind" accommodated-work policy that creates the prima facie case can at the same time operate as a "legitimate, nondiscriminatory reason," *id.* at 802, that rebuts that case[2]—Young must still have the opportunity to prove that the reason was a "pretext for discrimination." *St. Mary's Honor Center v. Hicks*, 509 U.S. 512, 515 (1993) (internal quotation marks omitted).

There was ample evidence of pretext here—certainly enough to create a genuine issue of material fact. Unlike in the many reported cases in which employers have accommodated only those injuries acquired on the job, the testimony here showed that UPS would accommodate many off-the-job injuries and illnesses as well. See Pet. 4-5 (noting testimony stating that ineligibility for DOT certification could arise from diseases or injuries acquired outside of work and giving examples of UPS drivers relieved of lifting duties as a result of out-of-work illnesses and injuries). A trier of fact could reasonably conclude

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[1] Failing to treat "women affected by pregnancy * * * *the same* * * * as other persons not so affected but similar in their ability or inability to work" violates the plain terms of the PDA, 42 U.S.C. § 2000e(k). Where an employer (like UPS) has a policy that provides accommodated work to significant classes of workers who are "similar in their ability or inability to work" as pregnant workers, but does not provide the same accommodations to workers who request them because of pregnancy, the violation of the statute is apparent even without resort to the judge-made proof framework of *McDonnell Douglas*.

[2] Notably, the government does not claim that the Tenth Circuit has held that the very policy that creates the prima facie case can also constitute the legitimate, nondiscriminatory reason rebutting that case. It argues only that "at least the Sixth Circuit" has adopted such a rule (U.S. Br. 20) and that the Tenth Circuit's position is "unclear" (*id.* at 19).

that, given the wide array of circumstances in which UPS provides accommodated work, the failure to provide accommodated work for pregnancy does not reflect a pregnancy-neutral policy but instead bespeaks discriminatory intent. 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) would have provided further support for a finding of pretext.

The court of appeals ruled that Young had not presented sufficient evidence of a prima facie case to overcome summary judgment. It thus ruled against Young without reaching the question of pretext. See Pet. App. 25a-29a. Tellingly, the government makes no effort to explain why the evidence was insufficient to create a genuine issue of material fact on the pretext question. But its suggestion that the Sixth and Tenth Circuits might also have ruled against Young necessarily depends on the premise that the evidence of pretext was insufficient. Because the government fails even to attempt to establish that premise, its suggestion that Young would be "unlikely to prevail" in the Sixth or Tenth Circuits (U.S. Br. 20) cannot be taken seriously.

The Solicitor General's brief makes clear that the circuits disagree on the question presented, and that the disagreement focuses on the very issue that led the court of appeals to reject Young's claim—whether a "pregnancy-blind" accommodated-work policy can make out a prima facie case. The disagreement in the circuits thus was directly consequential to the outcome below. This Court should grant the petition to resolve that disagreement.

C. This Court Should Not Wait to Resolve the Question Presented

The Solicitor General suggests that the enactment of the ADA Amendments Act (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553, may address the problems caused by the "erroneous interpretations of [the PDA] adopted by several courts of appeals." U.S. Br. 20. The Solicitor General substantially overstates the effect of the ADAAA.

The ADAAA expanded the definition of "disability" in the ADA, 42 U.S.C. § 12102. But it did not eliminate the prior statutory requirement that, to constitute a disability, a condition must be an "impairment." *Id.* at § 12102(1)(A). The EEOC's regulations define "impairment" as a "physiological disorder or condition, cosmetic disfigurement, or anatomical loss," or a "mental or psychological disorder." 29 C.F.R. § 1630.2(h). As the EEOC made explicit in the interpretive guidance accompanying those regulations, "conditions, such as pregnancy, that are not the result of a physiological disorder" are "not impairments." 29 C.F.R. Part 1630 App. § 1630.2(h).

To be sure, under the ADAAA definition employers will be required to provide reasonable accommodations to workers whose pregnancies result in additional physiological disorders (such as preeclampsia) that are themselves impairments. But that would provide no relief in a case like this one. Young's lifting restriction resulted from the ordinary incidents of pregnancy and not any additional disorders.

Young's situation is common in the reported cases. Pregnant workers often seek accommodated

work, not because of any physiological disorder, but simply because their doctors have advised them that a restriction on lifting will maintain a healthy pregnancy. See, *e.g.*, *Reeves v. Swift Transp. Co., Inc.*, 446 F.3d 637, 638-39 (6th Cir. 2006) (plaintiff's physician "restricted her to light work pending her first appointment with an obstetrician," and her obstetrician then "told her not to lift more than 20 pounds" but that "'everything was normal and that she could continue to work,' if she performed light work only"); *Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1309, 1311 (11th Cir. 1999) ("Soon after discovering she was pregnant, Appellant developed concerns that lifting a patient on her assigned hall who weighed almost 250 pounds could cause harm to her unborn child. * * *. She was told by Appellee to obtain a doctor's verification of the restriction and she consequently obtained a restriction from her obstetrician which imposed a lifting limitation of 25 pounds."). See also Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 19 (2009) (many requests for accommodation involve "avoidance guided by potential risk to mother or fetus (for example, a doctor's restriction on lifting heavy objects or exposure to contagions)").

While the ADAAA may incidentally guarantee accommodations for some pregnant workers, it does nothing for Young and the many other pregnant workers like her. More fundamentally, it does not advance the basic purpose of the PDA—to ensure that pregnant workers are "treated the same" as valued employees who are not pregnant. 42 U.S.C. § 2000e(k). When employers provide accommodated

work to employees who request them due to workplace injuries, but not to employees who request them due to pregnancy, they violate the PDA's mandate even in the many circumstances in which pregnancy occasions no disability under the ADA. Because so many lower courts have repeatedly misconstrued the PDA in those circumstances, this Court's intervention is necessary.

The government suggests (U.S. Br. 21), that now that the ADA requires employers to accommodate some (nonpregnant) employees with temporary conditions, the courts in the Fourth, Fifth, Seventh, and Eleventh Circuits may demand that employers provide pregnant workers the same accommodations as they provide to ADA-qualifying employees. That suggestion misunderstands the position of those circuits. Those courts have held that, so long as an employer acts pursuant to a "pregnancy-blind" policy, it can refuse to provide accommodations to pregnant workers without violating the PDA. See Pet. 12, 20-21. And, as the Fourth Circuit expressly held here, a "policy limiting accommodations to those employees * * * disabled as defined under the ADA" is "a pregnancy-blind policy." Pet. App. 18a. As *amici* law professors and womens' rights groups explained (Amicus Br. 11-14), so long as the Fourth Circuit's holding remains the majority position in the lower courts, the breadth of the ADAAA will actually operate to *diminish* the protections accorded to pregnant workers like Young. That is a compelling reason to grant *certiorari* now.

Nor is there any reason to wait for the EEOC to issue "new enforcement guidance on pregnancy discrimination." Cf. U.S. Br. 21. The Solicitor General offers no date by which the EEOC would issue

such guidance, nor does he represent that the Commission has made a definite (or even tentative) decision to issue such guidance. All the Solicitor General can state is that "the EEOC is currently considering the adoption of" such guidance. *Id.*

More to the point, the Solicitor General's own brief states that a "majority of the courts of appeals," *id.* at 8, have decided the question presented in a way that conflicts with "the longstanding position of the EEOC" as expressed in guidance dating back to 1979, *id.* at 15-17. The Solicitor General does not offer a single reason to think that *new* guidance from the EEOC will change this situation. Such an indefinite, indistinct possibility can hardly be a basis for this Court to defer deciding an issue that the Solicitor General himself acknowledges is "important and recurring" and has divided the circuits.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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