No. 11-2078
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PEGGY YOUNG,

Plaintiff-Appellant

v.

UNITED PARCEL SERVICE, INC.,

Defendant-Appellee

Appeal from the United States District Court
for the District of Maryland

Brief *Amici Curiae* of American Civil Liberties Union, American Civil Liberties Union of Maryland, A Better Balance, Equal Rights Advocates, Legal Aid Society – Employment Law Center, Legal Momentum, National Partnership for Women & Families, National Women's Law Center, Public Justice Center, Southwest Women's Law Center, Women's Law Center of Maryland, Inc., and Women's Law Project

in support of Plaintiff-Appellant and in support of reversal

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici curiae* American Civil Liberties Union and American Civil Liberties Union of Maryland state that none of *amici curiae* is a publicly held entity, none has a parent corporation, none has 10 percent or more of stock owned by a publicly held entity, none has a public entity that has a direct financial interest in the outcome of the litigation, and this case does not arise out of a bankruptcy proceeding.

/s/ Ariela M. Migdal
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March 5, 2012

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INTEREST OF *AMICI*

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The **ACLU of Maryland** is one of its regional affiliates. Through its Women's Rights Project, the ACLU litigates cases concerning sex discrimination in the workplace, and has appeared before the U.S. Supreme Court and federal Courts of Appeals in numerous cases involving women's equality, both as direct counsel and as *amicus curiae*. Specifically, the ACLU has litigated landmark cases concerning the interpretation of the Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076, *codified at* 42 U.S.C. § 2000e(k), including *Lochren v. Suffolk County Police Department*, No. 01-CV-3925 (ARL), 2008 WL 2039458 (E.D.N.Y. May 9, 2008), *subsequent history omitted*, a case involving light duty assignments. The proper scope of the PDA is a matter of great concern to the ACLU and its members, and one on which we are currently engaged in advocacy with the U.S. Equal Employment Opportunity Commission (EEOC) following the EEOC's recent public Meeting on discrimination against pregnant workers. *See Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities: Meeting of the U.S. Equal Employment*

Opportunity Commission (Feb. 15, 2012), *available at* http://www.eeoc.gov/eeoc/meetings/2-15-12/index.cfm.

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through legislative advocacy, litigation, research, public education and technical assistance to state and local campaigns, A Better Balance is committed to helping workers care for their families without risking their economic security. A Better Balance has been actively involved in advancing the rights of pregnant women and caregivers in the workplace. The organization runs a legal clinic in which the discriminatory treatment of pregnant women can be seen firsthand.

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 a myriad of workplace challenges. In furtherance of that objective, ERA has been involved in historic impact litigation, including two of the first pregnancy discrimination cases heard by the U.S. Supreme Court, *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*, 129 S. Ct. 1962 (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 by courts.

Legal Aid Society – Employment Law Center (Legal Aid) is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Since 1970, Legal Aid has represented low-wage clients in cases involving a broad range of employment-related issues, including discrimination on the basis of race, gender, age, disability, sexual orientation, national origin, and pregnancy. Legal Aid has appeared numerous times in federal and state courts, both as counsel for plaintiffs and in an amicus curiae capacity, to promote the interests of pregnant workers. Legal Aid also has extensive policy experience advocating for the employment rights of pregnant women. Legal Aid has a strong interest in ensuring that pregnant women are granted the full protections of the Pregnancy Discrimination Act and other federal and state laws.

Legal Momentum (formerly NOW Legal Defense and Education Fund) has worked to advance women's rights for more than forty years. Legal Momentum advocates through the legal system and in cooperation with government agencies

and policymakers to combat sex discrimination in employment. Legal Momentum has been at the national forefront of the movement to eliminate unjust barriers to women's economic security, such as pregnancy discrimination. In furtherance of that goal, Legal Momentum has represented several women working in non-traditional jobs who have been denied light duty positions while pregnant. Legal Momentum believes that employers who maintain light duty positions for a subset of workers, while denying light duty positions to pregnant women, are in violation of Civil Rights laws including Title VII and the Americans with Disabilities Act.

The National Partnership for Women & Families is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination. The National Partnership (then the Women's Legal Defense Fund) was a leader in the fight for the enactment of the Pregnancy Discrimination Act of 1978 and has filed briefs *amicus curiae* in every significant pregnancy discrimination case before the Supreme Court and in numerous federal circuit courts of appeal.

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's

legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, which includes the right to a workplace that is free from all forms of discrimination, including discrimination on the basis of pregnancy. NWLC has prepared or participated in the preparation of numerous *amicus* briefs in cases involving sex discrimination in employment before the federal Courts of Appeals and the Supreme Court.

The Public Justice Center (PJC) is a nonprofit legal services organization founded in 1985 that seeks to enforce the rights of people who are denied justice because of their economic status or because of discrimination. The PJC has a longstanding commitment to advancing the rights of employees, and low-wage workers, in particular. To that end, the PJC has filed numerous briefs in appeals involving an array of worker protection and anti-discrimination laws. *E.g.*, *Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171 (Md. 2011); *Breeden v. Novartis Pharms. Corp.*, 646 F.3d 43 (D.C. Cir. 2011); *Haas v. Lockheed Martin Corp.*, 914 A.2d 735 (Md. 2007); *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003) (*en banc*). In keeping with its commitment to defending workers' rights and enforcing laws that prohibit discrimination, the PJC has an interest in ensuring that the Pregnancy Discrimination Act is interpreted consistently with its intended purpose.

The Southwest Women's Law Center is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women's Law Center works in collaboration with a wide variety of direct service and advocacy organizations to develop public advocacy strategies to address violence against women, to eliminate discrimination, to help lift women and their families out of poverty, and to ensure that women have access to comprehensive family planning and reproductive health services.

The Women's Law Center of Maryland, Inc. is a nonprofit membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination in the workplace and in family law issues. The Women's Law Center operates an Employment Law Hotline to provide workers with information about their legal rights regarding issues that particularly impact women, such as pregnancy discrimination and family leave. Through direct services and advocacy the Women's Law Center seeks to protect women's legal rights and ensure equal access to resources and remedies under the law.

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 Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, to ensure equal treatment in the workplace.

* * *

This brief is being filed by the accompanying Motion for Leave of Court. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party's counsel authored any part of this brief, no party's counsel or other person besides *amici* contributed money to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant Peggy Young, a driver for United Parcel Service, Inc. (UPS) delivering packages sent by air, asked her employer for a "light duty" assignment after her doctor recommended that she not lift more than twenty pounds while pregnant. *Young v. UPS, Inc.*, No. DKC 08–2586, 2011 WL 66532, at *1–2, 5 (D. Md. Feb. 14, 2011). Although air drivers generally carry light letters and packages, Young's job description required her to be able to lift items weighing up to 70 pounds. *Id.* at *1. UPS denied her request, even though it had a practice of giving light duty assignments to other employees who were temporarily unable to perform their jobs. *Id.* at *2-3. Specifically, UPS's collective bargaining agreement required it to give light duty or other alternative assignments to employees who are unable to perform their jobs because of injuries that occurred "on the job," to employees with a qualifying disability under the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.*, preventing them from performing some aspect of the job, to employees injured "off-duty" who also failed a Department of Transportation medical exam and thereby became legally prohibited from driving, and to drivers involved in motor vehicle accidents. *Young*, at *2-3. As a result of UPS's denial, Young was forced to take unpaid leave and lost her medical coverage for the period during which she gave birth, until she was able to return to work at UPS two months later. *Id.* at *6.

The district court ruled that UPS did not discriminate against Young in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, as amended by the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, 92 Stat. 2076, *codified at* 42 U.S.C. § 2000e(k) (2006), because its policy is based on "gender-neutral," "pregnancy-blind" criteria, such as whether an employee was injured on the job or off the job. *Young*, at *12. In doing so, it followed a number of other courts that have similarly upheld policies treating pregnant workers worse than other temporarily disabled workers, as long as the employer can find a gender-neutral reason for doing so. The district court further found that Young had not identified a suitable comparator, because the employees to whom Young pointed were all distinguishable from her in being either accommodated under the ADA or under the provision governing drivers who lost their Department of Transportation certification. *Id.* at *13-14. In so ruling, the court failed to give effect to the PDA's command that pregnant employees be compared with all other employees similar in their ability and inability to work. Instead, it upheld a policy that treated Young, as a pregnant worker, *worse* than almost any other category of worker temporarily unable to perform physical requirements of the job.

This result turns the Pregnancy Discrimination Act on its head, subverting both the clear command of the statute and Congress's purpose in enacting it. The

PDA amends Title VII in two ways. First, it redefines Title VII's prohibition on discrimination "because of sex" to include discrimination because of pregnancy. Second, it requires employers to treat pregnant employees "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). This second clause limits the basis on which employers may compare pregnant workers with other workers who receive better treatment, such as light duty assignments, to the workers' capacity to work. Employers must treat pregnant workers as well as they treat any other worker similar in ability to work, and may not, as UPS has, come up with other reasons – even "pregnancy blind" ones – to treat other similarly-abled workers better than pregnant workers.

This straightforward reading of the statute's plain text emerges from the history and purpose of the PDA. As the Supreme Court has recognized, the PDA was enacted as a necessary remedy to many decades during which employers, lawmakers, and courts forced pregnant women out of the workplace based on the stereotype that pregnancy is incompatible with work and on the normative view that the proper place for pregnant women was at home. Congress recognized that stereotypes about pregnant women animated the discriminatory practices and laws that kept women at the bottom of the labor market. Responding to these laws, and to court decisions upholding them as nondiscriminatory, Congress enacted a

remedy aimed at making it possible for women to remain in the labor force during pregnancy and childbirth. The law accomplished this by mandating that pregnancy be treated in the same way as any other short-term disability, rather than being treated as a fragile state requiring protection and separation from work.

UPS's policy violates this command on its face, as does its denial of light duty to Young in particular. UPS's policy is to treat pregnant workers *less favorably* than other categories of workers who need similar accommodation, including ADA-eligible employees, employees injured at work, employees involved in car accidents, and employees who were injured off the job, but whose licenses have been suspended. The district court, in following a number of other courts that have upheld employers' discriminatory treatment of pregnant women, ignored the PDA's second clause. The result undermined the statute's purpose of keeping pregnant workers on the job when they are willing to work and would be able to do so if granted the light duty that other employees enjoy.

This case presents this Court with an opportunity to embrace a more faithful interpretation of the PDA. Excluding pregnant workers, while accommodating other groups of temporarily disabled workers, entrenches the very sex-role stereotypes that Congress aimed to uproot by passing the PDA. These include the stereotypes that pregnancy represents a woman's voluntary choice to focus on family rather than work, and that this choice – unlike the on-the-job injury of a

breadwinner – need not be accommodated by the employer. The decision below violates both the letter and the spirit of the Pregnancy Discrimination Act and should be reversed.

ARGUMENT

I. Congress Enacted the PDA to Overcome the Stereotype, Held by Employers and Entrenched by Some Courts, that Pregnancy is Incompatible with Work.

A. The History of the PDA Shows that it was Intended to Invalidate Laws and Policies Codifying the Misconception that Pregnant Women Cannot and Should Not Work.

The immediate impetus for the Pregnancy Discrimination Act's amendments to Title VII was the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), holding that discrimination on the basis of pregnancy did not violate Title VII because it did not constitute discrimination on the basis of sex. General Electric provided its employees with sickness and accident benefits, but excluded disabilities arising from pregnancy. *Id.* at 127. The Supreme Court distinguished pregnancy from the other conditions covered by General Electric by characterizing pregnancy as "a voluntarily undertaken and desired condition." *Id.* at 136. Following this decision, women's rights groups advocated for a law to ban pregnancy discrimination. Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 Geo. L. J. 567, 602 & n.191 (2010). Congress's

1978 enactment of the Pregnancy Discrimination Act's amendments to Title VII represented its "deci[sion] to overrule . . . *Gilbert*." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670 (1983).

The backdrop for this congressional repudiation of the Supreme Court's interpretation was a long history of laws giving effect to the stereotype and normative value that pregnancy was incompatible with work and with acting in the public sphere more broadly. This stereotype implicated all women, because it went hand in hand with the view that women are, "and should remain, 'the center of home and family life.'" *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (quoting *Hoyt v. Florida*, 368 U.S. 57, 62 (1961), and offering examples of laws that "limit[ed] women's employment opportunities" based on the belief that woman's proper role is that of mother). As the Committee Report on the PDA expressed the underlying problem, "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 deadend jobs." H.R. Rep. No. 95–948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751. This stereotype is more than an "assumption" or even a "practice"; it was codified in numerous state and local enactments that forced pregnant women out of the workplace by operation of law. *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634-35 (1974) (invalidating school board rule that forced pregnant public school

teachers to take unpaid maternity leave five months before they were expected to give birth, with no guarantee of re-employment); *AT&T v. Hulteen*, 556 U.S. 701, 129 S.Ct. 1962, 1975 n.4 (2009) (Ginsburg, J., dissenting) (citing *Turner v. Utah Dep't of Emp't Sec.*, 423 U.S. 44 (1975) (*per curiam*), a case concerning a state statute that made pregnant women ineligible for unemployment benefits).

Apart from laws and rules forcing women off the job, employers' own policies frequently pushed pregnant women out of the workforce, without regard to individual capacity. *See, e.g., Condit v. United Airlines, Inc.*, 631 F.2d 1136, 1137 & n.1 (4th Cir. 1980) (this Court addressed United Airlines' policy requiring that "A stewardess shall, upon knowledge of pregnancy, discontinue flying," recognizing that this practice had been changed "as a result of the Pregnancy Discrimination Act"). The medical profession long reinforced this stereotype by "routinely advising working women to leave their jobs by the sixth month of pregnancy," frequently resulting in pregnant women losing their jobs altogether. The profession later acknowledged that much of "'the advice given by generations of physicians regarding work during normal pregnancy has historically been more the result of social and cultural beliefs about the nature of pregnancy (and of pregnant women)'" than of "'documented medical experience'" or "'scientific basis.'" Laura Schlichtmann, Comment, *Accommodation of Pregnancy-Related Disabilities on the Job*, 15 Berkeley J. Emp. & Lab. L. 335, 350 & nn.100-03

(1994) (quoting the American Medical Association's Council on Scientific Affairs, *Effects of Pregnancy on Work Performance*, 251 JAMA 1995, 1995 (1984)).

Against this history, the PDA came about because Congress adopted "legal reforms that would 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). The key to such reforms was the need to refocus employers, courts, and lawmakers away from stereotypes about pregnant women's proper role at work, and toward their individual capacity to do the job in question. Thus, the PDA "specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work." H.R. Rep. 95-948, at 3. Legislators clarified that the only permissible point of comparison between pregnant workers and others, for purposes of determining whether they are entitled to the same accommodations, is "their actual ability to perform work." *Id.* at 5. If employers give other temporarily disabled employees accommodations such as transfers to lighter assignments, then this treatment must also be offered to pregnant workers who are temporarily unable to perform heavy work. *Id*. Congress deemed this requirement necessary to "remed[y]" a long history of "discrimination against pregnant workers." *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285-86 (1987). As Senator Birch Bayh, one of the co-

sponsors of the legislation, described the bill, it would "require that [businesses treat] disability based on pregnancy . . . as any other disability." 123 Cong. Rec. S15035 (daily ed. Sept. 16, 1977), *reprinted in* S. Comm. on Labor & Human Res., 96th Cong., Legislative History of the Pregnancy Discrimination Act of 1978, at 75 (1980).

The directive that employers treat pregnant workers the same as other temporarily disabled workers represented a paradigm shift. *See* Dinner, *supra*, at 450-51 (explaining that advocates initiated a "sea change" on the legal status of pregnant workers when they stopped advocating for "special … protection" of pregnant workers and started advocating a paradigm, ultimately codified in the PDA, calling "for the evaluation of individual pregnant women's particular capabilities"). Congress "recognized that working women made important financial contributions to their families and therefore should be able to maintain employment, even while pregnant"; it therefore "passed the PDA to prevent employers from forcing them to choose between continuing a career and continuing a pregnancy." Daniela M. de la Piedra, *Flirting with the PDA: Congress Must Give Birth to Accommodation Rights that Protect Working Women* 17 Colum. J. Gender & L. 275, 285-86 & n.69 (2008) (citing the statement of Senator Harrison Williams, as quoted in *Guerra*, 479 U.S. at 289, that the purpose of the PDA is to give women the right to participate fully in the workplace).

Congress sought to keep pregnant women in the workforce insofar as any other temporarily disabled person is, because legislators were concerned with the "devastating impact which the loss of a working mother's salary will have on the family unit." 123 Cong. Rec. 29,657 (1977) (statement of Sen. Harrison Williams), *reprinted in* S. Comm. on Labor & Human Res., *supra*, at 116; *see also* de la Piedra, *supra*, at 285-86 & n.70.

In short, Congress demanded that employers treat pregnant women as well as they treat other temporarily-disabled workers, with the goal of upending the central premise underlying decades of legally sanctioned pregnancy-based sex discrimination in employment: the notion that pregnancy is incompatible with work.

B. Congress Required Employers to Treat Pregnant Workers the Same as Other Temporarily Disabled Workers, in Order to Uproot the Entrenched Sex-Role Stereotypes that Title VII was Intended to Eliminate.

The function of light-duty reassignment for workers who are temporarily prevented, for whatever reason, from performing physical labor is to enable those workers to continue working through the period of their disability. Denying this option to pregnant workers shuts pregnant women who work in fields involving physically demanding or risky work – frequently male-dominated sectors – out of the workforce during pregnancy, reinforcing the outmoded view that pregnancy is incompatible with work and that the "proper" way for a mother to "discharge [her]

maternal functions" is to be at home. *Hibbs*, 538 U.S. at 729 (quoting *Muller v. Oregon*, 208 U.S. 412, 422 (1908), in which the Supreme court upheld a law limiting women's working hours). The effect of denying light duty to pregnant workers *while offering it to other workers*, such as those injured on the job, is to bolster the stereotype that, while men must work to support their families (and therefore must be accommodated with alternative assignments when they are temporarily prevented from performing their usual tasks), women's workforce participation is, "by virtue of [women's] reproductive role, short term [and] occasional." Reva Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929, 952 (1985).

Such policies limit opportunities, not only for pregnant workers, but for women as a class. *Id.* Treating pregnancy, but not other conditions, as incompatible with work undermines Title VII's overall objective of breaking down barriers to equal opportunity in employment, in light of the fact that "non-traditional occupations for women are more likely to include a physical component and thus, as discussed below, more likely to trigger pregnancy-based conflicts." Grossman, *supra*, at 575. For all of these reasons, Congress required employers to grant pregnant women the same treatment as other similarly-abled employees, comparing them based only on "'the actual effects of [their] condition on their ability to work.'" *Int'l Union, United Auto., Aerospace, & Agr. Implement*

Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187, 205 (1991) (quoting S. Rep. No. 95-331, at 4-6 (1977)).

In mandating a focus on capacity alone, Congress took on longstanding beliefs about women workers and pregnant workers in particular. A dominant stereotype about pregnant women is that they are, or should be, preoccupied with their families, not work. *See* Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimating Discrimination Against Pregnant Women in the Workforce*, 50 Me. L. Rev. 225, 226 (1998). When women are forced off the job in the middle of pregnancy, the result is a loss of salary and benefits and the alienation of women from the workforce for the period of pregnancy and childbirth. Dinner, *supra*, at 485. This thwarts Congress's aims. Research demonstrates that women's separation – even temporarily – from the workforce to bear and raise children has a long-term economic impact. *See, e.g.*, Sylvia Ann Hewlett, Off-Ramps and On-Ramps: Keeping Talented Women on the Road to Success 45-47 (2007); Marianne Bertrand *et al.*, *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors*, 2 Am. Econ. J. Applied Econ. 229, 252 (July 2010) (analyzing effect of career interruptions). And once a woman has been forced to leave work, it can be difficult to return. Hewlett, *supra*, at 43-45.

Congress recognized that policies that force women off the job reverberate and disadvantage all women workers, because "[w]omen are still subject to the

stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant." H.R. Rep. No. 95–948, at 6–7. Such rules and policies rely on additional "outmoded taboos" specific to pregnant women, such as the notion that it is unseemly or "embarrass[ing]" for pregnant women to work in the public sphere once they are "conspicuously pregnant"; these taboos historically were associated with rules requiring pregnant women to leave work once they "'began to show.'" *LaFleur*, 414 U.S. at 641 n.9 (describing the "considerations" that appear to have "inspired" a mandatory maternity leave regulation for teachers).

To overcome these "taboos," Congress structured the remedy to refocus the employer's inquiry on pregnant women's capacity to work. *See Guerra*, 479 U.S. at 285 (explaining that the PDA's "second clause" "illustrate[s] how discrimination against pregnancy is to be remedied"). As the Supreme Court has explained, "[t]he 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.'" *Johnson Controls*, 499 U.S. at 204 (quoting 42 U.S.C. § 2000e(k)). "In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job." *Id.*

Employer policies that respond to the PDA by categorizing pregnancy as an "off-the-job" injury, to be accorded less accommodation than an on-the-job injury, are relics of the stereotype that a pregnant worker has somehow chosen motherhood over her career. *See* Greenberg, *supra*, at 254. Historically, employers resisted according pregnancy the same accommodations as other short-term disabilities, because pregnancy represented a "voluntary" period of physical incapacity. Dinner, *supra*, at 455; *cf. Gilbert*, 429 U.S. at 136 (holding that Title VII did not forbid pregnancy discrimination in part because pregnancy "is often a voluntarily undertaken and desired condition"). Although Congress rejected the majority view in *Gilbert*, the characterization of pregnancy as a "voluntarily undertaken" choice that occasions periods of disability less deserving of accommodation than those occasioned by on-the-job injuries persists. This treatment of pregnant workers violates the basic principle of the PDA, which "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Newport News*, 462 U.S. at 684.

II. The Text of the PDA Requires Employers to Grant Light Duty to Pregnant Workers if They Do So for Any Other Worker Similar In His Ability or Inability to Work, Regardless of the Source of This Inability.

Read in light of the statute's history and purpose, the plain language of the PDA requires employers to enable pregnant women to remain on the job to the

same extent they make it possible for any other group of temporarily disabled employees to do so.

A. The Statute's Two Distinct Clauses Contain a Nondiscrimination Requirement and an Additional Requirement to Treat Pregnant Workers as Well as Any Other Similarly-Abled Employee.

Title VII as amended by the PDA remedies sex discrimination based on pregnancy by making two separate but related demands on employers. First, as with any characteristic protected by Title VII, the statute makes it unlawful for an employer "to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). The PDA amended the definitions section of Title VII to define sex to include "pregnancy, childbirth, or related medical conditions." *Id*. § 2000e(k) Second, the PDA also contains an explicit requirement governing employers' treatment of pregnant employees, and limiting the grounds on which they can compare them with other employees who are temporarily unable to perform aspects of their jobs. The statute requires "women affected by pregnancy, childbirth, or related medical conditions" to "be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work[.]" *Id*. As applied to a pregnant employee with a lifting restriction, the statute requires her to be given the same treatment – including the option of reassignment to light-duty work or other accommodation –

as the employer gives to any other person with a similar lifting restriction, including an employee who is injured on the job.

Courts have recognized that this second clause of the PDA "expressly require[es] that employers provide the same treatment of such individuals as provided for 'other persons not so affected [not pregnant] but similar in their ability to work.'" The PDA's second clause thereby "explicitly alters the [Title VII] analysis to be applied in pregnancy discrimination cases," *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996), by directing employers and courts to focus on a pregnant woman's capacity to work.

This second clause restricts the basis on which employers may compare pregnant workers with other workers to their "ability or inability to work." When assessing whether pregnant worker are entitled to the same benefits as another group of workers (or individual worker), the statute requires the employer to ask: is the other employee who received a benefit "similar in their ability or inability to work" to the pregnant employee? No other basis of comparison or distinction is given in, or permitted by, the statute; as one commentary explains, this clause of the statute "specifically requires equal treatment with a defined comparison group – workers who are temporarily disabled by causes other than pregnancy, but 'similar in their ability or inability to work.'" Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination*

Act's Capacity-Based Model, 21 Yale J.L. & Feminism 15, 33 (2009); *accord Johnson Controls*, 499 U.S. at 204 (describing the "ability or inability to work" limitation as "a BFOQ standard of its own"). The clause thereby "augments the basic anti-discrimination prohibition in the first clause by dictating the appropriate comparison group." Grossman & Thomas, *supra*, at 36.

By defining the appropriate comparison group, Congress restricted employers' ability to subdivide the population of temporarily disabled employees based on other factors – such as whether the injury arose "on the job" or "off the job" – for purposes of treating pregnant workers only as well as one sub-group of similarly-abled employees and worse than another sub-group. That is, the PDA "does not delegate to employers the right to define appropriate analogues to workers temporarily disabled by pregnancy – it provides one in the statute itself." Grossman & Thomas, *supra*, at 41. The statute requires employers to, for example, give pregnant women light duty accommodation benefits if it gives such benefits to any other employees who are temporarily unable to lift heavy objects, without regard to whether those other employees were injured on the job or off the job.

The statute likewise restricts courts. "While Title VII generally requires that a plaintiff demonstrate that [an] employee who received more favorable treatment" such as light-duty, "be similarly situated 'in all respects,' the PDA requires only

that the employee be similar in his or her 'ability or inability to work.'" *Ensley-Gaines*, 100 F.3d at 1226 (quoting *Mitchell v. Toledo Hosp.*, 964 F2d 577, 583 (6th Cir. 1996)). The source of the injury, the reason for the inability or ability to work, and the fact that an employee may be entitled to benefits by virtue of another law are not valid bases of comparison.

This unique statutory command effectuates Congress's purpose in enacting the PDA, described in Part I, *supra*, of defining pregnancy discrimination by reference to the actual impact that pregnancy has on an employee's capacity to perform her job functions. *See* Grossman, *supra*, at 615 (explaining that the statute does not leave the choice of comparators up to employers, but "specifically directs them to focus on capacity alone"). Defining the comparator group in the statute itself makes sense, because "pregnancy is a unique condition" that sometimes "imposes unique burdens on women who become pregnant," with the result that it is "frequently very difficult" for a pregnant worker to identify other workers who are "similarly situated" in all respects other than pregnancy for purposes of Title VII. Greenberg, *supra*, at 243. As in this case, the pregnant worker frequently can identify other workers who are treated better, and who are "similar in their ability or inability to work," but dissimilar in other respects (such as having been injured "on the job"). The PDA mandates that pregnant workers be offered the same benefits as those workers.

B. Some Courts and the EEOC Have Correctly Interpreted "Similarity" Under the PDA.

Several courts have correctly interpreted the PDA to require employers to treat pregnant women as well as any other similarly-abled worker, regardless of the source of injury. In *Ensley-Gaines*, the Sixth Circuit explained:

> While Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated "in all respects," … the PDA requires only that the employee be similar in his or her "ability or inability to work."

100 F.3d at 1226 (quoting *Mitchell*, 964 F.2d at 583, and 42 U.S.C. § 2000e(k)). Similarly, the Tenth Circuit held that the correct inquiry is whether the plaintiff had the capacity to perform the responsibilities of the requested modified duty, and that it is inappropriate to require a plaintiff to meet the qualification of having sustained an on-the-job injury, because that "requirement" for being assigned modified duty is not essential to performing the job. *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1193-94 (10th Cir. 2000). That court explained that instead of only comparing pregnant workers to those injured off the job, the better approach is to compare them with any "non-pregnant, temporarily-disabled employee," because to do otherwise would "short circuit[]" the plaintiff's case at the prima facie stage. *Id.* at 1195 n.7; *see also Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 437-38 (8th Cir. 1998) (when "distinguishing between employees" for purposes of assigning light duty,

"[e]mployers must look to the employee's actual abilities," and not other factors); *Tysinger v. Police Dept. City of Zanesville*, 463 F.3d 569, 574 (6th Cir. 2006) (in "a pregnancy discrimination claim, the 'relevant respects' in which comparables must be similarly situated are their 'ability or inability to work'") (quoting *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 353 (6th Cir. 1998)).

The EEOC, the agency charged with enforcing Title VII, has longstanding policy indicating that its interpretation is in accord. In 1978, the agency published a document entitled "Questions and Answers on the Pregnancy Discrimination Act," which became an Appendix to 29 C.F.R. Part 1604. It addressed the question whether pregnant workers must be given light-duty accommodation if other workers are:

> "Q. If, for pregnancy-related reasons, an employee is unable to perform the functions of her job, does the employer have to provide her an alternative job?
>
> A. An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc. For example, a woman's primary job function may be the operation of a machine, and, incidental to that function, she may carry materials to and from the machine. If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function."

The agency did not suggest that employers could avoid this responsibility by creating separate axes of distinction among workers, such as those injured on and

off the job. *See also* EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities 22 (May 2007) (reiterating that an employer "may not treat a pregnant worker who is temporarily unable to perform some of her job duties because of pregnancy less favorably than workers whose job performance is similarly restricted because of conditions other than pregnancy," without suggesting that the employer could come up with pregnancy-blind reasons to support such disparate treatment).

III. The Construction of the Statute Adopted by the District Court and Some Other Courts Subverts the Plain Language and Purpose of the PDA.

A. The District Court's Construction Allows Employers to Treat Pregnant Workers *Worse* than Most Other Temporarily Disabled Employees, in Contravention of the Statute's Purpose and Meaning.

The district court erred in rejecting Young's argument that UPS's light-duty policy violates Title VII on its face. The court found that UPS based its decisions about whether to offer light-duty accommodations on "gender-neutral criteria," such as whether the injury giving rise to an inability to work occurred "on the job." 2011 WL 665321, at *11. UPS's policy is to grant accommodations to employees who are temporarily unable to perform certain aspects of their job as a result of an on-the-job injury, a condition that qualifies for accommodation under the ADA, and any other condition, including an off-the-job injury, that causes a driver to lose Department of Transportation certification. *Id.* at *2-3. The district court called

these reasons for treating pregnant workers worse than other workers who might not be able to lift "pregnancy-blind," because the basis for distinguishing among employees is not pregnancy itself but other criteria unrelated to pregnancy. *Id.* at *12.

The statute, however, does not permit employers to treat pregnant workers worse than other workers who are similar in their ability or inability to work simply because the employer uses a factor other than pregnancy to distinguish among them. The district court's analysis ignored PDA's requirement that employers treat pregnant workers the same as any other worker who is similar in ability or inability to work, regardless of whether the workers are dissimilar in other respects. Thus, if the employer would give light-duty benefits to an employee who cannot lift more than twenty pounds as a result of an on-the-job injury, the plain language of the statute, interpreted in light of its legislative history, requires the employer to afford the same light-duty benefit to its pregnant workers. The statute does not provide an exception to this rule for employees who are injured on the job.

The district court erred in declining to require UPS to comply with the PDA's "express focus on the extent of capacity," and in allowing UPS to treat pregnant women worse than similarly-able people based on an "artificial distinction concerning the location where the incapacity arose." Grossman &

Thomas, *supra*, at 36. UPS's policy therefore violates Title VII as amended by the PDA by "exclud[ing] pregnant women" from the accommodation offered those injured on-the-job and those eligible for ADA accommodations, "despite their potentially similar work capacity," amounting to "in effect, a formal policy of discrimination." *Id*.

UPS's policy treats some workers with "off the job" injuries better than it treated Young. The district court upheld this treatment by holding that some of Young's examples were not similar in their inability to work, because they, unlike her, also suffered a *legal* impediment to driving, as well as a physical one. *Young*, 2011 WL 665321, at *13. But this additional impediment does not provide the employer with the opportunity to treat pregnant workers worse than others with off-the-job injuries (or, for that matter, on-the-job injuries).

Unfortunately, other courts, like the district court in this case, have failed to give full effect to the mandate that pregnant employees be provided accommodation equal to those granted to other workers similar in their ability to work. In *Urbano v. Continental Airlines*, 138 F.3d 204, 208 (5th Cir. 1998), the court upheld a similar policy on the basis that the employer treated the pregnant plaintiff "the same as it treats any other worker who suffered an injury off duty." The statute, however, requires more: it requires the employer to treat the pregnant employee the same as it treats any other worker who has a temporary lifting

restriction, whether the restriction was incurred through an off-duty injury or an on-duty injury. Such treatment is not, as the Eleventh Circuit put it in *Spivey v. Beverly Enters.*, 196 F.3d 1309, 1312 (11th Cir. 1999), "preferential treatment [for] pregnant employees"; *accord Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006) (rejecting the argument that a policy similar to UPS's violated the PDA's second clause and holding that "the Act merely requires employers to 'ignore' employee pregnancies," not to extend the light duty accommodations that other similarly-abled workers are offered). On the contrary, as one commentator noted, "it is hard to imagine how providing an accommodation to pregnant women that men will never need can amount to 'preferential treatment,'" nor does the statute cast it that way. De la Piedra, *supra*, at 293. These decisions, which allow employers to escape the PDA's mandate by premising the disadvantageous treatment of pregnant workers on an on-duty/off-duty distinction, have created a reality in several circuits in which, "instead of eradicating discrimination based on pregnancy, the PDA has often served to legitimate it." Greenberg, *supra*, at 227.

This result is what Congress attempted to outlaw. By separating workers into two categories – those eligible for accommodations to remain on the job and those who are not – and by putting pregnant workers in the latter category, employers subvert the PDA's purpose by treating pregnant workers worse than at least some, if not most, other workers who are similar in their ability to work. One

court recognized this problem, but mistakenly placed the blame on "a blind spot in the statutory scheme created by Congress." *Serednyj v. Beverly Healthcare LLC*, No. 2:08-CV-4 RM, 2010 WL 1568606, at *13 (N.D. Ind. Apr. 16, 2010), *aff'd*, 656 F.3d 540 (7th Cir. 2011). But it is not the statute that contains a blind spot. "[T]here unquestionably are workers 'similar in their ability or inability to work' who receive a job benefit," like light duty, "expressly denied to pregnant women," in violation of the statute. Grossman & Thomas, *supra*, at 36. Yet a number of courts, including the court below, have upheld such policies as long as employers can point to "pregnancy-blind" justifications, despite the fact that there is no "pregnancy-blind" exception to the PDA's requirement of treating pregnant workers as well as all those similar in ability or inability to work. *See id.* at 33-41 (describing the "similarly situated trap" for pregnant plaintiffs challenging discriminatory accommodation policies).

This Court should, like the *Ensley-Gaines* court, heed the Supreme Court's statement that "the PDA means what it says," and require employers to give pregnant workers light-duty accommodations to the extent that they provide such modified duty positions to any other similarly abled worker. Capacity to work, not location of injury, is the only valid measure of whether employees are similarly situated for purposes of comparative analysis. *See generally* Jamie L. Clanton, Note, *Toward Eradicating Pregnancy Discrimination at Work: Interpreting the*

PDA to "Mean What It Says," 86 Iowa L. Rev. 703 (2001) (summarizing courts' interpretations and endorsing an approach that turns on employees' ability to work, rather than other factors such as location of injury).

B. The District Court Incorrectly Assumed that Employers May Treat Pregnant Workers Worse than They Treat Other Temporarily Disabled Workers who are Covered by the Americans with Disabilities Act.

The district court wrongly accepted UPS's argument that ADA-eligible employees do not provide a basis of comparison with pregnant employees. 2011 WL 665321, at *13. The court agreed with UPS that several of Young's proffered comparators were accommodated under the ADA. The court erred, however, in concluding that this ended the analysis. There is no reason to discount ADA-eligible coworkers as valid comparators. On the contrary, the PDA requires UPS to offer its pregnant employees the same accommodations as it offers any other employee – including an employee covered by the ADA – who is similar in his ability or inability to work. The similarity at issue is whether the employee, like Young, has a physical restriction that prevents him or her from fulfilling the duties of the driver job. The PDA's history, described in Part I, *supra*, makes clear that Congress sought to recalibrate the treatment of pregnant workers to the treatment of other employees temporarily disabled from doing their jobs. Thus, using the treatment of ADA-eligible employees as a floor for the treatment of workers under the PDA properly effectuates not only the statute's language, but its purpose.

Correctly understanding the relationship between the PDA and the ADA is even more important now that Congress has brought many more temporary disabilities with similar effects on capacity to pregnancy under the ADA's protection. In 2008, Congress passed the ADA Amendments Act of 2008 (ADAAA). Pub. L. No. 110-325, 122 Stat. 3553. On May 24, 2011, regulations implementing the ADAAA became effective. 29 C.F.R. § 1630.1. Although Young does not argue that the statutory amendments or the new regulations govern her case directly (her injuries took place prior to the amendments), the amendments and their implementing regulations underscore how important it is that courts correctly interpret the PDA to require employers to treat pregnant workers as well as other similarly-abled workers, including those covered by the ADAAA.

The ADAAA requires employers to provide reasonable accommodations to workers whose temporary physical restrictions are similar to those experienced by many pregnant women with "normal" pregnancies. Under the EEOC's new regulations, "major life activities" triggering protection include lifting, bending, standing, walking, working, and the operation of the bowel, bladder, and digestive systems. 29 C.F.R. §§ 1630.2(i)(1)(i), (ii) (2011). The final rule rejected a six-month minimum on temporary impairments, and includes episodic impairments when they are active. *Id.* §§ 1630.2(j)(1)(vii), (ix). The EEOC's Interpretive Guidance states that "someone with an impairment resulting in a 20-pound lifting

restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting" for purposes of the ADAAA. *See* 29 C.F.R. pt. 1630 app. § 1630.2(j)(1)(viii) (effective May 24, 2011). The EEOC deleted from the Guidance its former statement that temporary conditions like broken bones, concussions, and the flu do not qualify. *See* Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 Boston College Law Review __ (forthcoming 2012) (*available at* http://ssrn.com/abstract=1961644 and attached).

The ADA's expanded coverage will make employers' unequal treatment of pregnant workers even more stark. Under the ADAAA, a person with a temporary lifting restriction occasioned by, for example, a back injury, will qualify for reasonable accommodation, which may take the form of a light-duty assignment. This individual may be identical to many pregnant women in his or her ability to work. The PDA, far from requiring "preferential" treatment of pregnant workers, demands that similarly restricted pregnant workers be granted the same benefit. *Cf. Cox*, *supra*, at 24-25 (observing that "the ADAAA's requirement that employers must now accommodate persons with modest short term limitations (*i.e.*[,] persons 'similar [to pregnant women] in their ability or inability to work') would significantly help PDA plaintiffs" if courts read the PDA's second clause "literally"). The statutory scheme recognizes that, regardless of whether a healthy

pregnancy may be comfortably categorized as a disability, it can have an identically disabling temporary effect on an employee's ability to perform certain physical aspects of her job. Accordingly, Title VII requires employers to afford any pregnant worker with such limitations the same accommodation as the ADA requires as to workers who are limited for other reasons related to physical disabilities, including injuries (whether suffered on or off the job).

On the other hand, the ADAAA, when interpreted in conjunction with an *incorrect* reading of the PDA, could have the perverse, unintended effect of exacerbating barriers to pregnant workers' ability to obtain the accommodations to which they are entitled by virtue of the PDA. Cox, *supra*, discusses the district court's decision in this case to illustrate the problems that arise when courts allow employers to use a "pregnancy-blind" distinction between pregnant workers and others who receive light-duty accommodations as a justification for disadvantaging the former. *Id.* at 25-26 & nn. 108-12. The court allowed UPS to treat Young worse than members of the ADA's protected class, holding that ADA-protected employees were not "appropriate comparators." 2011 WL 665321, at *13.

This analysis is correct, both in its interpretation of what the PDA, read "literally," requires, and in its observation that courts like the district court in this case have used the ADA as a sword against pregnant employees, contrary to Congress's intent. This Court should make clear that pregnant workers are entitled

to the same treatment as similarly-restricted ADA-eligible employees. This result would accomplish Congress's goal of eliminating employers' singling out of pregnant women for disadvantageous treatment and requiring them to treat pregnancy as well as other disabilities.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that:

1. The Amici Curiae Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) because it contains 6,989 words, counted by Microsoft Word, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(C)(iii).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point font.

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March 5, 2012

CERTIFICATE OF SERVICE

I certify that on March 5, 2012, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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