No. 12-1226

In The Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

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

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

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors and women's rights organizations who 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.

SUMMARY OF ARGUMENT

The petition in this case presents an issue of great significance for working women in the United States, who comprise nearly half the labor force. The vast majority of working women will become pregnant at some point during their working lives, and many of them will experience at least minor conflicts between job requirements or working conditions and the temporary, but real physical effects of pregnancy.

[1] 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 received timely notice of *amici's* intent to file this brief and have consented to its filing in letters submitted with the filing of this brief.

The Fourth Circuit's ruling interprets the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) ("PDA"), in a manner that is inconsistent with the statutory text, Congress' intent in passing the law, and this Court's post-PDA precedents. The ruling, instead, reverts back to a pre-PDA approach, in which pregnancy is in a class by itself, and pregnant working women are excluded from benefits and accommodations available to others. The Fourth Circuit's ruling is premised on three critical mistakes. First, the court searches for pretext – and upholds United Parcel Service's ("UPS") policy when it finds no evidence of animus – despite a clear facial violation of the statutory command to extend accommodations to pregnant women who need them if they are extended to employees with other conditions similarly affecting their ability to work. Second, the court reads the second clause out of the PDA, despite clear precedents from this Court that explain its meaning and proper application. Third, by applying its mistaken view of the second clause, the court strips pregnant women of most potential comparators, rendering the comparative right of accommodation an empty vessel.

Indeed, in light of recent amendments to the ADA expanding the pool of employees entitled to reasonable accommodation to include those with temporary conditions analogous to 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).

Beyond simply failing to give the PDA its due, the Fourth Circuit's ruling exacerbates existing 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 workplace is well documented, but it is women in low-wage jobs and traditionally male-dominated occupations who are most likely to experience temporary conflicts between the physical effects of pregnancy and job requirements. The Fourth Circuit's misunderstanding of the PDA's second clause will create profound economic instability for such women and their families and lead to the 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 gender equality and 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 review the decision of the Fourth Circuit and settle the longstanding circuit split about the proper interpretation of the PDA's second clause.

ARGUMENT

I. The Fourth Circuit's Decision Marks a Return to Precedents Purposely Superseded by Congress when it Passed the PDA.

The PDA was passed to overturn this Court's ruling in *General Electric Co. v. Gilbert*, 429 U.S. 125, 128 (1976), which held 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.* In *Gilbert*, this Court upheld an employer's policy that denied disability benefits during pregnancy leave while granting them for other types of temporary leave. The Court adopted the formalistic reasoning of *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974) (holding that the exclusion of pregnancy from a comprehensive disability insurance program did not violate the Equal Protection Clause), and refused to recognize that the exclusion of pregnancy, a condition only affecting women, discriminates on the basis of sex.

In enacting the PDA, Congress recognized that employer responses to pregnancy have hindered women's opportunities in the workplace. 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 designed to eliminate the most common and most damaging types of policies and practices for pregnant working women. The PDA's primary goal was 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).

The PDA established two forms of protection against discrimination for pregnant working women. The first clause of the Act redefined sex discrimination to include discrimination on the basis of "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). This clause unambiguously overturned *Gilbert*, *see Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 277 (1987); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S.

669, 678 (1983), and eliminated a wide range of employment policies that openly discriminated against pregnant workers or based employment decisions on stereotyped assumptions about their capacity to work.

The second clause of the Act 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). The second clause is unique in Title VII. To remedy a longstanding problem of employer policies that treated pregnancy as a *sui generis* characteristic and excluded pregnant women from receiving 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." 42 U.S.C. § 2000e(k). As the House Report on the PDA explains, the second clause provides the only appropriate point of comparison for pregnant and comparably disabled workers: "their actual ability to perform work." H.R. Rep. No. 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.").

The ruling below ignores this Court's interpretations of the PDA, the plain text of the statute, and Congress' intent. The Fourth Circuit's opinion upheld UPS's policy, which offers light-duty work to three categories of employees – those injured on the job, those entitled to accommodations under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006) ("ADA"), and those who have lost Department of Transportation certification due to legal impediments like a lost license or physical impediments regardless of the underlying cause – but denies it to employees, like Peggy Young, who have a temporary lifting restriction due to pregnancy. *See* Pet. App. 3a-4a.

The Fourth Circuit's ruling makes three critical mistakes and violates the PDA's core command that "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." *UAW v. Johnson Controls*, 499 U.S. 187, 204 (1991).

First, when evaluating the legality of UPS's failure to accommodate Peggy Young's pregnancy-related restriction, the court below erroneously applied the pretext analysis from *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). The PDA's second clause requires employers to grant pregnant women

accommodations necessitated by the physical effects of pregnancy *if they grant them to similarly situated employees*. UPS's admission that it accommodates multiple categories of employees, while refusing to accommodate pregnant women, establishes a formal policy of discrimination. The burden is not on the petitioner to establish that UPS's reason for the disparate treatment is the product of animus or bias. The formal disparate treatment speaks for itself. As the Sixth Circuit explained in *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996), while employees pursuing Title VII claims generally must establish that they are similarly situated in all respects to potential comparators, "the PDA explicitly alters the analysis to be applied in pregnancy discrimination cases" and "requires only that the employee be similar in his or her 'ability or inability to work.'" *See also* Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 Yale J. L. & Feminism 15, 36-41 (2009) (discussing cases). Congress dictated the appropriate comparison group: the PDA requires employers to focus on the extent of incapacity alone.

Second, despite a warning from this Court in *Johnson Controls*, 499 U.S. at 205, not to "read the second clause out of the Act," the ruling below does just that. Conceding that "[s]tanding alone, the second clause's plain language is unambiguous," the lower court concludes that its juxtaposition with the first clause creates "confusion" and "potential

incongruence." Pet App. 20a-21a. It then resolves its straw-man conflict by taking the draconian step of rendering the second clause meaningless. 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. 21a. As this Court explained in *Johnson Controls*, 499 U.S. at 204, however, the PDA *is* unique: "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 departs from the text and its intended meaning to circumscribe protection for pregnant workers.

Third, by carving out three categories of temporarily disabled workers who may not be used as comparators, the Fourth Circuit's ruling relegates pregnant workers to a status worse than virtually all other workers. Treating pregnancy as a category with no obvious comparator is exactly the type of approach endorsed in *Gilbert* but subsequently repudiated by Congress through the PDA. The rejection of this approach was confirmed by this Court in *Guerra*, which held that pregnant workers are to be treated no worse than comparably disabled workers. Indeed,

the PDA is "a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise." *Guerra*, 479 U.S. at 285.

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. In *Guerra*'s alternate holding, this Court ruled that even if the PDA required identical treatment – no better, no worse – of pregnant workers and comparably disabled workers, an employer could comply with the PDA and California's law mandating maternity leave by voluntarily providing the same leave to other disabled workers. *Id*. at 290-91. The fact that the pregnant workers were protected by an independent legal mandate would have had no effect on the employer's duty to comply with the PDA by treating both groups the same. *Id.* Yet, in the face of this clear rule, the court below rejects Young's interpretation of the PDA precisely because it means that a pregnant worker placed under a lifting restriction by a doctor could "receive whatever accommodation or benefits are accorded to an individual accommodated under the ADA, because the pregnant worker and the other individual are similar in their ability or inability to work – i.e., they both cannot work." Pet. App. 22a.

While the Fourth Circuit's reading of the PDA is the most restrictive to date, four other appellate

courts have also mistakenly upheld light-duty policies that accommodate some temporarily disabled employees, but refuse accommodation for pregnancy-related disability. *See Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637 (6th Cir. 2006); *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), *cert. denied*, 525 U.S. 1000 (1998). Two federal appellate rulings, meanwhile, have taken an opposing view about the proper analysis in light-duty cases. *See EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000); *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996). *See also* Pet. at 16-21 (discussing split).

II. The Expansion of the Americans with Disabilities Act Will Further Dismantle the PDA if the Court of Appeals' Ruling is Allowed to Stand.

Most courts have held that the ADA, in its original version, is inapplicable to any disability arising from a normal pregnancy. *See*, *e.g.*, *Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970 (S.D. Iowa 2002); Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. Rev. 443, 445-47 (2012) (discussing cases). By refusing to allow pregnant workers to seek the same accommodations granted to employees protected by the ADA, *see* Pet. App. 27a, the ruling below has inappropriately limited the comparative right of

accommodation guaranteed by the second clause of the PDA. As explained in part I, this erroneous interpretation of the PDA flatly violates this Court's precedents established in *Guerra* and *Johnson Controls*, which make clear that an employer's motive for providing accommodations to any particular group (or denying them to another group) is irrelevant to the question of whether the employer has fulfilled its obligation to provide pregnant workers with the same accommodations or benefits it provides others similar in their ability or inability to work.

This erroneous interpretation of the PDA, if allowed to stand, will be increasingly detrimental and unfair to pregnant women in future cases because of the ADA Amendments Act of 2008, 42 U.S.C.A. § 12102(2)(A) (2012) ("ADAAA"). The ADAAA and its regulations provide that employers must now offer reasonable accommodations for a broader set of impairments, including those that substantially limit one's ability to lift, walk, stand, or bend, even when the impairments are temporary in nature. *See id.* (identifying major life activities the substantial impairment of which qualifies an individual for coverage); 29 C.F.R. § 1630.2(i) & (j)(ix) (2012) (explaining new standard for impairments 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).[2] Thus, under the reasoning of the lower court, many of the employees who will now be protected under the ADAAA and should be comparators for pregnant women – those who, for example, on a short-term basis, suffer lower back pain, an inability to lift heavy objects, or difficulty standing for prolonged periods – will be unavailable for comparison, despite their similar ability or inability to work. The reasoning in *Young* and other appellate cases reaching a similar result "suggests that the expansion of ADA rights could have the perverse effect of decreasing employers' obligations to pregnant employees by reducing significantly the pool of potential comparators considered under a PDA claim." 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, 964-65 (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221332.

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[2] Young's claim arose prior to the enactment of the ADAAA. The rulings that the ADA does not cover disability related to normal pregnancy do not foreclose the possibility that future plaintiffs needing workplace accommodations for pregnancy-related limitations may have a claim under the amended, more expansive ADA. *See* Joan C. Williams et al., *I Just Need Water: Pregnancy Accommodation after the ADA Amendments Act of 2008*, 32 Yale L. & Pol'y Rev. ___ (forthcoming Jan. 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2155817.

Such a result would turn the ADAAA into a repeal by implication of clause two of the PDA, by effectively gutting the class of comparators the PDA identifies for the treatment of pregnant workers. Any interpretation of a statute that results in a repeal by implication from a subsequently enacted statute is clearly disfavored. *See id.* at 1028-31.

The expansion of the ADA and the restrictive interpretation of the PDA by the Fourth Circuit and other courts combine to leave pregnant women virtually in a class of their own, without protection under a statute that, by design, is premised on comparison to co-workers similar in their ability or inability to work.

III. The Fourth Circuit's Approach Turns the Second Clause of the PDA Into a Search for Animus and Misconceives the Gender Stereotyping Behind Pregnancy Discrimination.

In finding the UPS light-duty policy to be "pregnancy neutral," despite its unfavorable treatment of pregnancy-based limitations compared to multiple classes of conditions with a similar effect on ability to work, the Fourth Circuit effectively requires proof of animus above and beyond the differential treatment of pregnancy. The district court, the ruling and reasoning of which the Fourth Circuit affirmed, explained its approach explicitly in terms of animus, in

asking "whether a reasonable inference can be drawn that the employer has animus directed *specifically* at pregnant women." Pet. App. 61a (emphasis in original). As long as the employer's policy can be described without reference to pregnancy – by identifying in pregnancy-neutral terms the preferred classes of conditions that are entitled to light-duty accommodations – this approach allows an employer's accommodation policy itself to defeat any inference of an intent to discriminate against pregnant workers.

Reading in a new requirement that a plaintiff demonstrate that pregnancy-based animus motivated the employer's failure to accommodate pregnancy as generously as other classes of limitations violates the terms of the PDA. As Petitioner explains, requiring proof of pregnancy-based animus cannot be reconciled with the plain language of the PDA's second clause, which makes the disfavored treatment of pregnancy, compared to other conditions similarly affecting work, a violation of the Act without any inquiry into the reasons for the differential treatment. *See* Pet. 10-11. *See also Johnson Controls*, 499 U.S. at 199 ("explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination"). For this reason alone, the decision below is incorrect and must be vacated in order to restore the full scope of the PDA.

The Fourth Circuit's approach is also incorrect because it fails to grasp what Congress recognized in enacting the PDA: the failure to accommodate pregnancy as generously as other conditions similarly

affecting work is itself based on gender stereotyping. By requiring additional proof of animus, the Fourth Circuit misconceives the nature of pregnancy discrimination and ignores the lessons taught by Congress' overruling of this Court's decision in *Gilbert*. The refusal to accommodate pregnancy to the same extent as comparably disabling conditions reflects and reinforces a gender ideology that is incompatible with women's full participation in the labor force.

When an employer refuses to grant light-duty assignments to pregnant workers, while doing so for workers with other conditions affecting ability to work, it casts pregnancy as a unique liability undeserving of accommodation that could allow pregnant women to remain on the job. This judgment devalues pregnant workers' contributions to paid employment, while elevating women's maternal roles in reproduction and caretaking. The question whether to accommodate pregnancy itself triggers descriptive and prescriptive stereotypes about how pregnancy and motherhood affect women's attachment to the labor force. Searching for pregnancy-based "animus" does not capture this dynamic, in which a reverence for maternity is paired with predictions (will she return or won't she?) and prescriptions about how pregnancy (and later, motherhood) affects women's labor force participation (does she belong on the job or at home?).

The gender stereotyping behind pregnancy discrimination makes for a poor fit with a search for overt animus. Lingering ambivalence about pregnant employees and new mothers in the work force is

masked by an overlay of reverence for pregnancy and motherhood. Amy J.C. Cuddy et al., *When Professionals Become Mothers*, *Warmth Doesn't Cut the Ice*, 60 J. Soc. Issues 701, 703 (2004) (discussing social science finding that mixed-valence stereotyping – e.g., ranking mothers high on warmth but low on competence – triggers distinctive paths of prejudice). Motherhood is "normal" in the descriptive sense that most women become mothers and in the prescriptive sense that it fulfills a socially expected role. *See* Martha Chamallas, *Introduction to Feminist Legal Theory* 372 (2d ed. 2003) (citing census data showing that only 18% of women will not have given birth by their 44th birthday).

Rather than appearing as overt animus, pregnancy discrimination may coincide with a glorification of pregnancy and an elevation of women's maternal roles. *Cf.* Naomi Mezey & Cornelia T.L. Pillard, *Against the New Maternalism*, 18 Mich. J. Gender & L. 229, 250-53 (2012) (discussing "the mama grizzly" as a modernized cultural ideal in which mothers are lauded for their zeal in protecting children). As with the separate spheres ideology of old, the veneration of pregnancy and motherhood simultaneously marginalizes women's contributions as workers. *See*, *e.g.*, Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 Am. J. Soc. 1297, 1306 (2007) (discussing research showing a conflict between intensive mothering norms and perceptions of mothers' competence at work).

Like other gender stereotypes, the stereotyping here is influenced by race and class. Researchers investigating how stereotypes affect working mothers have found that white mothers are viewed more positively when they stay home with their children, while African American mothers are viewed more positively when they work outside the home. *See* Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 Geo. J. Poverty L. & Pol'y 1, 39 (2012) (discussing studies). At the same time, African American women are more likely to be stereotyped as unreliable workers after becoming mothers. *Id*. Rather than a protective reverence for their maternity, African American women are subjected to a gender ideology that expects them to work unimpaired and unaffected by pregnancy and motherhood. While the gender stereotyping around work and pregnancy affects women differently, it remains in all instances poorly suited to a judicial search for conscious, pregnancy-based animus.

Unlike the Fourth Circuit below, and the other circuits that have taken this approach, this Court has correctly grasped the gender stereotyping that underlies the differential treatment of maternity in employer policies. As the Court explained, in upholding Congress' Fourteenth Amendment power to enact inclusive, gender-neutral family leave requirements as a remedy for sex discrimination, employers engage in gender stereotypes when they design leave policies based on presumptions about mothers' and fathers' differential attachments to the labor force. *See Nev.*

Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003) (noting, with reference to gender-differentiated leave laws, that "stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread"). Although the traditional practice of extending maternity leave to women, without comparable paternity leave to men, may have appeared beneficial to women on the surface, such policies were based on "the pervasive sex-role stereotype that caring for family members is women's work." *Id*. at 731.

A similar gender ideology underlies employer policies that accommodate workers with various conditions affecting work, but not pregnancy. Treating some conditions as more compatible with workforce participation and more worthy of employer accommodation is part of the "self-fulfilling cycle" of "mutually reinforcing stereotypes" that promotes "stereotypical views about women's commitment to work and their value as employees." *Id*. at 736. Collapsing the PDA's second clause into a search for animus fails to capture the gender stereotyping underlying this more "subtle discrimination" that would be "difficult to detect on a case-by-case basis" requiring particularized proof of animus. *Id*. The second clause ties the treatment of pregnancy to other conditions similarly affecting work precisely because of the role gender stereotypes have played in employer policies setting pregnancy apart.

IV. The Fourth Circuit's Approach Makes the PDA an Ineffective Remedy for Women in Need of Its Protection.

As Petitioner explains, the Fourth Circuit has now joined the other circuits that have drained the second clause of its stated protection against employer policies that treat certain specified classes of conditions more favorably than pregnancy, despite similar impacts on work capacity. Together, these decisions have substantially undercut the PDA as a remedy against pregnancy discrimination, even as claims of pregnancy discrimination are on the rise. *See*, *e.g.*, Tresa Baldas, *Pregnancy Discrimination Suits Are Steadily Rising*, Nat'l L.J., Apr. 14, 2006, at 4 (noting increase in pregnancy discrimination lawsuits). Some have theorized that these court decisions weakening the PDA may be partly to blame. Lesley Alderman, *When the Stork Carries a Pink Slip*, N.Y. Times, Mar. 28, 2009, at B6 (reporting suspicion among lawyers that "some employers are now using the law's laxity and the dismal economy to tacitly discriminate against new or expectant mothers").

Women make up nearly half the labor force. *See* Bureau of Labor Statistics, *Women as a Percent of Total Employed in Selected Occupations, 2011* (May 1, 2012). The vast majority of working women will become pregnant at least once during their careers. Jeanette N. Cleveland et al., *Women and Men in Organizations: Sex and Gender Issues at Work* 208 (2000) (estimating that 75% of working women are likely to give birth at least once while working); Hal

G. Gueutal & Elisabeth M. Taylor, *Employee Pregnancy: The Impact on Organizations, Pregnant Employees and Co-workers*, 5 J. Bus. & Psychol. 459, 459 (1991) (90%). Yet, despite its prevalence in the workplace, pregnancy continues to be a source of employment bias. Studies from the early 1990's began documenting the prevalence of pregnancy-bias in the workplace and detrimental effects on a woman's career. *See* Jane A. Halpert et al., *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. Org'l Behav. 649 (1993) (substantial negative stereotyping against pregnant workers, resulting in significantly more negative performance appraisals of pregnant workers, especially by male reviewers) and Sara J. Corse, *Pregnant Managers and Their Subordinates: The Effects of Gender Expectations on Hierarchical Relationships*, 26 J. Applied Behav. Sci. 25 (1990) (pregnant managers penalized when they acted firmly in a conflict situation instead of conforming to expectations that pregnant women are more empathetic and nurturing). Pregnancy bias on the job remains. A more recent study found that retail store workers responded hostilely to pregnant job applicants, even as they reacted benevolently to pregnant customers. Michelle R. Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards that Maintain Traditional Roles*, 92 J. Applied Psychol. 1499 (2007). A follow-up study found that the negative reactions to pregnant applicants escalated when the applicants applied for jobs traditionally

held by men. *Id*. Other research shows that pregnant women are rated as less competent and less suited for promotion than non-pregnant workers performing at the same level, and that pregnant workers are less likely to be recommended for hire or promotion and receive lower salary recommendations. *See* Jennifer Cunningham & Therese Macan, *Effects of Applicant Pregnancy on Hiring Decisions and Interview Ratings*, 57 Sex Roles 497 (2007); Jennifer DiNicolis Bragger et al., *The Effects of the Structured Interview on Reducing Biases Against Pregnant Job Applicants*, 46 Sex Roles 215 (2002); Caroline Gatrell, *Managing the Maternal Body: A Comprehensive Review and Transdisciplinary Analysis*, 13 Int'l J. Mgmt. Revs. 97, 98-100 (2011) (literature review of studies finding pregnancy a trigger for bias against workers). One researcher coined the term "pregnant presenteeism" for the phenomenon of pregnant workers seeking to compensate for employer bias by presenting themselves as healthy and remaining at work even when they are unwell. Caroline Jane Gatrell, *"I'm a Bad Mum": Pregnant Presenteeism and Poor Health at Work*, 72 Soc. Sci. & Med. 478 (2011). Pregnant "presenteeism" becomes necessary when a woman cannot expect the same level of protection that workers with similar restrictions receive.

As the PDA implicitly recognizes, the failure to accommodate pregnancy in the workplace on the same terms as similarly restrictive conditions is part and parcel of the bias against pregnant workers.

The refusal to extend the same accommodations as they provide to other classes of employees devalues pregnant workers.

Pregnancy discrimination is a special concern for working class women and women in lower wage jobs. *See* Gatrell, *Managing the Maternal Body*, *supra*, at 104-05 (reviewing literature on pregnancy discrimination and class indicating working class mothers are as likely to experience unfair treatment while pregnant as managers). Indeed, women in working class jobs and lower wage jobs are the most likely to experience work conflicts while pregnant, and are most in need of the protections that the PDA's second clause promises. Professional women who work for employers with generous policies and an emphasis on employee retention may be able to secure any needed accommodations without the help of the PDA. *See*, *e.g.*, Bureau of Labor Statistics, *Employee Benefits in the United States – March 2012*, at 16 (July 11, 2012) (90 percent of workers in the top 10 percent of earnings have paid sick days, compared with only 23 percent of workers in the bottom 25 percent). Other women may not be so lucky. Women who perform physically demanding jobs, such as police work, firefighting jobs, construction work and factory jobs, often require some accommodation of their job duties during pregnancy in order to remain on the job. *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 (2010) (discussing failure of police departments to accommodate pregnancy with maternity uniforms, off-street modified duties, or maternity leave policies). Other jobs may conflict with pregnancy not because they are physically strenuous but because they take place in rigidly structured work environments, such as factory assembly lines, or customer service call centers. Women in these kinds of jobs are the least likely to be able to afford the lost pay if conflicts between pregnancy and work force them out of a job.

Pregnancy discrimination cases bear this out. Like the court below, courts have allowed employers to deny pregnant workers light duty accommodations for physically strenuous job tasks, despite having granted them to other workers with medical restrictions. *See*, *e.g.*, *Arizanovska v. Wal-Mart Stores, Inc.*, 682 F.3d 698 (7th Cir. 2012) (pregnant stocker denied light-duty exception from 50-pound lifting requirement despite availability of light duty for ADA-eligible employees); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011) (activity director at a nursing home denied accommodation for occasional physically strenuous tasks, despite employer policy accommodating ADA-qualified disabilities and on-the-job injuries). Employers have even denied pregnant women in low-wage jobs very minor and low-cost accommodations that are needed on a temporary basis in order to accommodate pregnancy, such as carrying a water bottle at work. *See Wiseman v. Wal-Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 48020, at *1

(D. Kan. July 21, 2009) (store policy barred pregnant employee who monitored fitting rooms from carrying a water bottle at work, notwithstanding her doctor's orders to regularly drink water).

Conflicts between pregnancy and work are especially pronounced for women in lower-wage jobs. One survey of cases found patterns of "workers fired on the spot or immediately after announcing a pregnancy, pregnant employees banned from certain positions no matter what their individual capabilities to do the job, and workers refused even small, cost-effective adjustments that would allow them to continue to work throughout their pregnancies." Bornstein, *supra*, at 5 (survey of cases in UC-Hastings College of Law Center for WorkLife Law database). That survey found "an extreme hostility to pregnancy in low-wage workplaces," and even revealed instances where pregnant workers were told by their supervisors to terminate their pregnancies. *Id*. It also found that pregnant women of color were treated especially harshly and were more likely to be denied accommodations granted to other pregnant workers. *Id*. *Cf.* 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) (Australian study finding that most cases of pregnancy discrimination occurred in occupations lower on the occupational ladder, such as sales/personal service work and lower-skilled administrative workers). Without effective recourse to the PDA, the women ensnared in such conflicts will face

difficulty re-entering the labor force if they lose their jobs during pregnancy. These disruptions have long-term consequences for women's workforce participation. Diane M. Houston & Gillian Marks, *The Role of Planning and Workplace Support in Returning to Work after Maternity Leave*, 41 British J. of Indus. Rel. 197 (2003) (discussing research showing that an employee's experiences in the workplace while pregnant influence her decisions about whether and when to return to work after childbirth).

Pregnancy discrimination is the first block in the maternal wall. When women are forced out of a job because employers refuse to treat pregnancy as well as other conditions found deserving of accommodations, it jeopardizes their economic security and that of their families. Gaps in the labor force that occur during pregnancy can lead to longer absences from the work force, which become self-reinforcing. Maxine Eichner, *The Supportive State: Families, Government, and America's Political Ideals* 41 (2010) (noting that even brief absences from the work force have longer-term negative effects on women's economic prospects); Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 Harv. J. L. & Gender 57, 75 (2012) (describing how women's labor force gaps reinforce men's diminished caretaking roles).

The PDA case law in the lower courts, as exemplified by the Fourth Circuit's decision, has left those women most in need of the law's protection from pregnancy discrimination without an effective remedy

for it. This Court must once again instruct the lower courts that the PDA means what it says.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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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 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 the Pregnancy Discrimination Act and the Americans with Disabilities Act.

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.

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.

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