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## **Introduction to Amici Curiae Brief in *Young v. United Parcel Service, Inc.***

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## INTRODUCTION TO AMICI CURIAE BRIEF IN *YOUNG V. UNITED PARCEL SERVICE, INC.*

*Deborah L. Brake\* and Joanna L. Grossman\*\**

Over thirty years ago in these pages, law professor and feminist legal scholar Wendy W. Williams famously cautioned feminists that “if we can’t have it both ways we need to think carefully about which way we want to have it.”<sup>1</sup> When she wrote those words, the feminist and women’s rights advocacy communities were split about whether the newly-enacted Pregnancy Discrimination Act should walk the path of equal treatment, requiring for pregnancy only the same level of treatment as other conditions similarly affecting work, or take an accommodationist, non-comparative approach to pregnancy, recognizing its distinctive significance for women’s work and reproductive lives. With the small exception of permitting some non-comparative accommodations for pregnancy-related disabilities, the PDA has hewed to the equal treatment model.<sup>2</sup> And yet, despite that model’s promise, the intervening three decades of litigation in the lower courts have not been kind to the PDA, nor to pregnant women.

On December 3, 2014, the Supreme Court heard argument in *Young v. United Parcel Service, Inc.*, the most important pregnancy discrimination case to reach the Court in a quarter century.<sup>3</sup> The case raises crucial questions about the meaning and scope of the Pregnancy Discrimination Act (PDA) of 1978,<sup>4</sup> a law passed to eradicate longstanding employer policies that excluded pregnant women from the workforce, exempted them from generally available leave and insurance benefits, or otherwise made it difficult for them to maintain labor force attachments through the period of pregnancy and childbirth. The Act emerged as a response to the Supreme Court’s inability to recognize such policies as discriminatory; in a pair of

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<sup>1</sup> Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN’S RTS. L. REP. 175, 196 (1982).

<sup>2</sup> See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987).

<sup>3</sup> *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4th Cir. 2013).

<sup>4</sup> 42 U.S.C. § 2000e(k) (2012).

cases in the 1970s, the Court held that pregnancy discrimination was not a form of sex discrimination under either the Equal Protection Clause<sup>5</sup> or Title VII of the Civil Rights Act of 1964.<sup>6</sup> The PDA was designed to override the latter ruling.<sup>7</sup> In addition to declaring pregnancy discrimination a form of sex-based discrimination, the PDA includes a second clause requiring employers to treat pregnant workers the same as other workers with a “similar ability or inability to work.”<sup>8</sup>

In the cases that reached the Supreme Court after the enactment of the PDA, the Court interpreted the statute broadly to give it the effect Congress intended. In *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, the Court held that the guarantee of equal treatment applied to the pregnant spouses of male employees who were covered by the employer’s health insurance.<sup>9</sup> In *California Federal Savings v. Guerra*, the Court held that the second clause’s promise of identical treatment with comparable workers was in fact a floor not a ceiling on the benefits for pregnant workers; as a result, it did not preempt a state law’s more favorable treatment of pregnancy-related disability.<sup>10</sup> And finally, more recently, in *UAW v. Johnson Controls*, the Court ruled that it was a violation of the PDA for a battery manufacturing plant to exclude pregnant or fertile women from jobs with high levels of lead exposure.<sup>11</sup>

In each of these cases, the Court was mindful of the PDA’s overarching purpose—to facilitate women’s inclusion and advancement in the workplace despite their distinctive role in the reproductive process. Yet, in a series of cases beginning almost two decades ago, lower federal courts have violated the spirit, and in some cases the direct language, of these precedents when considering the validity of light-duty policies that grant alternative assignments to some workers with temporary disability, but not to pregnant workers with comparable restrictions. In *Reeves v. Swift Transportation Co.*, for example, the Sixth Circuit held valid a policy that granted light duty to truck drivers who were injured on the job, but refused it to all other workers with temporary disability.<sup>12</sup> The plaintiff was a

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<sup>5</sup> See *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974).

<sup>6</sup> See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

<sup>7</sup> 42 U.S.C. §2000e(k) (“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.”).

<sup>8</sup> *Id.* (“[W]omen 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[.]”).

<sup>9</sup> See 462 U.S. 669, 676 (1983).

<sup>10</sup> See 479 U.S. 272, 292 (1987).

<sup>11</sup> See 499 U.S. 187, 211 (1991). In a more recent case, *AT&T v. Hulteen*, the Court took a hyper technical view of the PDA in ruling that current female retirees could continue to be penalized in terms of pension credits for maternity leaves they took before the PDA was enacted—and before the company was forced to give the same credit to such leaves as it gave to other temporary disability leaves. 556 U.S. 701, 716 (2009).

<sup>12</sup> 446 F.3d 637, 638 (6th Cir. 2006).

pregnant woman with a lifting restriction who was fired after being told that the company had no light work for her to do.<sup>13</sup> The court concluded that the company's light-duty policy was valid, however, because it was "pregnancy blind" and not a pretext for discrimination.<sup>14</sup> The Eleventh and Fifth Circuits likewise upheld light-duty policies that drew similar "pregnancy-blind" distinctions between workers eligible for such assignments and those not eligible.<sup>15</sup> The Seventh and Fourth Circuits followed several years later with similar rulings.<sup>16</sup>

The Fourth Circuit's ruling is the one currently pending in the Supreme Court and for which the *amicus curiae* brief below was submitted. It raises the same issue as previous cases, but on even more egregious facts and with even more dire consequences given recent changes to the Americans with Disabilities Act, as the brief explains.

Peggy Young was an "air driver" for United Parcel Service (UPS), meaning she drove a route delivering packages that arrived by air rather than ground and, for that reason, were typically lighter.<sup>17</sup> When she became pregnant, she was instructed by her doctor not to lift more than twenty pounds.<sup>18</sup> UPS's policy allowed light-duty assignments to be granted to three classes of drivers: (1) those injured on the job; (2) those who have a disability covered by the Americans with Disabilities Act; and (3) those who are not eligible to work as a CDL driver for medical or other reasons such as a suspended license.<sup>19</sup> But UPS would not accommodate a pregnant woman with a lifting restriction because she was not covered by the company's light-duty policy.<sup>20</sup> The record in *Young* showed that UPS had accommodated drivers for lifting restrictions that were even more severe than Peggy Young's and for injuries that were not incurred on the job, but were sufficient to preclude CDL eligibility.<sup>21</sup>

Because women with pregnancy-related disability do not fall into any of these categories,<sup>22</sup> UPS permits them to "continue working as long as they wanted to during their pregnancies, unless and until the employee presented a doctor's note or other medical certification that she had a

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<sup>13</sup>*Id.* at 638-39.

<sup>14</sup>*Id.* at 642.

<sup>15</sup>*See* Spivey v. Beverly Enters. Inc., 196 F.3d 1309 (11th Cir. 1999); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204 (5th Cir. 1998).

<sup>16</sup>*See* Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540 (7th Cir. 2011); Young v. United Parcel Serv., Inc., 707 F.3d 437 (4th Cir. 2013).

<sup>17</sup>707 F.3d at 440.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 441.

<sup>20</sup>*Id.*

<sup>21</sup>Brief for Petitioner, Young v. United Parcel Serv., Inc., 707 F.3d 437 (4th Cir. 2013) (No. 11-2078), 2013 WL 93132, at \*4-\*9.

<sup>22</sup>The ADA has been consistently interpreted to exclude normal pregnancy as a covered disability. *See* Gorman v. Wells Mfg. Corp., 209 F. Supp. 2d 970, 976 (S.D. Iowa 2002) (noting that "the majority of federal courts hold that pregnancy-related complications do not constitute a disability under the ADA").

restriction that rendered her unable to perform the essential functions of the job.”<sup>23</sup> If unable to work, pregnant drivers will be granted a leave of absence.<sup>24</sup> Young sought and received several short-term leaves of absence as she went through three rounds of *in vitro* fertilization.<sup>25</sup> When she finally became pregnant during the third round, her doctor wrote a note recommending that she lift no more than twenty pounds during the first half of her pregnancy and no more “than 10 pounds thereafter.”<sup>26</sup> After some back-and-forth between Young and various supervisors at UPS about whether the note imposed a “restriction” or only a “recommendation,” the company decided that it could not allow her to continue working since she was not capable of performing the lifting described in the list of essential job functions for her position.<sup>27</sup> Young had already used up all available medical leave, so she was put on a leave of absence with no pay and no medical coverage.<sup>28</sup> She returned to work two months after giving birth in 2007.<sup>29</sup>

Young filed a lawsuit alleging sex and pregnancy discrimination, as well as race and disability discrimination.<sup>30</sup> The court rejected Young’s argument that it facially discriminated against pregnant employees by excluding pregnancy from eligibility for light-duty assignments.<sup>31</sup> Because the policy is “pregnancy-blind” and offers accommodations on the basis of “gender-neutral criteria,” the court refused to treat the policy as facially discriminatory or as raising an inference of pregnancy discrimination.<sup>32</sup> The court then applied *McDonnell Douglas* pretext analysis and concluded that Young did not establish that she met the fourth element – that a “similarly situated employee” was treated differently.<sup>33</sup> Young argued that UPS accommodated a wide range of temporary physical disabilities from high blood pressure and diabetes to drunk driving convictions.<sup>34</sup> UPS argued, and the appellate court agreed, that Young could not use anyone who was eligible for ADA accommodation or had lost their legal ability to drive as a comparator because they were not sufficiently similar in their ability or inability to work.<sup>35</sup> There is no similarity, in the court’s view, between a driver who suffers “from a legal obstacle to their operation of a vehicle” and a woman whose pregnancy poses “a physical impairment that

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<sup>23</sup> Young v. United Parcel Serv., Inc., No. 08-2586, 2011 WL 665321, at \*2 (D. Md. Feb. 14, 2011).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*3-\*4.

<sup>26</sup> *Id.* at \*4.

<sup>27</sup> *Id.* at \*5.

<sup>28</sup> *Id.* at \*5-\*6.

<sup>29</sup> *Id.* at \*6.

<sup>30</sup> *Id.* at \*11-\*12.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at \*12-\*15.

<sup>34</sup> *Id.* at \*14-\*15.

<sup>35</sup> *Id.* at \*12-\*15.

stymied her ability to lift.”<sup>36</sup> The court also dismissed with little discussion the notion that an ADA-eligible employee could be an appropriate comparator for a Young.<sup>37</sup> By eliminating a wide-range of employees to serve as comparators, the court effectively made it impossible for Young to prove that the second clause of the PDA was violated by UPS’s refusal of her light-duty request.

On appeal, the Fourth Circuit affirmed the district court’s ruling as well as its reasoning.<sup>38</sup> We argue in the brief that this reasoning effectively undercuts the second clause of the PDA, rendering it a dead letter. In explaining why the decision below is incompatible with the theory underlying the PDA, we rely heavily on the vibrant new feminist legal scholarship on pregnancy discrimination and the PDA. Part of our goal in the brief is to connect the insights from this scholarship to the issues in this case. By integrating this scholarship and applying it in a new way, the brief itself contributes to the legal scholarship on the Pregnancy Discrimination Act, bridging the gap between theory and practice.<sup>39</sup>

The case is one of the most important gender discrimination cases to reach the Court in many years. With women now comprising half the workforce,<sup>40</sup> and most women becoming pregnant during their working lives, the likelihood that a woman will face a conflict at some point between work and pregnancy is very high. The majority of women work during pregnancy and return to the workforce following their pregnancy.<sup>41</sup> “For example, two-thirds of women who had their first child between 2006 and 2008 worked during [their] pregnancy, and [eighty-eight] percent of these first-time mothers worked into their last trimester.”<sup>42</sup> For many women, the short-term physical effects of pregnancy will at some point conflict with the demands of their job.<sup>43</sup>

The nature of the conflict varies by the particular job and the progression of the pregnancy, but such conflicts often include lifting and

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<sup>36</sup> *Id.* at \*13.

<sup>37</sup> *Id.* at \*19-\*20.

<sup>38</sup> *Young*, 707 F.3d at 439.

<sup>39</sup> Cf. Emily M.S. Houh, *Toward Praxis*, 39 U.C. DAVIS L. REV. 905 (2006).

<sup>40</sup> See U.S. CONGRESS JOINT ECON. COMM., WOMEN AND THE ECONOMY 2010: 25 YEARS OF PROGRESS BUT CHALLENGES REMAIN 1 (2010), available at [http://www.jec.senate.gov/public/?a=Files.Serve&File\\_id=8be22cb0-8ed0-4a1a-841b-aa91dc55fa81](http://www.jec.senate.gov/public/?a=Files.Serve&File_id=8be22cb0-8ed0-4a1a-841b-aa91dc55fa81); see also *Full Transcript: Obama’s 2014 State of the Union Address*, WASH. POST (Jan. 28, 2014), [http://www.washingtonpost.com/politics/full-text-of-obamas-2014-state-of-the-union-address/2014/01/28/e0c93358-887f-11e3-a5bd-844629433ba3\\_story.html](http://www.washingtonpost.com/politics/full-text-of-obamas-2014-state-of-the-union-address/2014/01/28/e0c93358-887f-11e3-a5bd-844629433ba3_story.html).

<sup>41</sup> NAT’L WOMEN’S LAW CTR., *THE PREGNANT WORKERS FAIRNESS ACT: MAKING ROOM FOR PREGNANCY ON THE JOB 2* (2013), available at [http://www.nwlc.org/sites/default/files/pdfs/pregnantworkersfairnessfactsheet\\_w\\_bill\\_number.pdf](http://www.nwlc.org/sites/default/files/pdfs/pregnantworkersfairnessfactsheet_w_bill_number.pdf) [hereinafter MAKING ROOM FOR PREGNANCY].

<sup>42</sup> *Id.*

<sup>43</sup> Joanna L. Grossman, *The Pregnant Workers’ Fairness Act: Accommodating the Needs of Pregnant Working Women*, VERDICT (May 11, 2012), <http://verdict.justia.com/2012/05/11/the-pregnant-workers-fairness-act>.

standing restrictions, the need for more frequent breaks, and scheduling adjustments for medical appointments and sick leave.<sup>44</sup> Much of the time, such conflicts can be resolved with minor accommodations, which are often cost-efficient and simple to administer.<sup>45</sup> Nevertheless, employers too often have blatantly refused to provide accommodations to pregnant women, even while doing so for other workers.<sup>46</sup> Such refusals play a significant part in the conflicts that track women into less desirable jobs or force them out of the workforce entirely, with lasting personal, health and financial consequences.<sup>47</sup> Last year, the EEOC received over five thousand charges of pregnancy discrimination, making it one of the fastest-growing types of claims.<sup>48</sup>

The work-pregnancy conflicts at stake in these cases overwhelmingly harm low-income workers and women in non-traditional, male-dominated jobs.<sup>49</sup> First, these workers are most likely to experience lasting, devastating economic harm when these conflicts result in job loss. Forty-one percent of women are the primary breadwinners for their families, and their ability to work while pregnant is critical to their family's economic survival.<sup>50</sup> Moreover, the types of jobs that are especially likely to require accommodation for pregnancy are those that typically pay less, such as retail clerk and shelf stocker, or require physically rigorous tasks traditionally reserved for men, such as firefighter and police officer.<sup>51</sup> Representative examples include a pregnant food-server and restaurant line-worker who needed more bathroom breaks, a pregnant hotel cleaner with a twenty pound lifting restriction, and a pregnant security officer who needed a stool for sitting in a job that required long hours of standing.<sup>52</sup> When employers deny such simple accommodations, workers are terminated or forced to take unpaid leave, with devastating consequences.<sup>53</sup>

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<sup>44</sup> *See id.*

<sup>45</sup> *See* NAT'L WOMEN'S LAW CTR., THE BUSINESS CASE FOR ACCOMMODATING PREGNANT WORKERS (2012), available at [http://www.nwlc.org/sites/default/files/pdfs/pregnant\\_workers\\_business\\_case\\_12.04.12.pdf](http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers_business_case_12.04.12.pdf).

<sup>46</sup> *See* NAT'L WOMEN'S LAW CTR., IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS 5, 7 (2013), available at [http://www.nwlc.org/sites/default/files/pdfs/pregnant\\_workers.pdf](http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf).

<sup>47</sup> *Id.*

<sup>48</sup> *See* Claire Zillman, *Yes, pregnancy discrimination at work is still a huge problem* (July 15, 2014, 5:00 AM), <http://fortune.com/2014/07/15/pregnancy-discrimination/>.

<sup>49</sup> *Id.*; *see also* MAKING ROOM FOR PREGNANCY, *supra* note 41, at 5.

<sup>50</sup> MAKING ROOM FOR PREGNANCY, *supra* note 41, at 3 (stating that forty-one percent of working mothers were their family's primary breadwinner in 2010).

<sup>51</sup> *Id.* at 5-7.

<sup>52</sup> *Id.*

<sup>53</sup> *See* A BETTER BALANCE: THE WORK & FAMILY LEGAL CENTER ET AL., THE REFUSAL TO ACCOMMODATE PREGNANT WORKERS: REAL ACCOUNTS OF THE DEVASTATING CONSEQUENCES FOR WORKERS AND THEIR FAMILIES (2013), available at [https://www.aclu.org/files/assets/true\\_stories\\_about\\_why\\_pregnant\\_workers\\_need\\_workplace\\_accommodations.pdf](https://www.aclu.org/files/assets/true_stories_about_why_pregnant_workers_need_workplace_accommodations.pdf).

Pregnant women who are not provided with needed accommodations have to struggle to support their families, often relying on governmental assistance to replace lost wages.<sup>54</sup> They may also suffer from pregnancy-related and health complications, particularly if, as many women do, they continue to work and refrain from asking about accommodations for fear of losing their jobs.<sup>55</sup>

A loss in *Young* would give employers the green light to refuse even eminently reasonable accommodations for pregnant women. In that event, PDA scholarship and advocacy should explore the need for alternative legislative solutions, such as the Pregnancy Workers Fairness Act. (PWFA)<sup>56</sup> The PWFA is a proposed bill that was introduced to the House of Representatives on May 8th, 2012.<sup>57</sup> The purpose of the bill is to eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.<sup>58</sup> Modeled after the ADA, the PWFA would require employers to make reasonable accommodations for pregnancy, child birth, and related conditions and bar employers from denying employment opportunities based on the need for accommodations. Under the bill, an employee could not be forced accept an accommodation if she preferred to continue in her existing job, nor could it force her to take a leave from work if a known reasonable alternative is available.<sup>59</sup> The PWFA's express goal is to raise the floor of treatment of pregnancy in the workplace so that "[n]o . . . woman [will] have to choose between her job and a healthy pregnancy."<sup>60</sup>

A loss in *Young* would leave pregnancy stuck in a growing gap between the PDA and the American with Disabilities Act (ADA), despite the compatible and mutually reinforcing purposes of the two Acts.<sup>61</sup> Even though the American with Disabilities Amendments Act (ADAAA) of 2008 broadened the universe of disabilities that require accommodations to include temporary impairments and less severe impairments, normal

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<sup>54</sup> *See id.*

<sup>55</sup> *See id.* at 3.

<sup>56</sup> *See* Pregnant Workers Fairness Act, H.R. 5647, 112th Cong. § 2 (2012).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Senators Casey and Shaheen, Reps Nadler, Maloney, Speier, Davis and Fudge Introduce Pregnant Workers Fairness Act to Protect Pregnant Women from Workplace Discrimination*, ROBERT P. CASEY, JR. (May 14, 2013), <http://www.casey.senate.gov/newsroom/releases/senators-casey-and-shaheen-reps-nadler-maloney-speier-davis-and-fudge-introduce-pregnant-workers-fairness-act-to-protect-pregnant-women-from-workplace-discrimination> (quoting Dina Bakst, President of A Better Balance).

<sup>61</sup> *See* NAT'L WOMEN'S LAW CTR., *THE PREGNANCY DISCRIMINATION ACT AND THE AMENDED AMERICANS WITH DISABILITIES ACT: WORKING TOGETHER TO PROTECT WORKERS* (2013), available at [http://www.nwlc.org/sites/default/files/pdfs/pda\\_adaaa\\_preg\\_workers\\_fact\\_sheet.pdf](http://www.nwlc.org/sites/default/files/pdfs/pda_adaaa_preg_workers_fact_sheet.pdf).

pregnancy is still not considered to be an impairment under the ADA.<sup>62</sup> And yet, since many of the temporary disabilities now protected under the ADAAA have similar work-related effects as pregnancy, they should raise bar for accommodating pregnant workers as well.<sup>63</sup> Without a reinvigorated PDA through a victory for the petitioner in *Young*, the PWFA will be needed to close this gap.

Against this backdrop of the current state of weak federal legal protections for pregnant workers, several states and cities have recently passed state and local laws to expand protections for pregnant workers.<sup>64</sup> Alaska, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Louisiana, Maryland, Minnesota, New Jersey, Texas, and West Virginia are among the states that have enacted laws specifically covering the work conflicts faced by pregnant workers.<sup>65</sup> These state protections require employers to provide reasonable accommodations for pregnant workers.<sup>66</sup> For example, West Virginia recently passed its Pregnancy Workers Fairness Act, using the same title and substantive language as the proposed federal legislation.<sup>67</sup> In addition to these states, several municipalities have enacted city ordinances to protect pregnant workers.<sup>68</sup> The cities of New York, New York; Philadelphia, Pennsylvania; Central Falls, Rhode Island; Providence, Rhode Island; and most recently Pittsburgh, Pennsylvania have all enacted city ordinances addressing work-pregnancy conflicts.<sup>69</sup> Similar to state laws, these city ordinances require employers to reasonably accommodate conditions related to pregnancy.<sup>70</sup>

While these state and local laws reflect a growing public commitment to ease the conflicts of work and pregnancy, they are not a substitute for federal-level protection. For example, the city ordinances are limited in scope and application.<sup>71</sup> For instance, the Pittsburgh, Pennsylvania ordinance applies only to those businesses with city contracts worth \$250,000 or more; contractors bidding on city jobs must certify that they

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<sup>62</sup> *See id.* at 1-2.

<sup>63</sup> *Id.* at 2-3.

<sup>64</sup> *State and Local Laws Protecting Pregnant Workers*, A BETTER BALANCE, <http://www.abetterbalance.org/web/ourissues/fairness-for-pregnant-workers/310> (last visited Jan. 19, 2015).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *See* W. VA. CODE R. §§ 5-11B-1-B-2 (2014).

<sup>68</sup> *State and Local Laws Protecting Pregnant Workers*, *supra* note 64.

<sup>69</sup> *Id.*; *see also* PITTSBURGH, PA., ORDINANCES ch. 161, art. VII, § 161.44 (2014), available at <https://pittsburgh.legistar.com/LegislationDetail.aspx?ID=1911405&GUID=31C757AF-40A9-4C44-8E7C-7EA971776160&Options=ID%7cText%7c&Search=pregnant>.

<sup>70</sup> *Id.*; *State and Local Laws Protecting Pregnant Workers*, *supra* note 64.

<sup>71</sup> *See* Robert Zullo, *Pittsburgh City Council advances panhandling restrictions, pregnancy protections* (Oct. 2, 2014, 12:00 AM), <http://www.post-gazette.com/local/2014/10/02/Council-advances-panhandling-restrictions-pregnancy-protections/stories/201410020233>.

will comply with the ordinance and notify their employees.<sup>72</sup> Although, the Pittsburgh city ordinance will still provide protection for approximately 800 or more city employees and an undetermined number of contractors, it leaves many employees in the city without such protection.<sup>73</sup> State laws and other city ordinances have similar gaps, and together create only a thin patchwork of remedies for pregnant workers.

While it is commendable that states and municipalities have taken affirmative steps to address the current gap in federal law on a local level, such local laws fall far short of an adequate solution. As the *Young* case illustrates, until this gap is closed at the federal level, pregnant workers will continue to fall through the breach.

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<sup>72</sup> See *id.*; see also *Pittsburgh Approves Workplace Protections for Pregnant City Employees*, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES (Oct. 17, 2014), [http://go.nationalpartnership.org/site/News2?abbr=daily2\\_&page=NewsArticle&id=45843](http://go.nationalpartnership.org/site/News2?abbr=daily2_&page=NewsArticle&id=45843).

<sup>73</sup> *Pittsburgh Approves Workplace Protections for Pregnant City Employees*, *supra* note 72.

**No. 12-1226**

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In The Supreme Court of the United States

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PEGGY YOUNG, *Petitioner,*

v.

UNITED PARCEL SERVICE, INC., *Respondent.*

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**On Writ Of Certiorari To The United States Court Of  
Appeals For The Fourth Circuit**

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**BRIEF OF LAW PROFESSORS AND WOMEN'S AND  
CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN  
SUPPORT OF PETITIONER**

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**INTEREST OF AMICI CURIAE<sup>1</sup>**

*Amici curiae* are law professors, women's rights organizations, and civil rights organizations that share expertise in pregnancy discrimination and a longstanding commitment to civil rights and equality in the workplace for all Americans. Their interest in this case is in ensuring that the Pregnancy Discrimination Act is given its intended meaning. Statements of interest for the organizations and a list of individual signatories may be found in Appendix A.

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### SUMMARY OF ARGUMENT

This case presents an issue of great significance for working women in the United States. The Fourth Circuit's ruling interprets the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k) (2012) ("PDA"), in a manner that is inconsistent with the statutory text, Congress' intent, and this Court's post-PDA precedents. The ruling reverts to a pre-PDA approach, placing pregnancy in a class by itself and excluding pregnant women from workplace benefits and accommodations available to others who are similar in their ability or inability to work. The ruling undermines the very purpose of the PDA, which was to help pregnant women maintain labor-force attachments and have greater economic stability.

The Fourth Circuit's ruling reinvigorates the reasoning in *General Electric v. Gilbert*, 429 U.S. 125 (1976), which the PDA was specifically passed to supersede. It marks a return to the philosophy that employers can provide less support for pregnancy than they do for other health conditions that affect work, so long as their decision to deny coverage is not motivated by animus. But the PDA repudiates this approach. In its Second Clause, the Act defines what equal treatment means: employers must treat pregnant workers "the same . . . as other persons not so affected but similar in their ability or inability to work. . . ." 42 U.S.C. §2000e(k). In other words, the PDA creates a comparative right of accommodation with a

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<sup>1</sup> Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel for petitioner and respondent have consented to its filing in letters on file with the Court.

baseline that turns on the work effects of an employee's incapacity, rather than its source. This mandate solves the

analogy problem that plagued pre-PDA courts and led employers to simply exempt pregnancy, a health condition that affects only women, from otherwise available benefits. This Court has consistently instructed that the Second Clause means what it says – that pregnant workers cannot be treated worse than workers with similar limitations.

By refusing to allow Peggy Young to compare herself to workers injured on the job, workers whose accommodations were required by a collective bargaining agreement, or workers entitled to accommodations under the Americans with Disabilities Act, 42 U.S.C. §12101 (“ADA”), the Fourth Circuit has stripped pregnant women of most potential comparators. This renders the comparative right of accommodation around which the PDA is built essentially meaning-less. This problem will only escalate with the recent amendments to the ADA, 42 U.S.C. §12102, which expand the pool of employees entitled to reasonable accommodation to include those with temporary conditions analogous to pregnancy. Under this reading, Congress’ expansion of protections for employees with other disabilities would have the perverse effect of decreasing the level of support for pregnancy. The Fourth Circuit’s approach, if left standing, will exponentially widen the gulf in employment opportunities between pregnant women and others “similar in their ability or inability to work.” *See* 42 U.S.C. §2000e(k). Nothing in the text of the ADA or its amendments supports this reading, nor is there any precedent for allowing one statute to nullify another without ex-press Congressional direction to do so.

The Fourth Circuit’s central mistake is to collapse the PDA’s first and second clauses into a singular search for animus. Instead of simply asking whether Peggy Young was treated worse than other employees similar in their ability or inability to work, as clearly mandated by the statutory text, the Fourth Circuit mistakenly applied the pretext model of proof in a search for an invidious motive. But a formal policy that ignores the PDA’s directive to treat two groups the same is unlawful disparate treatment, regardless of the motive underlying the policy. This approach ignores the PDA’s clear command to focus on the effects of pregnancy rather than its unique nature in order to ensure equal opportunity for women and mothers. The Fourth Circuit’s ruling exacerbates harmful stereotypes about pregnant workers, one of the primary problems the PDA was intended to counteract. The lower court’s reasoning and approach traffic in the notion that pregnancy is a unique liability undeserving of accommodation and reinforce a gender

ideology that is incompatible with women's full participation in the labor force.

Moreover, the women most in need of the PDA's protection are most harmed by the ruling below. The persistence of pregnancy discrimination in the work- place is well documented, but it is women in low-wage jobs or traditionally male-dominated occupations who are most likely to experience temporary conflicts between the physical effects of pregnancy and job requirements. Studies and caselaw reveal a reluctance by some employers to provide even minor and costless accommodations, reflecting hostility to pregnant women in the workplace. Pregnancy discrimination excludes women from traditionally 'male' jobs and renders low-wage, sex-segregated jobs less secure. The Fourth Circuit's misunderstanding of the PDA's Second Clause will create profound economic instability for such women and their families, leading to well- known obstacles to re-entry if they lose their jobs.

In sum, the Fourth Circuit's ruling adopts a view of pregnancy discrimination that belies both the text and intent of the PDA, reinforces stereotypes about the incompatibility of pregnancy with paid employment, and undermines this Court's longstanding commitment to the "equal opportunity to aspire, achieve, participate in and contribute to society based on . . . individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996).

For these reasons, we urge the Court to reverse the Fourth Circuit's ruling and restore the intended scope of the PDA.

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## ARGUMENT

### I. THE DECISION BELOW IGNORES THE HISTORY OF THE PDA AND REVIVES THE VERY DECISIONS CONGRESS SOUGHT TO SUPERSEDE

The Fourth Circuit's ruling belies the history that led to the PDA's enactment. In *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974), this Court refused to recognize that the exclusion of pregnancy, a condition only affecting women, from an otherwise near- comprehensive disability plan discriminates on the basis of sex. Although criticism of *Geduldig* would soon become a "cottage industry," Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 983 (1984), and the opinion would later become one with a "widely criticized conclusion" that members of this Court are "perhaps embarrassed" to cite, *Coleman v. Ct. of Appeals*, 132 S. Ct. 1327,

1347 n.6 (2012) (Ginsburg, J., dissenting), its circle of damage was nonetheless expanded two years later. In *General Electric v. Gilbert*, 429 U.S. 125, 128 (1976), this Court applied the same formalistic reasoning to hold that pregnancy discrimination was not a form of sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* (2012). The Court thus upheld a private employer's policy that denied disability benefits during pregnancy leave while granting them for other types of temporary leave. Briefs in *Geduldig* had urged this Court to consider the potential impact on Title VII, *see* Deborah Dinner, *Strange Bedfellows at Work: Neomaternality in the Making of Sex Discrimination Law*, 91 Wash. U.L. Rev. 453, 485, 491-92 (2014), for fear of this exact result.

Congress enacted the PDA for the express purpose of repudiating this Court's holding in *Gilbert* and the *Geduldig* reasoning that drove it. Congress did not hide its disdain for *Gilbert* and its intent to over-ride it. *See Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 277 (1987) (observing that the PDA unambiguously rejected *Gilbert*); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) (same). The PDA contains two distinct clauses. The First Clause rejects *Gilbert* by adding a new provision to the definitions section of Title VII, providing that 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." 42 U.S.C. §2000e(k). Notably, the two quoted phrases in the statute appear, in this precise form, nowhere else in the statute. They do appear, however, in the *Gilbert* decision. *Gilbert*, 429 U.S. at 135, 145 (holding that the exclusion of pregnancy does not discriminate "on the basis of sex" and is compatible with Congress' command to prohibit discrimination " 'because of . . . sex' "). This particular drafting of the statute makes sense only as a direct response to *Gilbert*. The Second Clause directs how employers must treat pregnant workers: "the same . . . as other persons not so affected but similar in their ability or inability to work. . . ." 42 U.S.C. §2000e(k).

In enacting the PDA, Congress recognized that employer responses to pregnancy have played a central role in workplace discrimination against women. As Justice Ginsburg has observed, "[c]ertain attitudes about pregnancy and childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman's place among paid workers and active citizens." *AT&T Corp. v. Hulteen*, 556 U.S. 701, 724 (2009) (Ginsburg, J., dissenting); *see also Cleveland Bd.*

of *Educ. v. LaFleur*, 414 U.S. 632, 634-35 (1974) (striking down school board rule forcing pregnant teachers to take unpaid leave after the fourth month of pregnancy); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 *Georgetown L.J.* 567, 595-600 (2010) (discussing exclusionary policies and practices). Congress responded to this history with specific directives to eliminate a wide-range of employment policies that openly discriminated against pregnant workers or based employment decisions on stereo-typed assumptions about their capacity to work. The PDA was designed to make the workplace as amenable to pregnancy as it was to other conditions affecting work – something employers had been reluctant to do on their own, even when unions pushed for such treatment in the collective bargaining process. See Dinner, *Strange Bedfellows*, *supra*, at 472-74.

The PDA was a swift rejection of the Court’s earlier philosophy on pregnancy: that ignoring the status of pregnancy fully met an employer’s obligation to pregnant workers. Instead, the Act was de- signed to “enable women to maintain labor-force attachments throughout pregnancy and childbirth.” Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 *Harv. C.R.-C.L. L. Rev.* 415, 484 (2011). Thus, the decision below, which equates pregnancy-blindness with PDA compliance ignores – even defies – that history. See Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 *Notre Dame L. Rev.* 511, 551-56 (2009). By characterizing UPS’s light-duty policy as “pregnancy-blind,” the Fourth Circuit is engaging in the same kind of formalistic reasoning as the Court did in *Geduldig* and *Gilbert*. See Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 *Harv. L. Rev.* 1307, 1358-59 (2012) (noting that “*Gilbert* relied on the same nar- row, anticlassificationist reasoning . . . [seeing discrimination as applicable] . . . only to practices that sort men and women into two groups perfectly differentiated on the basis of biological sex.”). The policies in *Gilbert* and *Geduldig* could easily have been deemed “pregnancy blind” under the Fourth Circuit’s standard if reworded only slightly to specify a near-exhaustive list of covered conditions while omitting pregnancy. Allowing this ruling to stand would breathe life into precedent specifically overridden by Congress.

## II. THE DECISION BELOW MISCONSTRUES AND MISAPPLIES THE SECOND CLAUSE OF THE PDA

### *A. The Second Clause of the PDA Creates and Defines a Right to Equal Treatment.*

The decision below fails to give any effect to the Second Clause of the 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). To remedy a long-standing problem of employer policies that treated pregnancy as *sui generis* and denied pregnant women otherwise generally available benefits, Congress created a comparison group for pregnant women – employees “similar in their ability or inability to work” – and directed that the two groups be treated “the same for all employment-related purposes.” *Id.*; see also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 n.14 (1983) (“The meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees.”).

The Second Clause, by design, solves the analogy problem – the idea that pregnancy could be treated worse simply because it was not identical to any other work-limiting condition – that lay behind *Geduldig* and *Gilbert*. It establishes a baseline – a “floor . . . not a ceiling,” *Guerra*, 479 U.S. at 285 – that entitles pregnant workers to identify instances of unequal treatment and demand parity. Moreover, as this Court made clear in *Guerra*, under the PDA, a comparator may be selected *only* on the basis of ability or inability to work: the employer’s motivation for accommodating the needs of the comparator is irrelevant. This remains true when the employer is compelled to treat a comparator in a certain manner in order to comply with some other law. See *Section III infra*. As the House Report on the PDA explains, the Second Clause provides the *only* appropriate point of comparison for pregnant workers with comparable limitations: “their actual ability to perform work.” H.R. Rep. 95-948, at 5 (1978); see also Amending Title VII, Civil Rights Act of 1964, S. Rep. No. 95-331, at 4 (1977) (“Under this bill, the 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.”).

Pregnant women who are able to work must be permitted to work on the same conditions as other employees.”).

This interpretation does not convert the comparative right of accommodation into an absolute one, requiring “special treatment” for pregnant workers who require accommodation. Quite the contrary. Accommodating workers with comparable limitations but not pregnant workers *disadvantages* pregnant women. As the new guidance issued by the Equal Employment Opportunity Commission (“EEOC”) makes clear, employers can limit the number or duration of light-duty assignments, or even refuse to offer them altogether, as long as limits or restrictions apply to pregnant and non-pregnant workers with similar levels of incapacity alike. *See* U.S. Equal Employment Opportunity Comm’n, *EEOC Enforcement Guidance on Pregnancy and Related Issues*, No. 915.001, July 14, 2014, at 11 (hereinafter “EEOC Guidance”). But what they cannot do is offer benefits to some similarly restricted workers while withholding them from pregnant workers.

Peggy Young’s complaint simply asks that the Second Clause of the PDA be given the effect its text mandates. The Second Clause denotes an additional and distinctive obligation with independent meaning. The statute’s structure makes this apparent. The Second Clause is set off by a semi-colon and the word “and,” and it includes a verb – “shall” – that clearly imposes a discrete obligation on employers: employers “shall” treat pregnant workers the “same” as other workers with similar work limitations.<sup>2</sup>

Moreover, the Second Clause does not invite employers to treat pregnancy only as well as other least favored workers. Even the policies at issue in *Geduldig* and *Gilbert*, which Congress clearly rejected under Title VII, excluded some other conditions – dipsomania and sexual psychopathy, for example – along with pregnancy.

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<sup>2</sup> That the PDA appears in the definitional section of Title VII is of no matter. The mandate for religious accommodations appears there as well, but has been given full substantive effect.

(Continued on following page)

The PDA directive is simple. If an employer provides support for other health conditions that interfere with work, it must provide the same level of support for pregnancy. Indeed, the Fourth Circuit conceded that “[s]tanding alone, the second clause’s plain language is unambiguous.” The lower court nevertheless declined to apply its clear import by alleging that its juxtaposition with the first clause creates “confusion” and “potential incongruence.” Pet App. 20a-21a. It then resolved its straw-man conflict by taking the draconian step of rendering the Second Clause meaningless, in direct contravention of this Court’s warning not to “read the second clause out of the Act,” *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 205 (1991). The ruling below asserts that the Second Clause “does not create a distinct and independent cause of action,” not because the text does not support that reading, but because such a reading would create “anomalous consequences” such as treating pregnancy “more favorably than any other basis” under Title VII. Pet. App. 20a-21a. But this is clearly incorrect. Providing an accommodation to a pregnant employee when an employer has made the *same* accommodation available to employees with other health conditions is not “more favorable” treatment – it is simply equal treatment, as mandated by the PDA. As this Court explained in *Johnson Controls*, 499 U.S. at 204, “The PDA’s amendment to Title VII contains a BFOQ standard of its own: Unless pregnant employees differ from others ‘in their ability or inability to work,’ they must be ‘treated the same’ as other employees ‘for all employment-related purposes.’ “ (quoting 42 U.S.C. §2000e(k)). Eschewing this Court’s holding that “the PDA means what it says,” *id.* at 211, the court below departed from the text and its intended meaning to circumscribe protection for pregnant workers.

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See 42 U.S.C. §2000e(j) (2012); *Abramson v. William Paterson Coll.*, 260 F.3d 265, 281 & n.12 (3d Cir. 2001). Moreover, the text of the Second Clause cannot be “‘substituted’ in for sex” in the anti-discrimination provisions of Title VII without resulting in “grammatically incoherent directives.” Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. Davis L. Rev.961,1012-13(2013).

*B. The Fourth Circuit's Approach Turns the Second Clause Into a Search for Animus and Misapprehends the Theory Behind the PDA.*

The court below neglected the teachings of this Court's PDA decisions and misunderstood both the theory behind PDA and the approach to pregnancy discrimination it embraces. This Court has long been clear that treating pregnancy differently than other conditions with a similar effect on work violates the statute regardless of the employer's motivation. *See Johnson Controls*, 499 U.S. at 199 ("Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."); *Newport News*, 462 U.S. at 684 ("The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions."). Instead of simply applying the Second Clause, the court below embarked on an unnecessary and ill-conceived search for anti-pregnancy animus. Pet. App. 17a-18a (faulting plaintiff's lack of "evidence of UPS's discriminatory animus toward pregnant workers"); Pet. App. 28a (stating that the "facts fail to demonstrate the specific animus Young ascribes to them"); Pet. App. 17a-19a (rejecting plaintiff's evidence for failing to show "general corporate animus against pregnant employees"). Finding none, the court pronounced the UPS policy "pregnancy-blind." Pet. App. 18a. The Fourth Circuit is not alone on this misguided path. *See Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 640-41 (7th Cir. 2006). This Court must remind lower courts that no additional proof of intent is required if a plaintiff proves that her employer treated pregnancy worse than other conditions with a similar effect on work.

The Fourth Circuit's insistence on proof of an anti-pregnancy bias behind the UPS policy parallels the reasoning of the short-lived *Gilbert* decision. Like the court below, the *Gilbert* Court faulted the plaintiff for failing to prove that the employer's policy of omitting coverage for pregnancy was a pretext for intentional discrimination. *See Gilbert*, 429 U.S. at 135-36. Instead of finding "invidious" discrimination, the Court found the employer's temporary disability policy was predicated upon a neutral, cost-driven calculus. *Id.* at 130-32, 136; *see also Geduldig*, 417 U.S. at 494 (explaining the state's different treatment of pregnancy as "a policy determination"

reflecting cost-based judgments rather than “invidious discrimination”).

Taking the same wrong turn, the court below assumed that a neutrally-framed explanation for treating pregnancy worse than other conditions renders it non-discriminatory. But purportedly neutral explanations, such as cost, have always been available to explain the *sui generis* treatment of pregnancy, even as they masked implicit assumptions about women’s worth as employees and the effect of pregnancy on worker productivity. See Dinner, *Strange Bedfellows*, *supra*, at 476-79 (explaining that cost estimates contained biases about the expected return on employer investments in workers and assumptions about conflicts between work and pregnancy); *id.* at 475-76 (tracking the substitution of cost-based rationales for overt gender stereotyping, once the latter became politically unpalatable). The PDA responded to that history by ensuring that any cost-benefit analysis would be conducted “without the overlay of still prevalent stereotypes and bias about the capacity of pregnant employees or the likelihood that pregnant employees return to work after childbirth.” Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. Davis L. Rev. 961, 1028 (2013). Yet light-duty exclusions also implicitly rely on stereotype-driven assessments of cost to justify including the favored conditions while omitting pregnancy. *Id.* at 1032.

As Congress well understood in enacting the PDA, stereotypes about pregnancy have long shaped employer responses to pregnant workers and workplace policies governing pregnancy, and they continue to do so today. Social science research documents the persistence of gender stereotypes triggered by an employee’s pregnancy. See Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 68 Duke J. Gender L. & Pol’y 67, 103-107 (2013) (discussing social science research on pregnancy and maternity bias in the workplace). Some of these stereotypes are descriptive, ascribing to pregnant workers a lower level of competence and a reduced commitment to the workplace. See Grossman, *supra*, at 577 (collecting and describing studies); Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 Hastings L.J. 1359, 1369-72 (2008) (same). Others are prescriptive, prioritizing women’s maternal functions and devaluing women’s roles as workers. See Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 Yale L. & Pol’y Rev. 97, 103-104 (2013) (citing studies). The PDA responds to both sets of

stereotypes by ensuring that pregnant women have the same rights to work, and under the same conditions, as other employees with conditions similarly affecting work capacity.

In failing to grasp the discriminatory treatment in UPS's policy, the court below misunderstood the theory at the heart of the PDA. Both proponents and opponents of the Act understood that contested assumptions about pregnant workers were at the heart of the fight over the baseline by which to set the nondiscriminatory treatment of pregnancy. The Act's detractors grounded their arguments in traditional views about women, especially mothers, as "margin- al participants in labor markets." Franklin, *supra*, at 1321; *see also id.* at 1336 n.140 (citing arguments employers made to the EEOC in 1965, urging a narrow definition of sex discrimination because women leave the workforce when they marry and employer investments in worker training are lost). PDA proponents made their case for the legislation by high- lighting the significance of gender stereotypes about pregnancy to women's equal rights at work. *See* Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 *Yale J.L. & Feminism* 1, 12 (2009) (citing testimony and views of PDA proponents). As Wendy Williams, a key proponent of the PDA, explained the backdrop to the legislation:

Pervasively, pregnancy was treated less favorably than other physical conditions that affected workplace performance. The pattern of rules telegraphed the underlying assumption: a woman's pregnancy signaled her dis- engagement from the workplace. Implicit was not only a factual but a normative judgment: when wage-earning women became pregnant they did, and should, go home.

Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 *N.Y.U. Rev. L. & Soc. Change* 325, 335 (1984-85).

Employers' differential treatment of pregnancy was a key part of the systemic stereotyping to which the PDA responded: the refusal to treat pregnant women as "real" workers. *See* Williams et al., *A Sip of Cool Water*, *supra*, at 103 ("women who seek accommodations for a condition arising out of pregnancy frequently meet with hostility fueled by gender stereotyping"). The Second Clause is a corrective to a particular form of pregnancy discrimination that took shape historically – and, as

this case makes clear, persists. As employers developed more generous benefit plans in order to attract skilled labor in response to a tightening labor market, they exempted pregnant workers from these benefits, seeing them as poor investments, more likely to leave the workplace and be supported by a male breadwinner. See Dinner, *Strange Bedfellows*, *supra*, at 496-97 & n.188 (citing PDA opponents' arguments that pregnant women leave the workplace); *id.* at 498 (noting opponent's argument that disability benefits should be reserved for family providers and "women are not breadwinners"). This same gender ideology underlay the state's argument in *Geduldig*, defending its omission of pregnancy on the ground that women return to work after pregnancy at lower levels than workers recovering from other conditions. See Oral Argument at 15:17, *Geduldig v. Aiello*, 417 U.S. 484 (1974) (No. 73-640), available at [http://www.oyez.org/cases/1970-1979/1973/1973\\_73\\_640](http://www.oyez.org/cases/1970-1979/1973/1973_73_640) ("... there is a major difference in the return to work rate following disability from pregnancy"); see also Ruth Bader Ginsburg, *Gender and the Constitution*, 44 Cinc. L. Rev. 1, 42 (1975) (articulating the Court's implicit rationale in *Geduldig* that "pregnancy-related disability has no place in a worker's benefit program" because "childbirth marks a new period in the woman's life cycle" in which "she should be supported by the family's man, not the state or an employer she is destined to leave").

The same set of gender stereotypes that forced pregnant women out of some jobs altogether (as in the school teacher cases) also prompted employers to adopt workplace policies that treated pregnancy worse than other conditions affecting work capacity. See Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 Stan. L. Rev. 1871, 1894 (2006) ("Failure to treat pregnant employees 'the same as other persons not so affected but similar in their ability or inability to work' reflects the unconstitutional sex-role stereotype that, as *Hibbs* put it, 'women's family duties trump those of the workplace.'"). These distinct forms of pregnancy discrimination are interrelated and reinforcing. The unfavorable treatment of pregnancy in workplace policies on benefits and accommodations is an effective way to push pregnant women out of their jobs. See Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118, 1123-24 (1986). Both types of discrimination – the outright termination of pregnant employees and workplace policies disfavoring pregnancy from other conditions – are

predicated on the same stereo-typical view of women as mothers first, workers second. See *Coleman v. Ct. of Appeals*, 132 S. Ct. 1327, 1343 (2012) (Ginsburg, J., dissenting) (citing witness in PDA hearings articulating the gender ideology behind pregnancy discrimination, that “women are mothers first, and workers second”); *id.* at 1345 (discussing the gender stereotypes about women’s commitment to the workforce that underlie pregnancy discrimination).

These stereotypes continue to have traction through the policies of employers, like UPS, that refuse light-duty accommodations for pregnancy, despite granting them to workers with other conditions similarly affecting work. Cf. Finley, *supra*, at 1136 (discussing the stereotypes underlying employer refusals to fold pregnancy into workplace policies on the same terms as other conditions, including: that pregnancy is a voluntary, natural choice for women; that employers should not have to bear the costs of covering it; and that doing so would be unfair to the “real” workers deserving of such benefits).

Despite these core lessons of the PDA, the court below stubbornly and repeatedly referred to the PDA’s directive in the Second Clause as requiring “preferential” treatment for pregnancy or, even more derisively, “most favored nation” status. Pet. App. 19a-23a; see also *Reeves*, 446 F.3d at 642 (rejecting plaintiff’s challenge to discriminatory light-duty policy as asking for “preferential treatment”); *Urbano v. Continental Airlines*, 138 F.3d 204, 208 (5th Cir. 1998) (same); *Spivey v. Beverly Enters.*, 196 F.3d 1309, 1312 (11th Cir. 1999) (same). This disparaging terminology itself bespeaks a grave misunderstanding of the PDA and reinstates the very stereotypes about work and pregnancy that the Act was designed to eradicate. See Williams et al., *A Sip of Cool Water*, *supra*, at 103-104 (tracing courts’ “intuition that pregnant women are asking for ‘special treatment’ “ to gender-stereotyped views linking the costs of accommodating male workers to the “ordinary costs of doing business,” but costs associated with pregnancy as “something extra that employers should not have to shoulder”). Indeed, the *Gilbert* Court used this exact same baseline, classifying the excision of pregnancy from the employer’s benefit plan as neutral – and by extension, rendering any inclusion of pregnancy alongside the favored conditions to be special treatment. *Gilbert*, 429 U.S. at 134-35.

Congress rebuked this very reasoning when it enacted the PDA. The Act responded to the flawed view that pregnancy is “unique” by isolating the effects of pregnancy on one’s capacity to work as the proper point for comparison. Cf. Katharine T.

Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 Cal. L. Rev. 1532, 1536 (1974) (“ . . . pregnancy’s unique identifiability facilitates drafting laws and regulations based on exactly those generalizations, stereotypes, and assumptions that constitutional doctrine in the area of sex discrimination was intended to curb.”). By honing in on the work effects of pregnancy, the PDA drives home the key lesson that, in its effects on work, pregnancy is not unique after all, but one part of a broad complex of human conditions that affect work capacity. See Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 Women’s Rts. L. Rep. 175, 193 (1982). The Second Clause instructs that treating pregnancy as well as other conditions with a similar effect on work is not special treatment, but rather the very definition of what it means not to discriminate on the basis of pregnancy.

The decision below and others like it veer so far off course in part because they insist on shoehorning all PDA claims into the *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), pretext proof framework, which was designed to smoke out discriminatory intent from circumstantial evidence. Pet. App. 25a-29a; see also Widiss, *Gilbert Redux*, *supra*, at 1018-26 (discussing and critiquing lower courts’ use of this framework in rejecting PDA challenges to discriminatory accommodation policies). While the pretext model is applicable to pregnancy discrimination cases if the contested issue is whether the plaintiff’s pregnancy was the reason for the adverse action taken against her, it is not necessary in cases like this one, where the employer admits to treating pregnancy worse than other conditions with a similar effect on work. See Williams, *Equality’s Riddle*, *supra*, at 349 (“With *Newport News*, *Gilbert’s* conceptual framework is definitively interred. Pregnancy-based rules prima facie violate Title VII. . . . The more complicated inquiries [of pretext] . . . are now irrelevant.”); *cf. id.* at 349 n.101 (noting the continuing viability of the pretext model where the adverse action is not taken pursuant to an employer policy, but allegedly based on a covert intent to discriminate because of pregnancy); Joanna L. Grossman & Gillian Thomas, *Making Pregnancy Work: Overcoming the PDA’s Capacity-Based Model*, 21 Yale J.L. & Feminism 15, 36 (2009) (arguing that exclusionary light-duty policies constitute per se disparate treatment). In the case below, there was no need to “smoke out” the employer’s intent behind its differential treatment of pregnancy. Proof that the employer grants light-duty work for other conditions with a similar effect on work, but not for

pregnancy, establishes the violation. *See* EEOC Guidance, *supra*, at 12 (“A plaintiff need not resort to the burden shifting analysis set out in *McDonnell Douglas Corp. v. Green* in order to establish a violation of the PDA where there is . . . evidence that a pregnant employee was denied a light-duty position provided to other employees who are similar to the pregnant employee in their ability to work.”).

Even though the *McDonnell-Douglas* model and its prima facie case might be sufficiently modified to fit the fact patterns in the refusal-to-accommodate cases, there is no reason to do so. Filtering the evidence through the prima facie case, followed by the employer’s proffer of a legitimate non-discriminatory reason for the differential treatment of pregnancy, and culminating in an inquiry into whether the proffered reason is a pretext for discrimination, is unnecessarily formalistic and encourages courts to focus on the wrong issue: the employer’s subjective mindset in treating pregnancy differently.<sup>3</sup>

The text of the Second Clause leaves no room for a distinction based on the source of the condition to masquerade as a legitimate non-discriminatory reason. *See* Amending Title VII, Civil Rights Act of 1964, S. Rep. No. 95-331, at 4 (1977) (“the 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”); EEOC Guidance, *supra*, at 7 (“An employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee’s limitations (e.g., a policy of providing light duty only to workers injured on the job.”); *id.* at 12 (stating that a rule differentiating pregnancy from other conditions based on place of injury (on-the-job or not) is not a legitimate nondiscriminatory reason).

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<sup>3</sup> The pretext model continues to be useful, however, in cases where the employer purports to follow a non-discriminatory policy treating pregnancy the same as other conditions similarly affecting work, but plaintiff proves that the asserted pregnancy-neutral reason is actually a pretext for discrimination. *See* EEOC Guidance, *supra*, at 12 (giving example where employer explains denial of light-duty to pregnant worker “based on something other than the source of an employee’s limitation,” such as a cap on the number of light-duty assignments available, but the plaintiff proves that the employer has waived that cap for non-pregnant workers).

Accepting a rule about the source of an employee's condition as a legitimate reason for the differential treatment of pregnancy would be to accept "the very stereotype the law condemns." *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1990)). Nor is it any less of a violation of statutory text if the employer, when it adopted a policy that accommodated other conditions with a similar effect on work, did so out of neglect as opposed to a deliberate, conscious intent to disfavor pregnancy. Unless justified as a BFOQ, it is an unlawful employment practice to treat pregnancy less well than comparable disability, regardless of the employer's motive for doing so. See *Johnson Controls*, 499 U.S. at 199 ("[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect").

Courts instead should permit plaintiffs to prove pregnancy discrimination directly by establishing the employer's differential treatment of pregnancy compared to other conditions with a similar effect on work. While the court below opened the door to proving discrimination directly as an alternative to the pretext model, it wrongly grafted onto this method a requirement that the plaintiff provide "direct evidence" of "animus" against pregnancy. Pet. App. 17a-18a, 24a-25a. This compounds the error discussed above, turning a determination of differential treatment into a search for subjective animus. See EEOC Guidance, *supra*, at 11 (stating that even without proof of employer statements evidencing anti-pregnancy animus, "a pregnant worker may still establish a violation of the PDA by showing that she was denied light duty or other accommodations that were granted to other employees who are similar in their ability or inability to work."). Neither the employer's reason for treating pregnancy differently nor the nature of the evidence offered are material. Cf. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-99 (2003) (rejecting a "direct evidence" requirement in mixed motive cases because the statute makes no distinction between circumstantial and direct evidence); see also EEOC Guidance, *supra*, at 7 ("Pregnant employees seeking to establish that they have not been treated the same as other employees similar in their ability or inability to work can establish unequal treatment through various forms of evidence.").

To the law's detriment, some lower courts, including the court below, have allowed the proof frameworks to become the tail that wags the dog. Cf. Sandra F. Sperino, *Rethinking Discrimination Law*, 110 Mich. L. Rev. 69 (2011) (criticizing

lower courts' reflexive use of judicially devised proof frameworks in lieu of more straightforward applications of statutory text). In doing so, they have transformed the Second Clause of the PDA from a clear directive to treat pregnancy at least as well as other conditions similarly affecting one's ability to work and into a search for pregnancy-based animus.

### III. THE EXPANSION OF THE AMERICANS WITH DISABILITIES ACT WILL FURTHER DISMANTLE THE PDA IF THE COURT OF APPEALS' RULING IS ALLOWED TO STAND

The rights guaranteed by the PDA are comparative. The PDA does not create any absolute entitlement, but makes the level of treatment due pregnant workers contingent on how the employer treats non-pregnant workers with conditions similarly affecting work. As this Court has explained, "Congress intended the PDA to be a floor beneath which pregnancy disability benefits may not drop. . . ." *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987). Disregarding this directive, the ruling below incorrectly – and inexplicably – placed ADA-accommodated individuals outside the realm of comparison for pregnant workers under the PDA. Pet. App. 18a-19a, 27a. The court was egregiously wrong in doing so.

Under the PDA, the employer's reason for refusing to accommodate pregnant workers despite accommodating non-pregnant workers is not material. That some non-pregnant workers may be accommodated pursuant to another legal mandate does not remove their treatment as a baseline for pregnant workers. As this Court made clear in the alternative holding in *Guerra*, if the PDA had required identical treatment of pregnant and non-pregnant workers in that case, employers could have complied with both the PDA and the California law mandating maternity leave by extending comparable leaves to non-pregnant, similarly affected workers. *Guerra*, 479

U.S. at 290-91. The same reasoning applies to employees entitled to accommodation under the ADA. *See* EEOC Guidance, *supra*, at 7 (a PDA violation may be established by "evidence that reasonable accommodations . . . are provided under the ADA to individuals with disabilities who are similar to a pregnant worker in terms of their ability or inability to work."); *id.* at 11 (Example 10).

Indeed, it would be nothing less than bizarre for the PDA's baseline to depend on whether the employer voluntarily accommodated other conditions or did so solely by force of law.

In such a universe, voluntary accommodation of disability would create the obligation to accommodate pregnancy, but the passage of a disability law would eliminate it. The Second Clause permits no such shenanigans and simply makes the minimum level of treatment for pregnant workers depend on the accommodations available to non-pregnant but similarly capable workers. Such an approach would also flatly contradict the PDA's history, including early applications of the Act forcing employers to extend to pregnancy those benefits that they were already required by law to provide to other conditions similarly affecting work. *See* Widiss, Gilbert *Redux*, *supra*, at 967-68 (discussing the PDA's interaction with other statutory mandates and explaining that the PDA required "leveling up" for pregnancy, "even if an employer's exclusion of pregnancy from disability, health insurance, sick day, or other policies was due to pregnancy-neutral factors, such as . . . compliance with other statutory mandates"); *id.* at 1019-20 (discussing early EEOC guidance to this effect). The ADA should not be turned into a sinkhole for pregnant workers.

The lower court's reasoning, which was troubling under the original ADA, is even more so after the 2008 Amendments ("ADAAA"), which amended the ADA to require accommodation of a wider range of disabilities than under court interpretations of the original ADA. 42 U.S.C. §12101(2)(A) (2012); *see also* EEOC Guidance, *supra*, at 15 ("Congress made clear in the [ADAAA] that the question of whether an individual's impairment is a covered disability should not demand extensive analysis and that the definition of disability should be construed in favor of broad coverage."). The ADAAA and its regulations now require reasonable accommodations for a broad range of impairments, including those that substantially limit a person's ability to lift, walk, stand or bend, even if such limitations are temporary in duration. *See* 42 U.S.C. §12101(2)(A) (2012) (identifying major life activities for which substantial impairment would qualify an individual for coverage); 29 C.F.R. §1630.2(i) & (j)(ix) (2012) (explaining the standard for impairment under the Amendments and stating that "[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section"); 29 C.F.R. pt. 1630 app. (2012) (similar).

The ADAAA's expansion of the class of workers entitled to accommodations should, by virtue of the baseline set in the PDA, raise the floor for pregnant workers with a similar ability or inability to work. *See* EEOC Guidance, *supra*, at 3

n.11 (“The expanded definition of ‘disability’ under the ADA also may affect the PDA requirement that pregnant workers with limitations be treated the same as employees who are not pregnant but who are similar in their ability or inability to work by expanding the number of non-pregnant employees who could serve as comparators where disparate treatment under the PDA is alleged.”). If the ADAAA requires accommodation, for example, for a worker with temporary lower back pain, a pregnant worker with a similar limitation should receive the same accommodation. The court below, however, wrongly concluded that workplace accommodations required by the ADA are not appropriate comparison points for the treatment of pregnant workers under the PDA.

If upheld, the lower court’s ruling would give the ADAAA the “perverse effect of decreasing employers’ obligations to pregnant employees by reducing significantly the pool of potential comparators considered under a PDA claim.” Widiss, *Gilbert Redux*, *supra*, at 964-65; *see also* EEOC Guidance, *supra*, at 8 (comparing the kinds of disabling conditions now requiring reasonable accommodation under the ADAAA to similar effects on work resulting from pregnancy). A law designed to help one set of workers with disabilities would then have the shocking and unintended effect of nullifying the Second Clause of the PDA.

There is nothing in the original or amended ADA to support this interpretation, and this Court has repeatedly admonished that legislative repeals by implication are strongly disfavored. *See Cook County v. U.S. ex rel. Chandler*, 538 U.S. 119, 132 (2003); *Hagen v. Utah*, 510 U.S. 399, 416 (1994); *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936); *see also Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“ . . . when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”). This is all the more true since the two statutes share a common purpose: ensuring that employees with health conditions are not unreasonably excluded from the workplace.

The lower court’s confusion in handling the intersection of the PDA and the ADA stems in part from its incorrect assumption that the temporary nature of pregnancy makes it incomparable to lasting disabilities. Pet. App. 27a. However, nothing in the PDA makes the temporary duration of pregnancy necessarily incommensurate with such conditions. The similarity that counts is the effect on an employee’s ability to work. *See Brake & Grossman*, *supra*, at 96-97 (explaining references to “temporary” disabilities in the PDA’s legislative history). For

example, an employer may violate the PDA by permitting an employee with type 2 diabetes but not a pregnant employee to take frequent snack breaks, even though pregnancy is temporary and type 2 diabetes is not. The critical inquiry is whether the employer treated pregnancy less favorably than it treats a non-pregnant worker with a condition having a similar effect on work.

#### IV. THE FOURTH CIRCUIT'S APPROACH MAKES THE PDS AN INEFFECTIVE REMEDY FOR WOMEN IN NEED OF ITS PROTECTION

An undeservedly narrow reading of the PDA will have a particularly adverse impact on women who most need its protection: women in non-traditional occupations and low-wage working women.<sup>4</sup>

The discriminatory denial of accommodations to pregnant workers impedes sex integration of the labor market, relegating women to low-wage, female-dominated jobs with little security.

Many jobs remain heavily segregated by sex. Women *already* face substantial obstacles to traditionally male-dominated jobs, *see* Ariane Hegewisch & Heidi Hartmann, *Occupational Segregation and the Gender Wage Gap: A Job Half Done*, Institute For Women's Policy Research at 4-6 (Jan. 2014) (noting that "some of the most common occupations for either women or men" remain highly segregated). Jobs traditionally held by women are generally low paying. *See* U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey* (2014) (noting that traditionally male-dominated jobs pay significantly higher wages than occupations with a predominantly female workforce); U.S. Census Bureau, *American Community Survey* (2012) (comparing, for example, median earnings in male-dominated protective services occupation of \$48,836 with median earnings in female-dominated personal care occupation of \$23,141). Thus, working in traditionally male dominated jobs offers women, particularly women lacking advanced degrees, a rare avenue to middle class earnings. The inability to retain a non-traditional job due to non-accommodation of pregnancy is thus a particularly grave loss to working class women who have few other opportunities to earn a living wage for themselves and their families.

The likelihood of conflicts between pregnancy and work, however, is particularly pronounced in traditionally male-dominated jobs. For example, women in non-traditional

occupations are particularly susceptible to exposure to hazardous substances such as chemicals, gas, dust, fumes, or radiation. *See* Grossman & Thomas, *supra*, at 19 (2009) (citing studies). Pregnant firefighters may face exposure to toxins contained in fire smoke, including carbon monoxide, benzene and other irritant and asphyxiate gasses with a potentially negative impact on fetal health. *See* Melissa A. McDiarmid et al., *Reproductive Hazards of Fire Fighting II: Chemical Hazards*, 19 *Am. J. of Industrial Medicine* 447, 451-62 (1991). Non-traditional occupations are also more likely to require strenuous physical activity, some of which may be contraindicated for certain phases of pregnancy. For example, a seven-months-pregnant police officer may find it challenging to pursue a suspect in a foot chase. *See* Karen J. Kruger, *Pregnancy and Policing: Are They Compatible? Pushing the Legal Limits on Behalf of Equal Employment Opportunities*, 22 *Wisc. Women's L.J.* 61, 70 (2006). Non-traditional occupations also frequently involve work conditions that can interfere with pregnancy, such as irregular hours or night shifts. *See* Clair Infante-Rivard et al., *Pregnancy Loss and Work Schedule During Pregnancy*, 4 *Epidemiology* 73 (1993) (concluding that the risk of preterm delivery is more than twice as high among women who work night shifts relative to women on fixed day schedules). Given these constraints, lack of pregnancy-related accommodations can significantly erode women's ability to both obtain and retain higher-wage, male-dominated jobs.

Beyond facing a higher risk of conflict between pregnancy and work, women in non-traditional occupations are also especially vulnerable to pregnancy discrimination. Although several studies have found stereotyping and bias against pregnant employees and applicants, *see, e.g.*, Jane A. Halpert et al., *Pregnancy as a Source of Bias in Performance Appraisals*, 14 *J. Org'l Behav.* 649 (1993) (finding substantial negative stereotyping against pregnant workers, resulting in significantly more negative performance appraisals of pregnant workers, especially by male reviewers); Michelle Hebl et al.,

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4 As used here, the term "non-traditional occupations" encompasses all occupations where one sex constitutes more than 75 percent of the labor force. *See* Women's Bureau, U.S. Dept. of Labor, *Nontraditional Occupations of Employed Women in 2010*, at 1 n.1 (Aug. 2010), available at [http://www.dol.gov/wb/stats/NontraJobs\\_2010.htm](http://www.dol.gov/wb/stats/NontraJobs_2010.htm).

*Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards That Maintain Traditional Roles*, 92 J. of Applied Psych. 1499, 1507 (2007) (finding hostile reactions to pregnant job applicants despite benevolent reactions to pregnant customers), such negative reactions are even stronger when pregnant applicants pursue jobs traditionally held by men. See Hebl, *supra*. Women who enter non-traditional fields are more likely to encounter entrenched institutional sexism stemming from doubts about their professional competence. For instance, women who enter law enforcement “face tremendous difficulties” because their male colleagues “doubt that women are equal to men in performing job skills, fear that women cannot do ‘real’ police work, and have concerns about women’s ‘emotional fitness.’” Kruger, *supra*, at 67; cf. Corina Schulze, *Institutionalized Masculinity in US Police Departments: How Maternity Leave Policies (or Lack Thereof) Affect Women in Policing*, 23 Crim. J. Stud. 177, 179-180 (2010) (discussing ways in which the police departments’ “masculine value system” contributes to the underrepresentation of women in those departments). Pregnancy heightens these concerns, increasing women’s risk of being forced out and making pregnancy-related accommodations both rare and vital to the women in these jobs.<sup>5</sup> It is important to remember that claims under the Second Clause arise only when an employer accommodates other physical limitations or injuries but refuses to provide the same level of support to pregnancy. But if an employer makes a light-duty position available for a worker with an injured back, the employer should also be able to make a light-duty position available for a pregnant employee with back pain or a lifting restriction.

Regardless of the type of occupation, the Fourth Circuit’s interpretation of the PDA is especially harmful to low-income women, the group Congress was particularly concerned with when it passed the PDA. See H.R. Rep. No. 95-948, at 3 (1978) (noting that “the assumption that women will become pregnant and leave the labor force . . . is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs”).

Women in low-wage jobs remain highly vulnerable to the harms of non-accommodation. First, like women in non-traditional occupations, women in low-wage jobs are more likely to experience conflicts between pregnancy and work because they work in physically demanding jobs or highly regimented workplaces. See Grossman, *supra*, at 578-83. Second, low-wage

women are less likely to be granted even minor and costless accommodations and thus more likely to be forced out because of these conflicts. *See* Stephanie Bornstein, *Poor, Pregnant, and Fired: Caregiver Discrimination Against Low-Wage Workers*, University of California, Hastings College of the Law Center for Worklife Law (2011), at 2, available at <http://worklifelaw.org/pubs/PoorPregnantAndFired.pdf> (concluding that many pregnant low-wage workers are “fired on the spot or immediately after announcing a pregnancy, . . . banned from certain positions no matter what their individual capabilities to do the job, and . . . refused even small, cost-effective adjustments that would allow them to continue with work throughout their pregnancies”); Paula McDonald et al., *Expecting the Worst: Circumstances Surrounding Pregnancy Discrimination at Work and Progress to Formal Redress*, 39 *Indus. Rel. J.* 229, 237 (2008) (study finding that most cases of pregnancy discrimination occurred in low-wage occupations); *cf. Wiseman v. Wal-Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 48020, at \*1 (D. Kan. July 21, 2009) (store policy barred pregnant fitting room monitor from carrying a water bottle at work despite recommendation from doctor). Moreover, given rigid work schedules with parsimonious leave policies, low-wage workers find it challenging to take time off for necessary medical appointments. *See* Bornstein, *supra*, at 6 (noting that “less than one-third of working parents with incomes under \$28,000 ha[ve] access to flexible workplace scheduling”); *see also* Bureau of Labor Statistics, *Employee Benefits in the United States – March 2014* (July 25, 2014), available at <http://www.bls.gov/news.release/pdf/ebs2.pdf> (noting that only 21 percent of workers in the bottom 10 percent of wage-earners have access to paid sick days). Accordingly, court interpretations that minimize protections of the PDA exacerbate already difficult conditions for low-wage working women.

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<sup>5</sup> PDA-related litigation indeed suggests that conflicts tend to arise with particular frequency in non-traditional occupations. *See e.g. Reeves v. Swift Transp. Co.*, 446 F.3d 637 (6th Cir. 2006) (delivery truck driver); *Lehmuller v. Incorporated Village of Sag Harbor*, 944 F. Supp. 1087 (E.D.N.Y. 1996) (police officer); *Dimino v. New York City Transit Auth.*, 64 F. Supp. 2d 136 (E.D.N.Y. 1999) (transit police officer); *Spees v. James Marine, Inc.*, 617 F.3d 380 (6th Cir. 2010) (welder).

The plight of a low-income woman segregated out of a higher-wage, male-dominated job into the equally strenuous low-wage one based on her reproductive capacity is far from novel. As far back as a century ago, pregnancy was the common basis for “‘protecting’ female employees out of jobs desirable to males.” Deborah L. Rhode, *Speaking of Sex: The Denial of Gender Inequality* 34 (1997). Giving the PDA its due is not just a matter of doing justice to the plain language of the statute. It is vital to putting an end to the longstanding unjust treatment of working women, particularly ones who perform “men’s jobs,” or who work for low wages.

#### CONCLUSION

For the foregoing reasons, the Fourth Circuit’s ruling should be reversed.

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### Appendix A

The *Amici* have substantial expertise in employment discrimination law and issues relating to women's workplace equality. Their expertise thus bears directly on the issues before the Court in this case. These *Amici* are listed below. For professors, their institutional affiliations are listed for identification purposes only.

#### Organizations

**Legal Momentum** (formerly NOW Legal Defense and Education Fund) has been at the national forefront of the movement to advance women's rights for more than forty years. As part of this work, Legal Momentum has particularly focused on eliminating unjust barriers to women's economic security, such as pregnancy discrimination. To combat pregnancy discrimination, Legal Momentum advocates through the legal system and in cooperation with government agencies and policy makers. In addition, Legal Momentum routinely represents women working in nontraditional or low-wage jobs who have been denied light duty positions while pregnant. It is Legal Momentum's position that interpreting the Pregnancy Discrimination Act to require employers to accommodate pregnant workers when such accommodations are available to other workers is vital to eradicating pregnancy-based workplace discrimination.

**Equal Rights Advocates** (ERA) is a national women's advocacy organization based in San Francisco, California. Founded in 1974, ERA's mission is to protect and expand economic and educational access and opportunities for women and girls. ERA employs a three-pronged approach to achieving its mission: public education, policy advocacy, and litigation. ERA is committed to assisting working women who face myriad workplace challenges. In furtherance of that objective, ERA has been involved in historic impact litigation, including two of the first pregnancy discrimination cases, *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *Richmond Unified Sch. Dist. v. Berg*, 434 U.S. 158 (1977), as well as the more recent *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009). ERA's nationwide multi-lingual hotline serves hundreds of women every year and helps them navigate these challenges. Calls from workers facing pregnancy discrimination are on the rise, and ERA has a strong interest in ensuring that women are adequately protected by a fair application of the Pregnancy Discrimination Act (PDA) by courts.

**The Maurice and Jane Sugar Law Center for Economic and Social Justice** is a national non-profit law center extensively engaged in labor and employment law litigation, including gender and pregnancy discrimination. The Sugar Law Center is deeply interested in this case because its outcome affects the right of thousands of women workers employed in traditionally male workplaces and the ongoing harms occurring to women workers who become pregnant while working. The judgment of amici is based on over 15 years experience in public interest advocacy and representation on behalf of workers before administrative agencies and federal and state courts throughout the country. Our experience includes one of the first cases in the Midwest directly confronting the issues arising in this case, and is based on a history and mission of public advocacy that has included contacts with state and local elected officials who have sought understanding of the issues before the court in the present matter.

**Public Justice, P.C.** (Public Justice) is a national public interest law firm dedicated to pursuing justice for the victims of corporate, governmental, and individual wrongdoing. It works to advance civil rights and civil liberties, employees' rights, consumers' and victims' rights, environmental protection, access to justice, and the protection of the poor and the power-less. Public Justice has prosecuted a wide range of gender discrimination and workers' rights cases. It is devoted to ensuring that women and men are treated equally, that pregnant and non-pregnant workers are treated equally on the basis of their ability to work, and that the Pregnancy Discrimination Act is interpreted to mean what it says.

**The Union for Reform Judaism** (URJ) including 900 congregations in North America encompassing

1.3 million Reform Jews, the **Central Conference of American Rabbis** (CCAR), whose membership includes more than 2000 Reform rabbis, and the **Women of Reform Judaism** that represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of a longtime commitment to asserting the principle, and furthering the practice, of the full equality of women on every level of life.

**The Women's Law Project** (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP is dedicated to improving the legal and economic status of women and their families through litigation, public policy initiatives, public

education, and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination by bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. WLP assists women who have been victims of pregnancy discrimination in employment through its telephone counseling service and through direct legal representation. The WLP has a strong interest in the proper application of the Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, to ensure equal treatment in the workplace.

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