No. 12-1226

IN THE
Supreme Court of the United States

PEGGY YOUNG, *Petitioner*

v.

UNITED PARCEL SERVICE, INC., *Respondent*

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

Brief of U.S. Chamber of Commerce as Amicus Curiae in Support of Respondent

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October 31, 2014

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community.

Many of the Chamber's members are subject to Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e-2(a)(1) ("PDA"). Petitioner's interpretation of the PDA would distort Title VII and result in an unprecedented, unbounded, and legally unsupported theory of "intentional" discrimination that in fact requires no showing of intent to discriminate.

Many of the Chamber's members, and UPS itself, provide greater accommodations for pregnant employees than required by Title VII. These employers

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

have decided—for a variety of reasons—to offer pregnant employees more than what federal law compels them to provide.

This case does not call for the Court to resolve the optimal manner in which employers should accommodate pregnant employees. Nor is it to decide the minimum protections for pregnant employees required by Title VII, or to resolve any claim of disparate impact discrimination based on pregnancy under an employer's facially-neutral policy.

Rather, Petitioner and her amici ask this Court to stretch core discrimination-law principles far beyond previously settled bounds, and to subject employers to increased penalties for supposed intentional discrimination without corresponding proof. The Chamber's members have a strong interest in the proper resolution of that issue.

SUMMARY OF ARGUMENT

This case presents a choice between two markedly different approaches to interpreting the second clause of 42 U.S.C. § 2000e(k), which provides that pregnant employees shall be treated the same as other employees "similar in their ability or inability to work." Petitioner argues that, in clarifying through the PDA what it means to discriminate "because of sex," this clause created an entirely new cause of action based on an employer's failure to accommodate a pregnant employee who cannot perform the ordinary tasks associated with her job. The Government agrees. Respondent maintains that this clause simply clarified that an employer must not

consider pregnancy in making employment decisions and, if it does, it is subject to the pre-existing causes of action previously found in Title VII.

The Chamber supports Respondent's arguments, but will not belabor them. Rather, this brief expands on the structural support for Respondent's reading of the statute and the practical reasons why Respondent's reading is correct.

The structure of Title VII makes clear that the statute recognizes two distinct types of actionable discrimination based on pregnancy. Where an employer *intentionally* burdens an employee because she is pregnant, she can raise a disparate treatment claim. Where an employer has applied a facially neutral policy that *unintentionally* burdens a pregnant employee, the employee can assert that the policy created an unlawful disparate impact. These two theories are analytically distinct, require different forms of proof, allow for different defenses, and provide different remedies.

The position advanced by Petitioner and her amici (including the Government) distorts this statutory structure, and would create the unprecedented anomaly of an "intentional" discrimination claim that requires no showing of discriminatory intent. The sole argument offered by Petitioner and the Government for this remarkable conclusion, while repackaged in various forms, inevitably relies on ignoring the statutory context and assuming that the PDA creates a freestanding cause of action for failure to accommodate pregnancy. It does not.

Reading § 2000e(k) to create this contradiction in terms—a disparate treatment cause of action with no showing of intentional discrimination—would lead to untenable and implausible results. Under Petitioner's reading, Title VII would prevent businesses from giving unique benefits to employees injured in service of their employer, and would prohibit neutral seniority policies. It also would read Title VII as outlawing scores of other innocuous, commonplace, pregnancy-neutral policies followed by American businesses. These results further confirm that Petitioner's reading misconstrues the operation of Title VII and should be rejected.

More broadly, this case presents a flawed lens through which to draw general conclusions regarding federal legal protections for pregnant employees. In an attempt to create a novel, unbounded, and unsupported theory of intentional discrimination under Title VII, Petitioner has abandoned any disparate impact claim—the most natural claim through which to seek redress for grievances of this type. The Court should be particularly hesitant to create in this case a claim of intentional discrimination that requires no showing of intent to discriminate.

ARGUMENT

I. TITLE VII RECOGNIZES ONLY TWO CAUSES OF ACTION FOR EMPLOYMENT DISCRIMINATION

The structure of Title VII makes clear the untenable nature of Petitioner's approach.

A single provision in Title VII—42 U.S.C. § 2000e–2—gives rise to two distinct theories of liability. It provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e–2(a).

On its face, the prohibition of discrimination "because of" a protected trait most naturally creates a cause of action for disparate treatment—*i.e.*, discrimination that *intentionally* targets a protected trait. *See, e.g.*, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

In *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), this Court interpreted this same provision also to create disparate impact liability—*i.e.*, liability where an employer imposes a neutral policy that has an *unintentional* impact on a protected class.

Disparate treatment and disparate impact theories are analytically distinct causes of action that differ in at least four key respects.

First, as its name implies, disparate treatment liability is premised on a finding of intentional discrimination. It requires a showing that a protected trait "actually motivat[ed] the employer's decision." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (citation omitted); *see also Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) ("A disparate-treatment plaintiff must establish that the defendant had a discriminatory intent or motive for taking a job related action.") (internal quotation marks omitted). Intentional discrimination can be shown either by a policy or decision that relies expressly on a protected characteristic, or on a policy or practice that, although ostensibly neutral, operates to single out exclusively members of a protected class, *see, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

"By contrast, disparate-impact claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Raytheon Co.*, 540 U.S. at 52. They are a means of proving actionable discrimination where there is not proof of discriminatory intent. Thus, a disparate impact claim stands in stark contrast to a disparate treatment claim; it focuses on the mere presence of a "neutral, generally applicable" policy which by itself, "can, in no way, be said to have been motivated by" a protected trait. *Id.* at 55.

Second, the two types of claims require different types of proof. Because intentional discrimination can sometimes be difficult to prove, this Court has recognized a burden-shifting framework that allows a plaintiff to proceed based solely on a minimal *prima facie* showing of potential discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Although a plaintiff may likewise make use of a burden-shifting framework on a disparate impact claim, the required threshold showing is more substantial. *See, e.g.*, *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 650-55 (1989) (explaining that even stark racial disparities in employment may not establish a *prima facie* case of disparate impact without careful analysis of the available labor pool).

Third, an employer can rely on various defenses to avoid disparate impact liability, such as the "business necessity" defense or the lack of alternative employment practices. *See* 42 U.S.C. § 2000e–2(k)(1)(A)(i)-(ii). These defenses have been applied only in disparate impact cases. *See, e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997 (1988).

Fourth, a finding of intentional discrimination exposes an employer to compensatory and punitive damages—remedies that are not available in a disparate impact claim. "In an action brought by a complaining party under [Title VII] against a respondent who engaged in unlawful intentional discrimination"—*i.e.*, not an employment practice that is unlawful because of its disparate impact—"the complaining party may recover compensatory and punitive damages." 42 U.S.C. § 1981a(a).

In light of these significant differences, this Court has admonished that "courts must be careful to distinguish between these theories." *Raytheon*, 540 U.S. at 53.

Critically, although 42 U.S.C § 2000e–2 creates causes of action for intentional discrimination and unintentional disparate impact, it does *not* create a cause of action for failure to *accommodate* employees with protected traits. Indeed, there are remedies for only two types of violations of Title VII—"intentional discrimination" and "disparate impact." 42 U.S.C. 1981a(a). There is no prescribed remedy for "failure to accommodate."

When read against this background structure and this Court's construction of the statute, the meaning of § 2000e(k) is clear. As Respondent explains, § 2000e(k) was a reaction to *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), a case involving *intentional* discrimination based on pregnancy. Resp. Br. at 29-31. The first clause of § 2000e(k) rejects the specific reasoning in *Gilbert*—that pregnancy does not fall within the protected characteristic of sex. And the second clause "explains the application of th[at] general principle to women employees.'" *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 n.14 (1983).[2] Thus, § 2000e(k) di-

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[2] Petitioner (Br. 22-23) and the Government (Br. 15) claim that this reading renders the second clause of § 2000e(k) superfluous. But there is nothing superfluous about a general clause that elaborates and expands upon a more specific clause earlier in the same sentence. In all events, although the second clause of § 2000e(k) of course

rects courts to apply the traditional discrimination claims in § 2000e–2—disparate treatment and disparate impact—to the now-protected trait of pregnancy.

This definitional provision does not alter the structure of discrimination claims found § 2000e–2. This Court has never understood the PDA to make structural changes to Title VII. *See e.g.*, *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1085, n.14 (1983) (Marshall, J., concurring) ("[T]he purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles."). And doing so would be inconsistent with the contemporaneous legislative understanding of the PDA. *See* S. Rep. No. 95-331, at 3-4 (1977) (explaining that the PDA "defines sex discrimination, as proscribed in the existing statute, to include [pregnancy and related medical conditions]; it does not change the application of title VII to sex discrimination *in any other way*") (emphasis added).

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overlaps with the first, that is at least as true under Petitioner's reading—which, if accepted, would cause the second clause to sweep up every case covered by the first clause.

II. PETITIONER'S THEORY DISREGARDS THE STRUCTURE OF TITLE VII AND DISTORTS THE CONCEPT OF DISPARATE TREATMENT

Because there are two, and only two, causes of action created by § 2000e-2—and because Petitioner has abandoned any disparate impact claim—she must necessarily be proceeding on a disparate treatment, *i.e.*, an intentional discrimination theory.

But Petitioner cannot show that Respondent engaged in "intentional" discrimination. Respondent applied a facially neutral policy to Petitioner. That policy had an obvious business purpose. Respondent did *not* apply the policy exclusively to pregnant women so as to be the functional equivalent of a facial classification, c*f. Yick Wo*, 118 US 356. *See* Resp. Br. at 51. And Respondent *did* apply the same policy to the group of non-pregnant employees most similarly situated to Petitioner—employees who were unable to do their jobs due to a condition, injury, or disability acquired while engaged in an activity outside of work. *Id.*

Unable to show discriminatory intent, Petitioner argues (Br. 17) that she need not show any discriminatory animus at all because UPS's facially neutral policy is "on its face" discriminatory.[3] Likewise, the

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[3] Petitioner makes a fallback argument that she may survive summary judgment by showing intentional discrimination indirectly under *McDonnell Douglass*. Yet, as Respondent explains (Br. 52-54), this argument is just another way of phrasing Petitioner's argument that it is

Government (Br. 16) makes the remarkable assertion that a policy that does not mention pregnancy and applies to both pregnant and non-pregnant workers alike is nonetheless "facially discriminatory" if it favorably exempts other non-pregnant workers on grounds unrelated to pregnancy. *See also* U.S. Br. at 15 (arguing that "[a] policy need not explicitly mention pregnancy-related work limitations in order to be facially discriminatory under Title VII").

That cannot be the law. A facially neutral policy, such as the one employed by UPS here, does not become facially discriminatory under the PDA merely because it does not affirmatively extend a privilege to a pregnant employee.

The arguments of both Petitioner and the Government both mistakenly conflate intentional and unintentional discrimination. For example, Petitioner (Br. 32) and the Government (Br. 16) assert that, in deciding whether employees are "similar in their ability or inability to work," a court may not consider the source of a work limitation or compare a pregnant employee to the most analogous subset of non-pregnant employees. They both argue that these factors must be disregarded because the text of § 2000e(k) draws no such distinctions.[4]

"facially" discriminatory to apply a neutral policy that does not affirmatively accommodate pregnancy.

[4] This argument is itself flawed, as it is entirely natural to say that an employee injured on the job, or a veteran injured at war, are not "similarly situated" to an employee who is unable to work due to a condition developed off the

Yet, factors such as the source of the disability, and whether a protected class is treated the same way as similarly situated members outside of the class, are central to the question of whether intentional discrimination has occurred. There are numerous legitimate reasons to distinguish among disabled employees in determining who has priority in receiving a coveted or costly accommodation. *See infra*, Section III. An employer's reliance on one of these neutral factors to grant an accommodation to some non-pregnant employees while denying it to others is thus strong evidence of a non-discriminatory purpose. "[T]he expansion of the concept of 'comparators' to those who merely have similar work restrictions runs counter to the underlying rationale for the use of comparators as evidence of intentional discrimination under Title VII." Constance S. Barker, Memorandum, Draft Enforcement Guidance on Pregnancy Discrimination and Related Issues Circulated for Review and Comment April 14, 2014 at * 2 (May 23, 2014).

Petitioner also contends that Respondent's position would prevent the PDA from fulfilling its purpose of overturning *Gilbert*. But *Gilbert* was a case in which the employer both treated pregnancy differently from *all* other analogous conditions and *facially* discriminated on account of pregnancy. *See* 429 U.S. at 127; *see also id.* at 146 (Brennan, J., dissenting).

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job. Indeed, the Government made this same argument in defending the Postal Service against the theory it now supports. Gov't Br., *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996), 1995 WL 17845805, at *26.

See also U.S. Br. at 9 ("Congress enacted the [PDA] to overturn this Court's holding in [*Gilbert*], that an employer's policy of treating pregnancy-related disabilities less favorably than *all* other disabilities did not violate Title VII.") (Emphasis added).

Thus, Respondent's reading leads to precisely the result one would expect following *Gilbert—i.e.,* a ban on intentional pregnancy-based discrimination. There is no reason to believe that Congress intended the PDA to sweep up employers who denied accommodations uniformly to both pregnant and non-pregnant employees who developed a disability as a result of non-work activities. Even Justice Stevens' dissent in *Gilbert* concluded that such a scenario would not constitute disparate treatment. 429 U.S. at 161 (Stevens, J., dissenting). Congress legislatively overruled *Gilbert*'s failure to treat classifications affecting pregnancy as classifications affecting "sex" in traditional Title VII cases. But there is nothing to suggest that Congress also intended to create a new, third type of discrimination claim heretofore unrecognized under Title VII.

The argument that Respondent's reading of the PDA would somehow eviscerate the statute rings particularly hollow given that Petitioner has abandoned any disparate impact claim. Whatever the reasons for that tactical decision in this particular case, it should not obscure the fact that, in general, employees who believe they are unlawfully burdened by the application of a facially neutral policy retain the ability to seek redress through a disparate im-

pact claim.[5] Nor should this Court allow a plaintiff who has not established unintentional disparate impact to nonetheless plead intentional disparate treatment based on an unintentional impact on pregnant employees.

III. PETITIONER'S APPROACH WOULD PRODUCE UNTENABLE AND IMPLAUSIBLE PRACTICAL RESULTS

Petitioner's reading of the PDA would not only create a contradiction in terms—an intentional discrimination claim that requires no proof of intentional discrimination—but it would also lead to untenable and implausible practical results.

To justify her proposed rule—that all pregnant employees must be given every privilege that their employer gives to *any* other employee of similar ability, without regard to any other factors—Petitioner insists on reading the "plain text" of § 2000e(k) with-

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[5] Indeed, a disparate impact claim could produce the same result as an accommodation claim in some cases. Where a neutral policy creates an unlawful disparate impact, the *remedy* for that impact would likely be to require an exception to the policy at issue (i.e., an accommodation) when applied to a burdened member of a protected class. *Cf.* Christine Jolls, *Antidiscrimination and Accommodation* 115 Harv. L. Rev. 642, 652-666 (2001) (arguing that disparate impact liability can often be viewed as an accommodation requirement). Of course, Petitioner has not pressed a disparate impact claim, and the only question before the Court is whether she can assert an accommodation claim as a type of disparate treatment.

out any reference to well-established principles of discrimination law codified in Title VII.

But when read without context (as Petitioner does), § 2000e(k) would become untenably broad. On Petitioner's view, the PDA independently commands 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 [*every*] other person[s] not so affected but similar in their ability *or* inability to work [without regard to the reason for the ability or inability].

Id. (brackets and emphases added).

According to Petitioner, this proposed rule would require total parity between *any* pregnant employee and *every* other employee who has a similar "ability *or* inability" to work—including on matters such as compensation, perks, and assigned tasks. It would also treat as intentionally discriminatory common, beneficial, and pregnancy-neutral policies that have been acknowledged as lawful by both the enactors of the PDA and by this Court. For example, Petitioner's reading of the PDA would make employers potentially liable for giving special solicitude to workers injured on the job or implementing neutral seniority policies.

It is implausible that Congress would have intended any of these outcomes in enacting the PDA. The more plausible reading—that the second clause

of § 2000e(k) is a gloss on the first clause, and must be read fully in context of the structure of Title VII—would avoid the untenable consequences of Petitioner's reading.

A. Although Petitioner candidly acknowledges the impact of her approach on accommodations for on-the-job injuries and seniority systems, she overlooks the unusual outcomes that would follow from applying the same approach to all of § 2000e(k).

For example, suppose a business gave hiring or promotion preferences to veterans of the U.S. military—as the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4335, requires and as thousands of American businesses do. This would violate the PDA under Petitioner's theory, even if the business evenhandedly gave preferences to both pregnant and non-pregnant veterans while denying it for both pregnant and non-pregnant non-veterans. This is because a pregnant non-veteran could claim that she was passed over for promotion in favor of a non-pregnant veteran of similar working ability—*i.e.*, the pregnant non-veteran could claim that she was not "treated the same for all employment-related purposes" as the non-pregnant veteran. The same logic would presumably invalidate—as intentional discrimination—a hiring preference for graduates of a particular university or applicants born in a business-owner's home state.

More implausible still, by viewing the second clause of § 2000e(k) in isolation from the broader context of that provision and the structure of Title VII as a whole, the logic of Petitioner's approach

would compel parity between all pregnant employees and every other employee who has a similar "ability *or* inability" to work. (Emphasis added.) Thus, if all context is ignored and § 2000e(k) is treated as an independent cause of action, a pregnant employee who has no impairment or disability at all would presumably have a claim for intentional discrimination if *any* other employee who was equally able to work received different compensation, perks, or tasks.

Under Petitioner's approach, it also should not matter if the non-pregnant employee actually received *worse* benefits (as all employees "shall be treated the same"). Or that the employer did not even know the plaintiff was pregnant (as no intent is required). Or that the pregnant employee does not *ask* to be treated the same way (as no request for accommodation is required). This cannot be what Congress intended; *i.e.*, Congress could not have intended the second clause of the PDA to create a freestanding cause of action, uninformed by Title VII principles.

B. Under Petitioner's interpretation of the PDA, a business that offered light-duty assignments to workers injured on the job—and to no other workers—would be liable for intentional discrimination, simply because a pregnant worker whose physical limitations do not stem from a work-related injury, but from pregnancy, would not be given the same accommodation.

That is not—and should not be—the law.

Employers may have legitimate obligations to offer special treatment to their employees injured on

the job. These obligations may simply not apply to employees who have off-the-job injuries, off-the-job illnesses, off-the-job disabilities, or pregnancies. Policies accommodating on-the-job injuries are commonplace in the American workforce and should not be condemned as intentional pregnancy discrimination.

Businesses may also have a special *legal* relationship to employees injured on the job. This is largely due to the various workers' compensation laws that govern on-the-job injuries but not injuries or impairments that occur off the job. For example, workers' compensation benefits sometimes depend on whether the employer offers (and the employee accepts) suitable light-duty work. *See* THE LEAVE AND DISABILITY COORDINATION HANDBOOK, ¶243 (Thompson Pub. Group 2013.) Moreover, the workers' compensation acts of many States either require or encourage businesses to offer light-duty positions to such workers. *See, e.g.,* Conn. Gen. Stat. § 31-313; La. Rev. Stat. § 23:1226; Cal. Labor Code § 4658.7; Me. Rev. Stat. Ann. tit. 39-A, §219; Minn. Stat. Ann. § 176.108.

Given this backdrop, it is not surprising that thousands of American businesses give a special preference to their workers injured on the job when it comes to allocating scarce and coveted light-duty work assignments. It would be surprising, however, if the PDA were intended to outlaw pregnancy-neutral policies that favor workers injured in the line of duty.

C. Finally, Petitioner's approach to the PDA also would necessarily lead American businesses to abandon their pregnancy-neutral seniority policies. Under Petitioner's rule, employers would need to ensure that pregnant employees are always given priority over a non-pregnant employee of equal working ability, even if a non-pregnant employee has seniority.

Again, that is not the law. Preferring to adhere to a neutral seniority policy is not proof of intentional pregnancy discrimination. As this Court recognized in *AT&T Corp. v. Hulteen*, under the PDA "[b]enefit differentials produced by a bona fide seniority-based pension plan are permitted unless they are the result of an intention to discriminate." 556 U.S. 701, 709 (2009). More generally, this Court has recognized that "routine application of a bona fide seniority system would not be unlawful under Title VII." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977).

This Court's ruling in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), further illustrates the point. In *Barnett*, an employee with a back injury sought to retain a coveted light-duty mailroom job, but the employer instead gave the job to a more senior non-injured employee, pursuant to its policy of seniority-based job bidding. *Id.* at 394. The employee sued, alleging that the mailroom job was a reasonable accommodation for his back injury and that the company violated the ADA by denying him this accommodation. *Id.* at 394-95. The Supreme Court (with a minor qualification) ruled for the company, holding that a company's interest in doling out light-

duty assignments pursuant to a neutral seniority system will usually "trump" a claim for reasonable accommodation under the ADA. *Barnett*, 535 U.S. at 403-404. In other words, ADA claimants generally may not be prioritized over more senior colleagues just because they are entitled to reasonable accommodation under the ADA. Of course, the ADA confers an express, free standing affirmative right to a reasonable accommodation, whereas the PDA does not. It thus follows *a fortiori* from *Barnett* that the PDA does not entitle pregnant employees to get priority over more senior colleagues.

But if Petitioner's approach were adopted, it would overturn the seniority policies of thousands of American businesses and frustrate the valid goals of these policies. As this Court has recognized, "[t]he typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment . . . they consequently encourage employees to invest in the employing company, accepting less than their value to the firm early in their careers in return for greater benefits in later years." *Barnett*, 535 U.S. at 404. Petitioner's rule would undercut the uniformity and evenhandedness of such policies by requiring employers to prioritize pregnant employees ahead of everyone else when it comes to securing light-duty assignments, even at the expense of more senior employees who are equal in their ability to work. That would be significantly disruptive to the many American businesses—and millions of their employees—that reward seniority on a pregnancy-neutral basis.

Indeed, Petitioner's approach to the PDA—if accepted—would be more disruptive than the ADA claim pressed (unsuccessfully) in *Barnett*. Although the injured employee in *Barnett* sought to use the ADA's "reasonable accommodations" clause to gain priority over more senior colleagues, the ADA at least contains employer protections that allow the employer to deny such accommodations if doing so "would impose an undue hardship on [its] business." 42 U.S.C. § 12112(b)(5)(A). The PDA of course, does not contain a hardship exception to Petitioner's proposed accommodation claim.

Thus, Petitioner's view of the PDA would engraft an implied "reasonable accommodations" clause without the concomitant statutory defenses expressly made available for employers to defend against accommodation claims under other statutes, such as the ADA.

* * *

Each of the scenarios posited above flows directly from the logic of Petitioner's (and the Government's) interpretation. And each confirms the folly of attempting to rewrite Title VII law based on a passage of text in the definitional section of a statute while refusing to consider the broader statutory context.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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October 31, 2014