No. 12-1226

In the Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

V.

UNITED PARCEL SERVICE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* 23 PRO-LIFE ORGANIZATIONS AND THE JUDICIAL EDUCATION PROJECT IN SUPPORT OF PETITIONER PEGGY YOUNG

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INTEREST OF *AMICI CURIAE*[1]

Amici support the goals of the Pregnancy Discrimination Act (PDA) to prevent discrimination against pregnant mothers and to reduce pressure on women in the workforce to have an abortion. Economic pressure is a significant factor in many women's decision to choose abortion over childbirth. Protecting the ability to work can increase true freedom for women, promote the common good, and protect the most vulnerable among us. The PDA protects the unborn child as well as the working mother who faces economic and other difficulties in bearing and raising the child.

When Congress debated the bills that became the PDA, Congress heard testimony from medical experts about the impact of employment on pregnant women and their unborn children. The PDA's supporters included members of Congress who were concerned about the possibility that women would be forced to choose between their jobs and their unborn children. As when the PDA was passed, amici pro-life organizations support an interpretation of the PDA that gives pregnant women meaningful protection from discrimination.

All Our Lives is a nonprofit organization whose

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[1] Counsel for both parties have submitted blanket consent to the filing of *amicus* briefs in this case. No counsel for a party authored this brief in whole or in part. No person, other than *amici curiae*, their members, or their counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

approach to the abortion issue is informed by both the reproductive justice movement and the consistent life ethic. All Our Lives recognizes the many social and economic factors that place unjust pressure on women to have abortions. Therefore, its mission is to protect life by working for policies that serve the needs of both women and children. These policies include but are not limited to: ending sexual violence and coercion; making safe, effective family planning available to all, as well as prenatal, delivery, and postnatal health care; providing support to impoverished families; and ensuring that schools and workplaces meet the needs of pregnant women and parents.

American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a non-profit professional medical organization consisting of 2,500 obstetrician-gynecologist members and associates. AAPLOG held the title of "special interest group" within the American College of Obstetricians & Gynecologists (ACOG) for 40 years, from 1973 until 2013, until ACOG discontinued the designation of "special interest group." AAPLOG is concerned about the potential long-term adverse consequences of abortion on a woman's future health and continues to explore data from around the world regarding abortion-associated complications in order to provide a realistic appreciation of abortion-related health risks.

American Life League is the largest grassroots Catholic pro-life education organization in the United States.

Anglicans for Life (AFL) educates, equips and engages the Anglican Church in fulfilling Scripture's mandate to protect the vulnerable, defend the

fatherless, and plead for the widow. In the U.S. culture, today's widow is the single mother, seeking to provide for her and her family. Pregnancy discrimination hinders a woman's reproductive rights and sends the message that motherhood is not worthy of equal protection under the law. AFL believes the woman and baby both deserve protection during pregnancy.

Bethany Christian Services serves approximately 9000 women per year who have an unintended pregnancy. Many of these women face financial challenges. Many of these women have children whom they support. Bethany Christian Services believes the PDA provides important protections for these women to continue their employment to support their children and families.

Birthmother Ministries is dedicated to providing nonjudgmental assistance to any woman facing an unplanned pregnancy. Birthmother Ministries envisions the Christian community collaborating to love, serve, and support those who face an unplanned pregnancy, working together for the day when human life is universally valued, the need for abortion is eradicated, and all children are welcomed into God's family.

The Catholic Medical Association is a physician-led community of healthcare professionals that informs, organizes, and inspires its members to uphold the principles of the Catholic faith in the science and practice of medicine. Physician members commit to serve the human person who is created by God and to promote healthful policies respectful of life and the dignity and nature of the human person. The

association has an interest in protecting pregnant women from the economic coercion that exists when women must choose between their economic security and the lives of their unborn children.

The Christian Legal Society (CLS), founded in 1961, is an association of Christian attorneys, law students, and law professors, with chapters in nearly every state and approximately 90 public and private law schools. Since 1975, CLS's legal advocacy division, the Center for Law and Religious Freedom, has worked to protect the sanctity of human life in the courts, legislatures, and public square.

Christian Adoption Services, the Adoption Practice Section of the Christian Legal Society, is a collection of Christian adoption lawyers from across the country, dedicated to advocating adoption as a preferable alternative to abortion for those faced with an unplanned pregnancy. Christian Adoption Services affirms that human life is a gift from God, begins at conception, deserves respect, and is worthy of protection, and that adoption is an honorable, selfless and loving means of protecting life.

Concerned Women for America (CWA) is the largest public policy women's organization in the United States, with 500,000 members throughout all 50 states. Through its grassroots organization, CWA encourages policies that strengthen families and advocates the traditional virtues that are central to America's health and welfare. Its members are people whose voices are often overlooked—average, middle-class American women whose views are not represented by the powerful or the elite. For over 30 years, CWA has actively promoted legislation,

education, and policymaking consistent with its philosophy, lending a voice to conservative women in the culture, the legislatures, and the courts.

Democrats for Life of America (DFLA) is the preeminent national organization for pro-life Democrats. DFLA believes that the protection of human life is the foundation of human rights, authentic freedom, and good government. These beliefs animate DFLA's opposition to abortion, euthanasia, capital punishment, embryonic stem cell research, poverty, genocide, and all other injustices that directly and indirectly threaten human life. DFLA shares the Democratic Party's historic commitments to supporting women and children, strengthening families and communities, and striving to ensure equality of opportunity, reduction in poverty, and an effective social safety net that guarantees that all people have sufficient access to food, shelter, healthcare, and life's other basic necessities.

The Ethics & Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 15.8 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as the sanctity of human life, freedom of speech, religious freedom, marriage and family, and ethics. Southern Baptists have a long-standing concern about the treatment of the unborn and policies that affect them and their families.

Feminists For Nonviolent Choices is a

nonpartisan, nonsectarian organization that seeks to return to the grassroots of pro-life feminism. In the tradition of early American feminists, such as Susan B. Anthony and Elizabeth Cady Stanton, Feminists For Nonviolent Choices operates from the core ideals of justice, nondiscrimination and nonviolence. Feminists for Nonviolent Choices is an active voice for a consistent life ethic through our education, advocacy and outreach efforts, especially on college campuses. Feminists For Nonviolent Choices aims to promote a culture in which women can choose life from conception to natural death.

Heartbeat International, Inc. is the world's largest nonprofit organization which has the specific mission to serve, train and educate its over 1800 affiliates which collectively work directly with the hundreds of thousands of pregnant women whose pregnancies are unexpected or otherwise difficult. Heartbeat's affiliates assist by providing pregnant women with material aid, medical services and resources, housing, education opportunities and emotional support.

Law of Life Project (LOLP) is a public interest legal organization dedicated to legally defending the right to life and dignity of the human being from biological conception until natural death in all matters worldwide where such a defense is required. LOLP believes that a woman's dignity is compromised when her ability to choose life for her unborn child is put at odds with her ability to provide for it economically because of pregnancy discrimination in her workplace. LOLP has litigated cases and filed *amicus curiae* briefs in numerous courts around the world, including this Court.

Life Legal Defense Foundation (LLDF) is a California non-profit public interest organization that provides legal assistance to encourage and enable every woman to choose life for her unborn child. LLDF believes the Pregnancy Discrimination Act should be enforced in the manner that reflects the original intent of Congress – relieving financial strain and other types of pressure that might impel a woman to choose abortion when in actuality she desires to carry her pregnancy to term.

The March for Life Education and Defense Fund exists to build a culture of life and bring an end to abortion in America through grassroots and education efforts, most notably in the annual March for Life.

The National Association of Evangelicals (NAE) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that human life is sacred, that civil government has no higher duty than to protect human life, and that duty is particularly applicable to the life of unborn children because they are helpless to protect themselves.

The National Institute of Family and Life Advocates (NIFLA) is a national legal network of more than 1,300 pregnancy resource centers (PRCs), which provide support services and abortion alternatives to mothers contemplating abortion. Of its network, nearly 1,000 PRCs operate as licensed medical clinics,

providing ultrasound confirmation of pregnancy and other medical services to their clients/patients.

The mission of Students for Life of America is to create a culture where those most affected by abortion are empowered and equipped to recruit their peers to join our human rights movement, save lives on the front lines, lead local and national initiatives, and provide tangible resources while supporting those facing an unplanned pregnancy. Students for Life is a resource for and represents more than 838 pro-life student groups at the high school, college, med school and law school levels. SFLA is the only pro-life organization in the nation that works exclusively with young people.

In the spirit of the original suffragettes, Susan B. Anthony List works for the election of candidates who champion life and oppose abortion. Its members share the conviction of Alice Paul, author of the 1923 Equal Rights Amendment, that "Abortion is the ultimate exploitation of women."

University Faculty for Life is an association of hundreds of colleges and university professors who affirm the value of each human life from inception to natural death. Careful and unbiased review of all publicly available data reveals that economic concerns motivate many pregnant women to obtain abortions. Members of University Faculty for Life believe no woman should ever be forced to choose between her unborn child and her job.

The University of St. Thomas Pro-Life Center seeks to promote an end to abortion and stop the drive toward euthanasia through public education, curricular initiatives, and litigation. The center trains

students to work with lawyers and policy makers in the development and defense of laws recognizing the inviolable right to life of every innocent human being.

The Judicial Education Project (JEP) is dedicated to strengthening liberty and justice through defending the Constitution as envisioned by the Framers—a federal government of defined and limited power, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges interpret the Constitution, and the impact of court rulings on the nation. JEP's educational efforts are conducted through various outlets, including print, broadcast, and internet media. In pursuit of these constitutional principles, JEP has filed *amicus curiae* briefs in numerous cases before the federal courts of appeals and the Supreme Court.

SUMMARY OF ARGUMENT

Before Congress passed the Pregnancy Discrimination Act (PDA) in 1978, pregnancy was given no special protection under federal antidiscrimination law. For example, employers could treat pregnancy like a disabling disease and fire any employee who became pregnant against the wishes of the employer. *See General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). But with the PDA, Congress broadened Title VII's definition of sex discrimination to encompass discrimination based on "pregnancy, childbirth, or related medical conditions[.]" Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2076 (Oct. 31, 1978), *codified at* 42 U.S.C. § 2000e(k) (as

amended).

The PDA also states that employers must provide pregnant women with the same accommodations that they provide to other employees who have the similar ability or inability to work. This language is not extraneous surplusage; rather, it is a substantive component of the relief that Congress provided in the PDA. Employers may only consider the pregnant woman's ability or inability to work when determining how to accommodate her condition.

The Court of Appeals erroneously held that the PDA allows employers to treat pregnant women as poorly as they treat their least-accommodated workers rather than requiring them to treat pregnant women as well as they treat their best-accommodated workers. This conclusion is not only at odds with the text and structure of the PDA, but it blocks the PDA from addressing the very problem that Congress sought to solve, that is, to protect women from economic pressure to abort their children and to safeguard their fundamental right to procreate and bring up children. The Court of Appeals was wrong to conclude that Congress's attempt to protect these fundamental rights amounted to "preferential treatment." *Young v. United Parcel Service, Inc.*, 707 F.3d 437 (4th Cir. 2013).

ARGUMENT

I. ON ITS FACE, THE PREGNANCY DISCRIMINATION ACT REQUIRES EMPLOYERS TO PROVIDE PREGNANT WOMEN THE SAME ACCOMMODATIONS IT AFFORDS TO OTHER EMPLOYEES WITH

SIMILAR ABILITY OR INABILITY TO WORK.

The Court of Appeals erroneously held that UPS's policy of accommodating three classes of non-pregnant employees was irrelevant to whether UPS had unlawfully discriminated against Ms. Young for being pregnant when she was denied the same accommodation. *Young*, 707 F.3d at 451. Specifically, the court held that employers can deny accommodations to their pregnant employees so long as no employees with "off the job" injuries are also denied that accommodation. 707 F.3d at 448-49. In effect, the Court of Appeals held that employers only violate the PDA if pregnant women are the *only* group denied an accommodation or benefit. *See id.* at 446 (employers need not accommodate pregnant workers unless a comparable accommodation "was available to the universe—male and female—of nonpregnant employees.").

This holding was legal error because it rendered parts of the PDA superfluous. This Court has previously held that the second clause of the PDA, which mandates equal accommodation of pregnant women, provides substantive protections that are independent of the PDA's anti-targeting first clause. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 204-05 (1991); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987). The Court of Appeals also erred by holding that an employer can refuse to accommodate a pregnant woman's work limitations by reference to factors other than her pregnancy, even though the statute permits

only a single factor employers may consider: the woman's ability or inability to work.

A. **The language at issue is not surplusage; it creates a distinct requirement of equal accommodation.**

The first sentence of the PDA amends Title VII of the Civil Rights Act of 1964, providing that:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; *and 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) (emphasis added). The first clause, by declaring pregnancy discrimination a form of sex discrimination, already prohibits employer policies that single out or target pregnancy (a sex classification) for uniquely disfavored treatment. By holding that the second (italicized) clause of the sentence also merely prohibits an employer from singling out pregnancy for disfavored treatment, the Court of Appeals rendered that second clause superfluous. That result is at odds with the general principle of statutory interpretation that counsels "reluctan[ce] to treat statutory terms as surplusage in any setting[.]" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *see also*, *e.g.*, *Marx v. Gen. Revenue Corp.*, 133 S.Ct. 1166, 1178 (2013).

Indeed, this Court has explicitly construed the second clause of the PDA as having independent meaning and not as merely a restatement of the first clause. *Johnson Controls, Inc.*, 499 U.S. at 204-05 (applying second clause and criticizing the dissent for "ignoring the second clause of the Act" and "read[ing] the second clause out of the Act"). In addition, the most natural reading of the statute's use of the word "and" to separate the two clauses suggests that the clauses are cumulative, with the second clause carrying its own independent meaning.

Some combination of anti-discrimination and accommodation requirements is quite ordinary in civil rights law. Indeed, Title VII's substantive requirement that employers accommodate their employees' religion is, like the PDA, found in the definitional section immediately before the clause at issue in this case. *See* 42 U.S.C. § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."). Likewise, the Americans with Disabilities Act (ADA) provides both that individuals must not be denied work based on a qualifying disability and that employers must make reasonable accommodations for the limitations of disabled employees. *See* 42 U.S.C. § 12112(a), (b)(5). The two clauses of the PDA's first sentence are not some textual anomaly, but rather harmonize perfectly to achieve the same interrelated goals as other civil rights statutes.

B. The PDA excludes any factor other than the person's "ability or inability to work" from the determination of whether pregnancy must receive the same accommodation as other conditions.

The PDA requires that pregnant workers "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 plain language thus forbids an employer to distinguish accommodations for a pregnant worker from those provided to other workers based on any factor besides their respective ability or inability to work. As the Sixth Circuit has correctly put it: "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 v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (internal citation omitted) (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992)).

The legislative history confirms the plain meaning of the text. In the words of the House committee report, 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. No. 95-948, at 3 (1978), *reprinted in* Staff of S. Comm. On Labor and Human Resources, 95th Cong., Legislative History of the Pregnancy Discrimination Act of 1978, Public Law 95-

555 149 (Comm. Print 1979). Likewise, the Senate report states that "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." S. Rep. No. 95-331, at 4 (1977), *reprinted in* Staff of S. Comm. On Labor and Human Resources, 95th Cong., Legislative History of the Pregnancy Discrimination Act of 1978, Public Law 95-555 41 (Comm. Print 1979).

Thus, for example, an employer may not accommodate an employee whose need for light duty stems from an "on the job" injury, but then deny accommodation to an employee whose similar need for light duty stems from pregnancy. Nor may an employer accommodate employees who cannot do heavy lifting for a specified list of medical conditions– as UPS does for conditions rendering drivers ineligible for DOT certification or for those covered by the ADA– but refuse to accommodate workers who have those same lifting limitations because they are pregnant. Those impermissible distinctions rest on the *source* or *nature* of the workers' conditions rather than the *extent* of their ability to work. To hold otherwise would be to disregard the second clause's explicit language—the standard it "specifically defines." H.R. Rep. No. 95-948, at 3 (1978).

The Court of Appeals, however, simply balked at following the language of the second clause. It accepted UPS's classification of pregnancy as an "off the job" condition and held that this arbitrary distinction meant UPS had not discriminated against pregnancy by accommodating "on the job" injuries and

not pregnancy. *Young*, 707 F.3d at 448-49. But this irrelevant classification of pregnancy as "off the job" distinguishes the accommodated injuries from pregnancy on the basis of their *source*—on or off the job—and not their effect on the employee's *ability* to work, which is what the PDA mandates. Likewise, by refusing a needed transfer or light-duty assignment when a driver was pregnant but granting it when the driver lost his DOT license, UPS treated Ms. Young's pregnancy differently on the basis of the *source* and *nature* of her condition, not the difference in her relative ability to work. Under the plain language of the second clause, these distinctions are impermissible.

II. THE COURT OF APPEALS ERRED BY COMPARING PREGNANT WORKERS WITH THOSE WHO WERE REFUSED ACCOMMODATIONS RATHER THAN WITH THOSE WHO RECEIVED ACCOMMODATIONS.

The Court of Appeals adopted a cramped reading of the PDA that, rather than maximally accommodating pregnant women, sought to relegate their accommodations to the lowest possible level. This runs contrary to the very purpose of the statute and the well-recognized status of childbearing as a fundamental right deserving of the highest protection.

The second clause of 42 U.S.C. § 2000e(k) clearly requires that pregnant employees be treated the same as employees who have a similar ability to work. But the group of non-pregnant employees who were similarly limited in their work in this case included

both individuals who were ultimately accommodated–those with "on the job" injuries, for example–and those who were not accommodated–those with "off the job" injuries or conditions unrelated to DOT certification or ADA qualifications.

The Court of Appeals was faced with two possible options. It could have read the statute to say that, whenever an employer offers an accommodation to someone with the same ability to work as a pregnant woman, they must accommodate the pregnant woman as well. Instead, it chose the path of least protection, reading the statute as effectively saying to employers: as long as you discriminate against some people based on their relative inability to work, you can give the same treatment to all comparably-situated pregnant women. It means that as long as an employer refuses an accommodation for at least one non-pregnant worker, he can refuse the pregnant woman as well.

In essence, the Court of Appeals held that an employer does not discriminate against a pregnant employee unless it singles out pregnancy for the worst possible non-accommodation. Under this holding, as one other court of appeals has revealingly put it, "[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees," *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (Posner, J.)—that is, as badly as they treat *any* non-pregnant employee. Although the Court of Appeals here objected that pregnancy should not have "'most favored nation' status," *Young*, 707 F.3d at 446, it essentially held that employers can consign pregnancy to "least favored nation" status simply by classifying pregnancy with the least-accommodated category of conditions.

But this is not only "least favored nation" status; it is "race to the bottom" status. By relegating pregnancy to the lowest possible status, the Court of Appeals adopted an approach that would allow employers to "consistently employ discriminatory criteria as long as they were careful to draw their discriminatory lines broadly enough to include members of a nonprotected class." *E.E.O.C. v. Bd. of Governors of State Colls & Univs*, 957 F.2d 424, 431 (7th Cir. 1992); *accord NAACP v. Harrison*, 940 F.2d 792 (3d Cir. 1991) (Title VII disparate impact action); *United States v. Town of Cicero*, 786 F.2d 331 (7th Cir. 1986) (Title VII disparate impact action). That interpretation gives employers the power to simply wave away the PDA's requirement of equal accommodation.

This was error. As a textual matter, the Court of Appeals' interpretation is incorrect because it renders the second clause of 42 U.S.C. § 2000e(k) superfluous, as we argue above. Furthermore, faced with these two potential interpretations of the PDA, the Court of Appeals adopted the interpretation that least advances the clear purpose of the statute.

In the PDA, Congress expressly recognized how important a role pregnancy plays in women's lives. It follows that pregnancy should be treated comparably to conditions that the employer treats well, not conditions the employer treats poorly. There is also congressional commentary going directly to this question. Senator Jacob Javits, one of the bill's sponsors, noted when discussing the PDA, "where other employees who face temporary periods of disability do not have to face the same loss, it is especially important that we not ask a potential mother to undergo severe disadvantages in order to

bring another life into the world." 123 Cong. Rec. 29,387 (Sept. 15, 1977) (statement of Sen. Jacob Javits). This interpretation is the opposite of that adopted by the Court of Appeals because it assumes the PDA will be triggered whenever some other employee *is* accommodated, not when *no* other employee is accommodated.

A. **Congress sought to protect women from economic pressure to abort their children because of pregnancy discrimination.**

As this Court has noted, when Congress enacted the PDA, it "had before it extensive evidence of discrimination *against* pregnancy" and the problems this created for working women. *Guerra*, 479 U.S. at 285 (emphasis in original). "The Reports, debates, and hearings make abundantly clear that Congress intended the PDA to provide relief for working women and to end discrimination against pregnant workers." *Id.* at 285-86. Congress's decision to pass the PDA in the first instance only makes sense if pregnancy is a crucial aspect of human existence, one that warrants *at least as much* protection as other significant interests.

Congress was especially concerned about the ways that economic pressure weighs against decisions to bear children and have a family, even including economic pressure to terminate a pregnancy. Specifically, many members of Congress supporting the PDA were concerned that women should not be forced by economic vulnerability into having abortions, and they saw reducing such pressures as

one of the purposes of the PDA. *See*, *e.g.*, 123 Cong. Rec. 10,582 (Apr. 5, 1977) (statement of Rep. Hawkins, chief House sponsor: "Further, some mothers, unable to afford the loss of income [caused by discrimination], may be discouraged from carrying their pregnancy to term."); 123 Cong. Rec. 29,657 (Sept. 16, 1977) (statement of Sen. Williams, chief Senate sponsor: "One of our basic purposes in introducing this bill is to prevent the tragedy of needless, and unwanted abortions forced upon a woman because she cannot afford to leave her job without pay to carry out the full term of her pregnancy."); 123 Cong. Rec. 29,635 (Sept. 16, 1977) (statement of Sen. Biden: "In a very real-world-sense what this denial of freedom [because of discrimination] means is that many women, especially low income women, may be discouraged from carrying their pregnancy to term. To put it bluntly they will be encouraged to choose abortion as a means of surviving economically.")

In short, the PDA reflected the common ground shared by proponents and opponents of abortion, namely, that women have a fundamental human right to have children that should not be limited by economic pressure resulting from workplace discrimination. Without the protection of the PDA, women faced with a conflict between the need to work and the fundamental right to bear a child were forced to give up one or the other fundamental right. Even today, nearly 40 years after the PDA's passage, many women continue to face implicit pressure from employers to abort their children. *See* U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* (July

14, 2014), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last visited Sept. 9, 2014).

Moreover, economic pressures on childbearing have only increased since the PDA was passed in 1978. Two years after the passage of the PDA, less than 20 percent of American children were born to unmarried women, but by 2013, that percentage had doubled to 40.6 percent. U.S. Census, 2011 Statistical Abstract, tbl.1334, https://www.census.gov/compendia/statab/2011/tables/11s1336.pdf (last visited Sept. 9, 2014); Brady E. Hamilton, et al., *Births: Preliminary Data for 2013*, 63 Nat'l Vital Stat. Reps. 2, 14 tbl.6 (May 29, 2014), http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_02.pdf (last visited Sept. 9, 2014). Simultaneously, the participation of women with children under the age of eighteen in the national labor force increased from 56.6 percent in 1980 to almost 70% in 2013. Howard V. Hayghe, *Developments In Women's Labor Force Participation*, Monthly Labor Rev., Sept. 1997, at 42, *available at* http://www.bls.gov/mlr/1997/09/art6full.pdf (last accessed Sept. 9, 2014); U.S. Dept. of Labor, Bureau of Labor Stat., Emp't Characteristics of Families–2013 (Apr. 25, 2014), http://www.bls.gov/news.release/famee.nr0.htm (last visited Sept. 9, 2014).

More likely than not, today a pregnant woman will be either working or looking for work. In 2012, 62 percent of women with a birth in the previous twelve months were in the labor force. Lindsay M. Monte & Renee R. Ellis, U.S. Census Bureau, *Fertility of Women in the United States: 2012, Population Characteristics* 10 tbl.3, 12 (July 2014), http://www.census.gov/content/dam/Census/library/publications/2014/demo/p20-575.pdf (last visited Sept.

9, 2014). Women working full-time while pregnant typically work into the last month of their pregnancies. Lynda Laughlin, U.S. Census Bureau, Maternity Leave and Employment Patterns: 2006–2008, at 6, 8 (Oct. 2011), http://www.census.gov/prod/2011pubs/p70-128.pdf (last visited Sept. 9, 2014) (87 percent of full-time pregnant employees work in the last month before giving birth). Almost all working women who give birth will continue or return to work during the first year of their children's lives. *Id.* at 14; U.S. Department of Labor, Bureau of Labor Statistics, Employment Characteristics of Families–2013 (Apr. 25, 2014), *available at* http://www.bls.gov/news.release/famee.nr0.htm (last visited Sept. 9, 2014) (57 percent of all mothers with infants under a year old were working or looking for work in 2013).

Many of these women are either the sole or primary source of income for their families. Forty percent of all households with children under the age of 18 include mothers who are either the sole or primary source of income for the family, up from just 11% in 1960. Wendy Wang *et al.*, Pew Research Center, *Breadwinner Moms* 1 (2013), http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf (last accessed Sept. 9, 2014). The PDA was explicitly designed to protect pregnant women from the vulnerabilities that may arise from their economic position.

B. Congress understood that it was protecting women's fundamental rights to marry, establish a home, and

bring up children from pregnancy discrimination.

Faced with the pervasive problem of pregnancy discrimination, Congress sought to protect women's fundamental rights "to marry, establish a home, and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), *quoted in Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring); *see also Zablocki v. Redhail*, 434 U.S. 374, 385-86 (1978) (Marshall, J.) (discussing fundamental rights to "procreation, childbirth, child rearing, and family relationships."). Recognitions of this vital interest pervade the legislative history. The PDA's chief Senate sponsor, Sen. Harrison Williams, introduced the bill on the floor by explaining: "The entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to *full participation in family life*." 123 Cong. Rec. 29,658 (Sept. 16, 1977) (statement of Sen. Williams) (emphasis added). This Court quoted that statement in *Guerra* and affirmed it as an accurate indicator of the PDA's basic purposes. *See Guerra*, 479 U.S. at 288-89. "[F]ull participation in family life," of course, includes the fundamental right to bear children while also "participat[ing] fully and equally in the workforce."[2] Congress's recognition of these

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[2] *See also*, *e.g.*, *Leg. To Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing Before the Subcomm. On Emp't Opp. of the H. Comm. On Ed. And Labor*, 95th Cong. 19-20 (1977) (prepared statement of Prof. Wendy Williams); *Discrimination*

interests confirms that it meant pregnancy to be treated like other conditions that Congress deems important enough to receive accommodation, not like interests that are denied accommodation.

The legislative record also contains several references to the case that persuaded Congress to pass the PDA, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, the Supreme Court interpreted Title VII sex discrimination as not covering pregnancy discrimination. The PDA was designed to supersede that holding, and supporters of the bill cited the reasoning by the district court in *Gilbert v. General Electric Co.*, 375 F. Supp. 367 (E.D. Va. 1974). Although GE had contended that it could treat pregnancy differently from injuries and disabilities for which it provided benefits because pregnancy was voluntary, the district court emphatically rejected that argument, emphasizing the centrality of a woman's interest in bearing a child while being able to work:

> [U]nder G.E.'s policy the consequence of a female employee exercising her innate right to bear a child may well result in economic disaster, as in the case of at least one of the witnesses who appeared before the Court. . . .

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on the Basis of Pregnancy: Hearing on S. 995 Before the Subcomm. On Labor of the S. Comm. On Human Resources, 95th Cong. 115, 137 (1977) (testimony of Wendy W. Williams, Assistant Professor, Georgetown University Law Center). ("A necessary side effect of these policies [denying pregnancy protections] is the burden placed upon the woman's choice to bear a child, a right the Supreme Court has recognized to be of constitutional magnitude.").

> While it is true that women may, under certain conditions, resort to an abortion, it cannot be reasonably argued that Congress in its enactment of Title VII ever intended that an intended beneficiary of that Act forego a fundamental right, such as a woman's right to bear children, as a condition precedent to the enjoyment of the benefits of employment free of discrimination.

Gilbert, 375 F. Supp. at 381-82 (footnotes and citations omitted); *see also*, *e.g.*, *Leg. To Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing Before the Subcomm. On Emp't Opp. of the H. Comm. On Ed. And Labor*, 95th Cong. 19 (1977) (testimony of Prof. Wendy Williams); *Discrimination on the Basis of Pregnancy: Hearing on S. 995 Before the Subcomm. On Labor of the S. Comm. On Human Resources*, 95th Cong. 115, 137 (1977) (testimony of Wendy W. Williams, Assistant Professor, Georgetown University Law Center); *id.* at 438 (written testimony of Jacqueline M. Nolan-Haley, representing American Citizens Concerned for Life).

However, as this Court has recognized, Congress understood that it needed to do more than expressly acknowledge pregnancy discrimination as sex discrimination. Congress included the second clause of § 2000e(k) to "overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied." *Guerra*, 479 U.S. at 285 (emphasis added). Congress recognized what the legislative history of the PDA amply demonstrates: pregnancy is a unique condition, posing uniquely confusing considerations and analogies, particularly in the context of employment discrimination. For purposes of

the PDA, the relevant unique features are: (1) pregnancy only affects women; (2) pregnancy has historically posed significant barriers to equal treatment of women in the workforce; (3) these barriers implicate the fundamental right of a woman to bear a child. These three features justify the PDA's recognition that discrimination because of pregnancy is discrimination on the basis of sex entitled to the protections of Title VII.

Other unique features of pregnancy, however, can make the practical implementation of these protections confusing. The complicated analysis of pregnancy's status as a disability under the ADA, or a normal aspect of the human condition that sometimes presents temporarily disabling complications, is one example. *See* Joan C. Williams, *et al.*, *A Sip of Cool Water: Pregnancy Accommodation after the ADA Amendments Act*, 32 Yale L. & Pol'y Rev. 97 (2013). Congress included the second clause of § 2000e(k) in an attempt to clarify some of this confusion, by telling employers precisely what they should do to avoid discriminating against women on the basis of pregnancy. Employers should treat women affected by pregnancy "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). With this explanatory language, Congress explicitly acknowledged the discriminatory effect on women of not according pregnancy-related impairments of an employee's ability to work the same accommodations provided for other similar impairments.

The second clause of § 2000e(k) illustrates precisely how an employer can ensure that its

workplace accommodations will not discriminate against women by disfavoring pregnancy with policies structured around a male-centered "ideal worker" paradigm. The PDA does not require an employer like UPS to provide accommodations based *solely* on pregnancy-related circumstances. However, if an employer offers accommodations to employees based on other circumstances, it must ensure that the other circumstances do not reflect assumptions about legitimate reasons for accommodations that accord pregnancy less legitimacy. The only relevant consideration permitted under the second clause of § 2000e(k) is whether the pregnant woman's ability to work is comparable to the ability to work of the other accommodated worker. This special treatment of pregnancy is mandated by the PDA because pregnancy has historically posed such significant barriers to the equal treatment of women in the workplace, and because these barriers implicate the fundamental right of a women to bear a child in a way that cannot ever affect a man.

C. Requiring accommodations for pregnant women whenever they are given for those with similar ability to work does not imply impermissible "preferential treatment" for pregnancy.

The Court of Appeals was wrong to conclude that the plain meaning of the statute would create impermissible "preferential treatment" for pregnant workers claiming light-duty work or other accommodations. *See Young*, 707 F.3d at 448. Plainly, the PDA is violated only by *discrimination against*

pregnancy; if the employer makes no accommodations whatsoever for employees similar in their ability to work, the PDA is inapplicable. But as we have emphasized, this case requires a determination about the meaning of pregnancy discrimination itself: that is, whether employers must treat pregnant women as well as the employees who receive the greatest accommodations, or whether they may treat women as badly as non-pregnant employees who receive the fewest accommodations. The answer to that question is clear in light of Congress's recognition of the importance of the interest in being able to have children and also work: pregnancy should be treated the same as conditions that are important enough to accommodate.

Moreover, treating pregnancy the same as other accommodated conditions is necessary because—as the PDA recognizes—the distinctive features of pregnancy itself can lead to distinctive barriers to women's equal participation in the workplace. As the district court in *Gilbert* observed, "[P]arenthood is common to both sexes, yet under G.E.'s policy [denying benefits for pregnancy], it is only their female employees who must, if they wish to avoid a total loss of company induced income, forego the right and privilege of this natural state." *Gilbert*, 375 F. Supp. at 381. As discussed *supra* at 22-27, barriers caused by refusals to accommodate pregnancy implicate a women's fundamental right to bear a child in a way that cannot ever affect a man. *See Gilbert*, 375 F. Supp. at 381 (concluding that the effect on women "is undisputed and inextricably sex[-]linked"). Congress responded to this distinctive effect on women, not by ordering accommodation as an

absolute matter, but by ordering it when the employer accommodates the conditions of other employees who are similar in their ability or inability to work.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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