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 FOR RESPONDENT

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QUESTION PRESENTED

Whether UPS violated the Pregnancy Discrimination Act amendment to Title VII of the Civil Rights Act of 1964 when it treated petitioner the same as employees with similar restrictions resulting from off-the-job injuries or conditions.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that:

United Parcel Service, Inc. is a publicly traded corporation, and no public company owns 10% or more of its stock.

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STATEMENT

When petitioner became pregnant, her health care providers imposed a lifting restriction that precluded her from performing an essential function of her job as a UPS delivery driver. Petitioner was not eligible for a light-duty work assignment under UPS's then-applicable accommodations policy. Petitioner sued UPS under Section 703 of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 (42 U.S.C. § 2000e-2(a)(1) (PDA)), alleging that UPS had intentionally discriminated against her because she was a pregnant woman. The district court, after determining that no material facts were in dispute, applied settled law to grant summary judgment for UPS. Pet. App. 57a, 62a-63a. Consistent with every other court to have considered a similar issue, the Fourth Circuit affirmed. *Id.* at 29a.

1. UPS is the world's largest package delivery company. In the United States, UPS operates a large fleet of vehicles to transport packages between customer homes and offices, UPS service centers, airports, and transfer facilities. Much of UPS's workforce is organized by the International Brotherhood of Teamsters, and the terms of employment for union members are addressed in an extensively negotiated collective bargaining agreement (CBA), which specifies circumstances under which UPS may provide accommodations to drivers who become unable to perform essential functions of their jobs. J.A. 544-67. Petitioner was a member of the Teamsters union. Pet. App. 34a.

UPS employed petitioner in Maryland as an "air driver," a position that involved loading packages onto vehicles, transporting them, and then unloading

them for delivery to customers and at UPS's service centers. Petitioner acknowledges that an essential function of her position was the ability to lift packages weighing up to 70 pounds. J.A. 123, 541-42, 574, 578. Although petitioner now contends that her coworkers sometimes helped her lift heavier packages (Pet. Br. 11), she admitted below that she lifted packages weighing up to 70 pounds. Pet. App. 33a; *see also* J.A. 97, 126. Other air drivers acknowledged that they, too, regularly lifted and moved packages weighing over 20 pounds and up to 70 pounds. J.A. 366, 369, 424, 528.

In July 2006, petitioner took a leave of absence to become pregnant via in vitro fertilization. Pet. App. 5a. Her health care providers recommended in writing that she should not lift more than 20 pounds. J.A. 182 (midwife), 580 (doctor). When she sought to return to work, petitioner brought this restriction to the attention of Carolyn Martin—UPS's occupational health manager, and the only person with authority to grant petitioner an accommodation. *Id*. at 186, 575, 687, 691. Although Ms. Martin "empathized with [petitioner's] situation and would have loved to help her" (Pet. App. 7a (alteration and internal quotation marks omitted)), she explained that UPS's then-applicable policy did not allow her to provide petitioner with a "light duty" assignment. J.A. 87.

The CBA specifies that UPS may make alternative assignments available to four categories of workers. J.A. 254.

First, UPS provides temporary alternative work assignments (TAW), if available, to employees who are unable to perform their regular jobs because of injuries sustained on the job. Pet. App. 34a; J.A. 254, 547. UPS designs these "work hardening"

assignments to help those injured on the job "[re]build their muscles" so that they will no longer "have weight restrictions" and therefore can resume "their normal job responsibilities" as soon as possible. J.A. 254, 569. TAW assignments are generally limited to 30 days (*id*. at 267, 569), with a few exceptions if the employee's doctor states that the employee will be able to return to regular work within a short time frame (usually one or two additional weeks). *Id*. at 269.

Second, the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*., requires UPS to provide reasonable accommodations for an employee who has a cognizable impairment. Pet. App. 34a; J.A. 548-49. UPS crafts ADA accommodations on a "case-by-case basis" (J.A. 548-49), depending on what is reasonable under the circumstances, which means a disabled employee may or may not receive a light-duty accommodation. *Id*. at 570.

Third, UPS will provide an "inside" job to drivers who lose their Department of Transportation (DOT) certification because of a failed medical examination, a revoked or suspended driver's license, or involvement in a motor vehicle accident. J.A. 553-54, 565. "Inside" jobs are not necessarily performed "inside." Pet. App. 36a n.5. Rather, employees accommodated with an "inside" job are assigned "whatever [non-driving] job is available that [UPS] has room to put them into" until their DOT certification is restored and they can return to regular driving duties. J.A. 260. These "inside" jobs often involve heavy lifting work and include "anything from a loader to an unloader, to a sorter." *Id*. at 261. Some employees who lose their DOT certifications "r[i]de along with [o]ther driver[s]" and continue to deliver packages

over 20 pounds. *Id*. at 387-88, 439. To be sure, some "inside" *tasks* do not require heavy lifting (Pet. Br. 8-9), but an employee provided an "inside" *job* accommodation must be physically able to perform all the essential functions of that position, often moving between tasks that do and do not include heavy lifting. J.A. 269-70, 274, 281. Thus, a driver with a 20-pound lifting restriction is not qualified to perform "inside" work. *Id*. at 304-06. In short, "inside" work is *not* "light duty," and there is nothing in the record suggesting that those who received "inside" jobs performed only light-duty tasks.[1]

Fourth, Article 16, Section 4 of the CBA specifically deals with maternity and paternity issues. For pregnancy-related lifting or other physical restrictions, UPS may grant a "light duty request certified in writing by a physician . . . in compliance with state or federal laws if applicable." J.A. 355, 555. This policy was adopted well before this litigation, in light of legislation in some States requiring employers to provide light-duty work to pregnant employees. At the time of the events in question, Maryland had not yet adopted such legislation. *Id*. at 360-61, 651-52.

When petitioner sought to return to work, UPS accommodated pregnant women who fit into any of

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[1] For example, the employee whom petitioner characterizes as having been "reassigned to a clerk's position making phone calls" (Pet. Br. 9) testified that she "had to lift" from "twenty-five to forty packages a day over twenty-five–twenty pounds." J.A. 405-06. All of the other "examples" offered by petitioner similarly required lifting of heavy packages. *Compare* J.A. 647 *with id*. at 366; *see also id*. at 448-49.

these categories. For example, UPS accommodated pregnant women who had suffered an on-the-job injury or whose physical condition amounted to a disability cognizable under the ADA. J.A. 576. If a pregnant driver lost her DOT certification because of a failed medical exam related to a condition arising out of pregnancy, she was "offered an inside job" until she was able to regain her certification, so long as she was physically able to perform the essential functions of that alternative position. *Id*. at 304, 694. And UPS provided light-duty work assignments to pregnant women where required under State law. *Id*. at 651.

Contrary to petitioner's unsupported speculation (Pet. Br. 31, 49), light-duty work assignments were not available under the policy to *any* employees who were unable to perform their normal work assignments due to lifting restrictions or other physical conditions that did not fall within one of the four categories of accommodations. Specifically, Ms. Martin's undisputed testimony was that she had "never approved or authorized any light duty or alternative job assignment" as an accommodation for those injured off the job (unless the resulting limitation amounted to a cognizable disability under the ADA). *Id*. at 570, 683.

For example, a driver with a lifting restriction due to a back injury sustained *off the job*, which was not an ADA-cognizable disability (*see Duncan* v. *Wash. Metro. Area Transit Auth.*, 240 F.3d 1110, 1114 (D.C. Cir. 2001) (en banc)), would not be eligible for an accommodation. Nor would a driver who could not lift 70 pounds due to illness or frailty, because that driver could not perform the essential functions of his or her position.

UPS's managers testified that these policies were uniformly enforced. *See* J.A. 264 ("if a person is hurt off the job, they are not able to work until they are able to return to work regular duty"); *id*. at 570 ("if a male employee injured himself engaging in recreational activities, yard work at home, or any other activity off the job and, as a result had a lifting restriction that made him unable to perform the essential functions of his regular job, the employee was not offered light duty or an alternative job assignment").

In denying petitioner's request for light-duty work, Ms. Martin relied solely on UPS's policy and the essential functions of petitioner's air driver job; she did not communicate or consult with anyone else. J.A. 684. Pursuant to that policy, Ms. Martin explained to petitioner that, because her lifting restriction did not result from an on-the-job injury, she was ineligible for a light-duty accommodation. Pet. App. 6a-7a. Ultimately, Ms. Martin "knew that [she] had to treat [petitioner] the same way [she] would treat any other bargaining unit employee with a similar restriction not resulting from an on-the-job injury, which meant that she was not entitled to light duty." J.A. 574-75.[2]

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[2] Petitioner alleges that Myron Williams, the Capital Division Manager, told her that she was "too much of a liability" while pregnant and that she could not come back to work "until [she] was no longer pregnant." Pet. App. 8a (alteration in original; internal quotation marks omitted). Mr. Williams denies he said this or anything like it. J.A. 691. This factual dispute is immaterial to the issue before this Court, however, because it is undisputed that Mr. Williams lacked the authority to grant

An employee whose physical restrictions preclude performance of an essential function of his or her job, but who is ineligible for an accommodation, must take a leave of absence. This leave policy treats pregnant women "the same as anybody else." J.A. 284, 571. All UPS "employees [a]re permitted to continue working as long as they wan[t] . . . unless and until the employee present[s] a doctor's note or other medical certification that [he or] she ha[s] a restriction that render[s] [him or] her unable to perform the essential functions of the job." *Id*. at 571; *see also id*. at 284, 307, 480, 575-76. Consistent with that policy, UPS has permitted pregnant women without lifting restrictions to work throughout their pregnancy. *Id*. at 61, 103-04, 107, 409-10, 476, 478, 480, 529, 572, 637, 669-70. But because petitioner's health care providers had imposed such restrictions, she was required to take a leave of absence. Pet. App. 7a. Petitioner later returned to work at UPS. *Id.* at 8a.[3]

2. Petitioner filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that UPS's denial of the requested light-duty work accommodation constituted sex discrimination. Pet. App. 8a.

[Footnote continued from previous page]

petitioner an accommodation or to overrule Ms. Martin's decision. *Ibid*.

[3] Although petitioner contends that she lost her UPS insurance while on leave (Pet. Br. 13), she admitted below that she was fully insured through her husband's plan. *See* C.A. J.A. 1405-21.

After the EEOC issued a right to sue letter, petitioner brought suit for monetary relief under Title VII, as amended by the PDA. Pet. App. 8a-9a. That amendment defines sex discrimination to include discrimination "because of . . . pregnancy" and clarifies that "women affected by pregnancy . . . 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). Petitioner alleged only disparate treatment; her request to add an untimely and unexhausted disparate-impact claim was denied by the district court. J.A. 239-40.[4]

Following extensive discovery, UPS moved for summary judgment. Pet. App. 9a. The district court ruled, based on the undisputed evidence in the record, that petitioner had not shown direct evidence of discrimination; failed to establish a prima facie case of disparate treatment because she could not identify a similarly situated comparator who received more favorable treatment; and could not show that UPS's nondiscriminatory application of a neutral policy was a mere pretext for discrimination. *Id.* at 9a-10a. The district court thus granted summary judgment to UPS.

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[4] Petitioner also raised an ADA claim and a race discrimination claim (on the theory that UPS accommodated black, but not white, pregnant employees). The district court granted summary judgment to UPS on both of these claims. *See* Pet. App. 9a & n.5. Petitioner does not challenge these rulings in this Court, nor does she challenge the preclusion of her disparate-impact claim.

3. The Fourth Circuit, in a thorough opinion by Judge Allyson Kay Duncan, affirmed. Based on the text and structure of the PDA, an exhaustive review of the record evidence, and the decisions of its sister circuits, the panel unanimously concluded that petitioner had raised no genuine issue of material fact calling into question the district court's grant of summary judgment to UPS. Pet. App. 17a-29a.

The court of appeals explained that each of the circuits to have considered the issue had held that an employer does not violate the PDA by denying a pregnant employee an accommodation or benefit pursuant to a pregnancy-blind policy like UPS's. Pet. App. 21-22a (citing *Troupe* v. *May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994); *Serednyj* v. *Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Reeves* v. *Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006); *Spivey* v. *Beverly Enters., Inc.*, 196 F.3d 1309, 1312-13 (11th Cir. 1999); *Urbano* v. *Cont'l Airlines, Inc.*, 138 F.3d 204, 207-08 (5th Cir. 1998)). The Fourth Circuit also expressed the concern that to adopt petitioner's position "would be to transform an antidiscrimination statute into a requirement to provide accommodation to pregnant employees, perhaps even at the expense of other, nonpregnant employees." Pet. App. 22a.

SUMMARY OF ARGUMENT

The PDA amended Title VII to clarify that traditional anti-discrimination protections apply to pregnant women. It does not mandate accommodations or other special treatment for pregnant employees. Because UPS treated petitioner the same as it did other employees with similar lifting restrictions resulting from an off-the-job injury or condition, UPS

did not discriminate against petitioner on account of her pregnancy.

I. Petitioner asks this Court to declare that employers must provide accommodations to women with pregnancy-related lifting restrictions, even if similarly situated nonpregnant employees do not receive such accommodations. While this might make for good *policy*, it is not required by the PDA.

A. All three branches of the federal government have historically repudiated petitioner's reading of the PDA. Every Article III court to have considered petitioner's interpretation has rejected it. Congress, too, has declined to adopt as positive law the position petitioner advances. The Department of Justice also consistently rejected it in defending the United States Postal Service's accommodations policy, which was and is materially identical to the one challenged by petitioner here. Although the EEOC pulled a volte-face following the grant of certiorari here, its views do not bind employers or this Court.

B. Other federal and state laws may address the policy concerns that petitioner presses here. Following the events in this case, Congress amended the ADA—which, unlike Title VII, *is* an accommodations statute—to broaden the scope of covered disabilities. A number of States have gone further and expressly required employers to make accommodations for pregnant employees with lifting or other physical restrictions. It is thus increasingly unlikely that the scenario here will ever recur.

C. Although not mandated by federal law, UPS has elected to voluntarily provide pregnant women the same accommodations as other employees with similar physical restrictions resulting from on-the-

job activities. Accordingly, while UPS's denial of petitioner's accommodation request was lawful at the time it was made (and thus cannot give rise to a claim for damages), pregnant UPS employees will prospectively be eligible for light-duty assignments.

II. The text, history, and structure of the PDA establish that UPS did not intentionally discriminate against petitioner by equating pregnancy-related physical limitations with similar limitations resulting from off-the-job injuries or conditions for the purpose of providing accommodations.

A. The plain text of the PDA prohibits employers from treating female employees differently "because of" pregnancy. By its terms, the PDA (1) prohibits discrimination on the basis of pregnancy; and (2) precludes employers from singling out pregnant women for disfavored treatment. Petitioner asks the Court to ignore the first clause of the PDA and adopt an unprecedented interpretation of the second clause. But both clauses must be read together.

B. The Senate and House Reports on the PDA confirm that the amendment "defines sex discrimination, as proscribed in the existing statute, to include [pregnancy and related medical conditions]; it does not change the application of title VII to sex discrimination in *any other way*." S. Rep. No. 95-331, at 3-4 (1977) (emphasis added); H.R. Rep. No. 95-948, at 4 (1978). Statements by sponsors of the bill echo these sentiments and make clear that employers may lawfully distinguish between on- and off-the-job injuries.

C. Petitioner's contrary reading of the PDA cannot be squared with the structure of Title VII.

1. The placement of the PDA in Title VII generally, and in the "Definitions" provision of Title VII specifically, leaves no doubt that the PDA clarifies that discrimination on the basis of sex includes discrimination on the basis of pregnancy. Equating pregnancy-related physical restrictions with similar restrictions resulting from off-the-job activity is not discrimination "because of" sex.

2. Moreover, petitioner's reading of the PDA would call into question neutral employment distinctions—such as salaried versus hourly and full-time versus part-time, in addition to on-the-job versus off-the-job—that are not just well-established but fundamental to federal and state fair labor standards and workers' compensation laws. Indeed, petitioner's reading of the PDA would mandate special treatment for pregnancy, requiring an employer to provide an accommodation to a pregnant employee if the same accommodation has ever been provided to any other employee for any reason.

III. Under well-established Title VII principles, petitioner did not raise a genuine issue of material fact as to her disparate-treatment claim, as both courts below correctly concluded.

ARGUMENT

Because UPS denied petitioner an accommodation pursuant to a neutral, pregnancy-blind policy—and not because of petitioner's pregnancy—the courts below correctly concluded that UPS did not intentionally discriminate under the PDA.

I. PETITIONER'S ARGUMENTS ARE BASED ON POLICY, NOT LAW

The briefs filed by petitioner and her *amici* are paeans to what employers *should do* to accommodate

pregnancy; they do not describe what employers *must do* under the PDA. No Article III court has ever adopted the view espoused by petitioner, and to this day the United States—in its capacity as employer—applies an accommodations policy materially identical to the one challenged as intentionally discriminatory in this case. There may be sound *policy* reasons for adopting a different approach—as, indeed, UPS has elected to do on a prospective basis. But what makes for good policy must be distinguished from the dictates of positive law.

A. All Three Branches Of The Government Have Historically Rejected Petitioner's Reading Of The PDA

Petitioner's position is that "when an employer accommodates only a subset of workers with disabling conditions (such as those who experienced on-the-job injuries), the PDA's plain text requires that pregnant workers who are similar in the ability to work receive the same treatment even if still other nonpregnant workers do not receive accommodations." Pet. Br. 28. Petitioner thus reads the PDA to confer "most favored nation" status on pregnant employees, entitling them to pick and choose from any of the accommodations that an employer elects to provide to any other employee in the company, regardless of whether they are similarly situated in other respects, and irrespective of neutral distinctions that are fundamental to labor and employment law.

1. No Article III court has ever accepted the construction of the PDA advanced by petitioner in this Court. On the contrary, the courts have unanimously approved pregnancy-neutral policies such as the one petitioner challenges here.

Every court of appeals has ruled that "[c]laims brought under the PDA are analyzed in the same way as other Title VII claims of disparate treatment." *EEOC* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1191 (10th Cir. 2000); *see also Smith* v. *F.W. Morse & Co.*, 76 F.3d 413, 420 (1st Cir. 1996); *Kerzer* v. *Kingly Mfg.*, 156 F.3d 396, 400-01 (2d Cir. 1998); *Doe* v. *C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008); *Young* v. *UPS*, 707 F.3d 437, 449-50 (4th Cir. 2013); *Urbano* v. *Cont'l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998); *Reeves* v. *Swift Transp. Co.*, 446 F.3d 637, 640-42 (6th Cir. 2006); *Serednyj* v. *Beverly Healthcare, LLC*, 656 F.3d 540, 547-48 (7th Cir. 2011); *Elam* v. *Regions Fin. Corp.*, 601 F.3d 873, 878 (8th Cir. 2010); *EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, 1511 (9th Cir. 1989); *Armstrong* v. *Flowers Hosp., Inc.*, 33 F.3d 1308, 1312 (11th Cir. 1994); *Gleklen* v. *Democratic Cong. Campaign Comm.*, 199 F.3d 1365, 1367 (D.C. Cir. 2000). In other words, petitioner must prove that she suffered unfavorable treatment *because of* her pregnancy.

And no Article III court to consider the issue has ever accepted petitioner's view that the PDA requires an employer to accommodate a woman with a pregnancy-related lifting restriction if it makes some sort of accommodation for any other employee for any other reason, or that failure to do so constitutes discrimination "because of" pregnancy. *See*, *e.g.*, *Young*, 707 F.3d at 449-50; *Urbano*, 138 F.3d at 208; *Reeves*, 446 at 640-42; *Serednyj*, 656 F.3d at 548-49; *Horizon/CMS Healthcare Corp.*, 220 F.3d at 1191; *Spivey* v. *Beverly Enters., Inc.*, 196 F.3d 1309, 1313 (11th Cir. 1999).

Petitioner does not address any of these appellate decisions in her merits brief. In fact, she even ignores the one case—*Ensley-Gaines* v. *Runyon*, 100 F.3d 1220 (6th Cir. 1996)—that she asserted conflicted with these decisions at the certiorari stage. That is undoubtedly because, as the Solicitor General has explained, the claim petitioner raises has been rejected by every court to consider the issue, including the Sixth Circuit. *See* U.S. Cert. Br. 17-19. Petitioner is thus advancing a legal theory that has never been accepted by any court anywhere. That is an important indicator of its incorrectness.

2. Congress, which is presumed to be aware of the consistent interpretation of the PDA by the courts of appeals (*Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-85 (1988)), has declined to adopt as positive law the position advanced by petitioner in this Court. Members of Congress have attempted—and failed—to mandate accommodations for pregnant women akin to what petitioner asks for in this case. *See*, *e.g.*, Pregnant Workers Fairness Act, S. 3565, 112th Cong. (2013) (not enacted); Pregnant Workers Fairness Act, H.R. 5647, 112th Cong. (2012) (not enacted); S. 942, H.R. 1975, 113th Cong. (2013) (pending in committee). If petitioner's proposed construction of the PDA were correct, these bills would have been entirely unnecessary. *Cf. Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974).

3. The Executive Branch has historically rejected the position advanced by petitioner in this Court.

a. Time and time again, the Department of Justice has stated that petitioner's reading of the PDA is "simply incorrect" and "runs counter" to this Court's precedents holding that the PDA is a mere "*definitional* amendment to Title VII" whose sole purpose is

to clarify that sex discrimination includes discrimination on the basis of pregnancy. Gov't Br., *Ensley-Gaines* v. *Runyon*, 1995 WL 17845805, at *26-27 (6th Cir. 1995) (emphasis added). Indeed, the Justice Department has gone so far as to call petitioner's reading of the PDA "frivolous" (Gov't Br., *Frank* v. *White*, No. 92-1579, 1992 WL 12126463, at *8 (4th Cir. 1992)) and "contrived" (Gov't Br., *Guarino* v. *Potter*, No. 03-31139, 2004 WL 3020921, at *7 (5th Cir. 2004)).

When its own ox was being gored, the government rejoined that the PDA's text does "not relieve plaintiffs of [their] obligation" to "prove intentional discrimination occurred." Gov't Br., *Ensley-Gaines*, 1995 WL 17845805, at *17-18 (internal quotation marks omitted). "Nor did it introduce new substantive provisions," the government noted; instead, "the amendment brought discrimination on the basis of pregnancy within the existing framework prohibiting sex-discrimination." *Id*. at *18 (internal quotation marks omitted). In doing so, the government stressed, "[t]he standard by which a pregnancy discrimination claim is measured requires the *same* type of analysis used in other Title VII sex discrimination suits." *Ibid*. (emphasis added). Accepting the precise position petitioner advances, the government warned, would "confe[r] additional, substantive rights to pregnant employees, beyond the right to nondiscriminatory treatment afforded to all . . . employees protected under Title VII." *Id.* at *17.

The government consistently defended the Postal Service's accommodations policy—which is materially identical to the UPS policy petitioner challenges as intentionally discriminatory—on the ground that "a distinction between injuries/illnesses incurred off-

the-job versus those incurred on-the-job is legal, so long as it is applied equally." Gov't Br., *Guarino*, 2004 WL 3020921, at *12; Gov't Br., *White*, 1992 WL 12126463, at *9 ("Plainly, however, it is not pregnancy discrimination to distinguish between employees who suffer on-the-job injuries and those who suffer off-the-job injuries"). If the argument petitioner advances here were accepted, the government explained, "pregnant employees [would receive] preferential treatment over other workers with non-occupational injuries/illnesses." Gov't Br., *Guarino*, 2004 WL 3020921, at *12-13.

b. To this day, the Postal Service "*continues* to offer different treatment to employees with on-the-job injuries than to employees with pregnancy-related limitations and employees with disabilities more generally." U.S. Br. 17 n.2 (emphasis added). Tellingly, petitioner says nary a word about the Postal Service's policy.

If UPS's former policy was a *per se* violation of the PDA, as petitioner contends, the Postal Service surely would be doing more than merely "considering its options with respect to [its] policies." U.S. Br. 17 n.2. The very fact that the government has not forsworn its own policy demonstrates that petitioner's construction is not compelled by the PDA.

The Solicitor General does not concede that the government-as-employer is intentionally discriminating against pregnant Postal Service workers, and has been since the PDA was enacted in 1978. And, since the government still defends the Postal Service policy, it should not be heard to attack or criticize UPS's materially identical policy. The government-as-employer is subject to Title VII (*see* U.S. Br. 1); if

the Postal Service's policy is lawful, then so too must be UPS's.

c. Two weeks *after* the Court granted certiorari in this case, the EEOC issued new enforcement guidance on pregnancy-related accommodations. Pet. Br. 22-23, 32-33, 38, 48-49; U.S. Br. 3-4, 25-27. That guidance represented a material about-face from the approach that the federal government had previously taken to the issue presented by petitioner since the adoption of the PDA almost forty years ago.

i. The EEOC previously (if implicitly) denied that a policy similar to UPS's violated the PDA. *See Horizon/CMS Healthcare Corp.*, 220 F.3d at 1191 (noting that the Commission "abandoned" the argument that a similar policy "constituted direct evidence of discrimination"). And contrary to petitioner's contention (Pet. Br. 21-22), the agency did not previously endorse the view it now advances. To be sure, the previous guidance provided that "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function." 29 C.F.R. pt. 1604 app. (1979), Questions and Answers on the Pregnancy Discrimination Act, Question 5; *see also* EEOC Compliance Manual § 626.4 Right to Work, 2006 WL 4673391. But it did not expressly contemplate the situation here, where only some temporarily disabled employees are relieved (those injured on the job), but others (those injured off the job) are not. Interpretive decisions, however, made clear that such a distinction is lawful. *See*, *e.g.*, *Webb* v. *Frank*, 1991 WL 1187564, at *3-4 (EEOC, Aug. 28, 1991).

ii. The EEOC's new guidance points in a decidedly different direction. In particular, the guidance

states that "[a]n employer may not . . . rel[y] on a policy that makes distinctions based on the source of an employee's limitations (*e.g.*, a policy of providing light duty only to workers injured on the job)." Enforcement Guidance, § I.A.5. The EEOC also posited the following "hypothetical" as one in which the employer "violated the PDA" and engaged in "disparate treatment":

> An employer has a policy or practice of providing light duty, subject to availability, for any employee who cannot perform one or more job duties for up to 90 days due to injury, illness, or a condition that would be a disability under the ADA. An employee requests a light duty assignment for a 20-pound lifting restriction related to her pregnancy. The employer denies the light duty request[.]

Enforcement Guidance, § I.C.1.b, Example 10.

iii. The EEOC's new guidance prompted vigorous dissents from two of the five EEOC Commissioners. *See* Statement of the Hon. Victoria A. Lipnic, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (July 14, 2014) ("Lipnic Statement"); Constance S. Barker, Statement, *Issuance of Enforcement Guidance on Pregnancy Discrimination and Related Issues* (July 14, 2014) ("Barker Statement"); Constance S. Barker, Memorandum, *Draft Enforcement Guidance on Pregnancy Discrimination and Related Issues Circulated for Review and Comment April 14, 2014* (May 23, 2014) ("Barker Memo").

These two Commissioners denounced the guidance as a "fatal[ly] flaw[ed]" attempt to "jump ahead" of this Court with respect to *this case* and to "jump

the gun on Congress and expand the PDA to accomplish" what federal legislators have thus far declined to enact. Barker Statement at 1-2; Barker Memo at 3; *see also* Lipnic Statement at 1. Both Commissioners recognized that the enforcement guidance marked a "dramatic departure" from the EEOC's previous position (Barker Memo at 4; Lipnic Statement at 2), "without sound legal basis or rigorous analysis, and [without any] explanation for the reversal of long-standing Commission policy" (Lipnic Statement at 2).

The two dissenting Commissioners also admonished their colleagues for issuing guidance that "introduces an entirely new legal interpretation of the PDA that is unsupported by Congressional intent or court interpretation." Barker Memo at 1. Commissioner Barker criticized the other Commissioners for presenting petitioner's theory "as if it were settled law even though no legal authority is cited, because of course, none exists." *Ibid*. Commissioner Lipnic agreed that "no Circuit Court of Appeals" had adopted petitioner's position, "and indeed, most have flatly rejected it." Lipnic Statement at 2.

iv. The EEOC has no substantive rulemaking authority and its enforcement guidance is not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Christensen* v. *Harris Cnty.*, 529 U.S. 576, 587 (2000); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991). Indeed, the Solicitor General only invokes *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). U.S Br. 26. But it would be "entirely inappropriate" to give *any* weight to the EEOC's countertextual construction of the PDA, which is neither consistent nor reasonable, and which "appears to be

nothing more than" a "convenient litigating position" to shore up petitioner's reading. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). If applied retroactively, such an unexplained reversal of agency interpretation would cause "precisely the kind of 'unfair surprise' against which [this Court's] cases have long warned." *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (citation omitted). That the Postal Service has not adopted the EEOC's view is all the more reason to accord no deference to the agency's interpretation.

B. Other Federal And State Statutes May Address The Policy Concerns Petitioner Advances Here

As the government recognizes, "[t]he decisions whether to extend antidiscrimination protection to anyone, and to whom or in what circumstances, are quintessentially legislative judgments." U.S. Br. 11. And, indeed, both before and after this litigation commenced, legislative bodies have addressed the concerns that petitioner presents here. These legislative developments reflect the reality that the PDA provides a "floor," not a "ceiling," for pregnancy-related accommodations. *Cal. Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 285 (1987) (internal quotation marks omitted).

1. As the government points out (U.S. Br. 24), the concerns expressed by petitioner in this case may already have been resolved at the federal level. Under the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2008), many more physical restrictions are treated as disabilities that employers must accommodate. 42 U.S.C. § 12101; 29 C.F.R. § 1630.2(i) & (j). Indeed, the government takes the position that pregnancy-

related lifting restrictions fall in this category. U.S. Br. 21, 24-25. In cases where the ADAAA applies, courts will have to determine the validity of this argument—which was not presented in this pre-ADAAA case. In light of the unquestionably broader scope of the ADA as amended, however, the scenario in this case may never be repeated. *See* U.S. Cert. Br. 20-21 (urging the Court to deny certiorari for this reason).

2. A number of States have adopted special protections for pregnant workers. *See*, *e.g.*, Cal. Gov't Code § 12945 (West 2012); Conn. Gen. Stat. § 46a-60(a)(7) (West 2011); 2014 Del. Laws Ch. 429 (S.B. 212) (approved Sept. 9, 2014); 2014 Ill. Legis. Serv. Pub. Act 98-1050 (H.B. 8) (West) (effective Jan. 1, 2015); La. Rev. Stat. Ann. § 23:342(4) (2012); Md. Code Ann., State Gov't § 20-609 (West 2013); Minn. Stat. Ann. § 181.9414 (West 2014); N.J. Stat. Ann. § 10:5-12(s) (West 2014); W. Va. Code Ann. § 5-11B-2 (West 2014). Pregnancy accommodation laws are pending in six more States, as well as the District of Columbia. *See* S. 417, 2014 Gen. Assemb. (Ga. 2014); H. 2102, 97th Gen. Assemb. (Mo. 2014); S. 05880-2013, 2013-2014 Assemb., Reg. Sess. (N.Y. 2013); H. 1892, 2014 Gen. Assemb. (Pa. 2014); Council 20-0769, 2014 Council (D.C. 2014); S. 401, 2013-2014 Leg. (Wis. 2013).

These statutes and bills (like their stalled federal counterpart) reflect a direct legislative solution to the *policy* concerns raised by petitioner. Indeed, four months after the court of appeals decided this case, Maryland enacted the Reasonable Accommodations for Disabilities Due to Pregnancy Act, S. 784, 2013 Gen. Assemb. (Md. 2013), which requires Maryland employers to provide accommodations for physical

limitations caused or contributed to by pregnancy. *See* Md. Code Ann., State Gov't § 20-609 (West 2013). As a practical matter, many employers like UPS will conform their practices to the more stringent standards imposed by these state laws, which are permissible under, but not compelled by, the federal PDA. *See Guerra*, 479 U.S. at 285.

C. UPS Has Elected As A Matter Of Corporate Discretion To Provide More Expansive Accommodations

With respect to the issue in this case, UPS has traditionally had the same policy as the Postal Service—the government agency that most closely resembles UPS in its operational aspects (delivering packages). Like the Postal Service, UPS has treated pregnant workers the same as other employees with physical restrictions resulting from off-the-job injuries or activities.

UPS cannot be faulted for following the same rules that the federal government has adopted and defended in its capacity as employer. *See*, *e.g.*, *Albertson's* v. *Kirkingburg*, 527 U.S. 555, 577 (1999) (employer did not act unlawfully by adopting a vision standard that the Department of Transportation had promulgated as a requirement for its truck driving positions); *see also Bates* v. *UPS*, 511 F.3d 974, 998 (9th Cir. 2007) (en banc) (UPS's reliance on a Department of Transportation hearing standard was "entitled to some consideration as a safety benchmark" in evaluating business necessity defense). That is particularly so since the courts of appeals have unanimously concluded that this policy does not violate the PDA.

On a going-forward basis, UPS has voluntarily decided to provide additional accommodations for pregnancy-related physical limitations as a matter of corporate discretion. UPS's new policy provides: "Light duty work will be provided as an accommodation to pregnant employees with lifting or other physical restrictions to the same extent as such work is available as an accommodation to employees with similar restrictions resulting from on-the-job injuries." *See* App., *infra*, at 2a.[5]

The purpose of this revised policy is to reinforce UPS's commitment to providing reasonable accommodations to pregnant workers. While this approach is not *required* by the PDA, UPS's revised policy is permitted under that statute and will aid operational consistency given that a number of States in which UPS operates have relatively recently mandated pregnancy accommodations. Accordingly, the question presented in this case will have no significance for any member of the UPS workforce after the new policy goes into effect on January 1, 2015.

The only question that remains is whether petitioner (who voluntarily left UPS in 2009, years after the events at issue) is entitled to compensatory relief on the ground that UPS's application of its previous policy to petitioner—a policy that conformed to judicial interpretations of the PDA and the government's own policy as employer—constituted inten-

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[5] As UPS previously noted (BIO 4), the CBA does not authorize disrupting the seniority system. Accordingly, TAW accommodations are made "provided the work is available" (J.A. 547), and pregnancy-related accommodations will be made on the same basis.

tional discrimination on the basis of sex. The answer is no, as explained next.

II. THE PDA DOES NOT PRECLUDE EMPLOYERS FROM AWARDING OR WITHHOLDING BENEFITS PURSUANT TO NEUTRAL CRITERIA

Congress enacted the PDA to "reestablish the principles of Title VII law as they had been understood prior to the [*General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976),] decision." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 679 (1983). Those principles have always mandated equal, not preferential, treatment of employees. *See Guerra*, 479 U.S. at 287. And they have always required proof of discriminatory intent to prevail on a claim of disparate treatment. *See*, *e.g.*, *Ricci* v. *DeStefano*, 557 U.S. 557, 577 (2009). Although employers cannot single out employees for less favorable treatment because of a protected trait (*see*, *e.g.*, *id.* at 579-80), they can limit benefits to those employees on the same neutral terms and conditions as to other employees (*see*, *e.g.*, *Tex. Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981)). That is all UPS did here.

Under these basic principles of disparate-treatment law, the decision below can only be affirmed. Recognizing as much, petitioner and her *amici* insist that the PDA adds "something more" to Title VII. Pet. Br. 23. But the text, history, and structure of the PDA all confirm that the PDA "does not really add anything to title VII." 123 Cong. Rec. 10,581 (1977) (Statement of Rep. Hawkins). The Act "defin[es] sex discrimination to include discrimination against pregnant women," but "does not change the application of title VII to sex discrimination in any other way." S. Rep. No. 95-331, at 4.

A. Text

The PDA amends Title VII by defining discrimination "because of" sex to include discrimination "because of" pregnancy, and then clarifies how traditional disparate-treatment principles apply to discrimination "because of" pregnancy. Consistent with these principles, the statute does not permit employers to place pregnancy in a class of its own for disfavored treatment. The policy challenged by petitioner fully complied with these textual requirements.

1. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (internal quotation marks omitted). The congressional language at issue here is:

> 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, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work[.]

Pub. L. No. 95-955, 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000e(k)).

Petitioner does not *interpret* this language, but leaps straight to asserting that its "import" is that an employer must provide a pregnant woman with any accommodation provided to *any* employee of compa-

rable physical work ability. Pet. Br. 20. All that is "plain" from the statutory text (*ibid.*), however, is that it clarifies that traditional disparate-treatment principles apply to pregnant women.

a. The PDA's first clause "add[s] pregnancy to the definition of sex discrimination prohibited by Title VII." *Guerra*, 479 U.S. at 284; *see Newport News*, 462 U.S. at 678. Specifically, it defines discrimination "because of" sex to include discrimination because of pregnancy.

By including pregnancy within the definition of "sex," the first clause effectively amends 42 U.S.C. § 2000e-2(a) to read: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to [her employment] because of such individual's . . . [pregnancy]." This prohibition on discrimination "because of" a protected trait means that that trait cannot "actually motivat[e] the employer's decision" to take a certain action. *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 52 (2003) (citation omitted). Title VII thus requires the employer to use only neutral criteria to deny benefits. *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 612 (1993); *see Burdine*, 450 U.S. at 259.

b. As this Court has held, the second clause of the PDA "explains the application of the general principle [of equal treatment] to women employees." *Newport News*, 462 U.S. at 678 n.14. The PDA's second clause thus clarifies that an employer must disregard the fact that an employee is *pregnant* and treat her the same way it treats other similarly situated employees. This Court has described Title VII's mandate in strikingly similar language: "similarly situated employees are not to be treated differently solely because they differ with respect to [a

protected trait]." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71 (1977).

c. Taken together, the two clauses clarify that traditional Title VII equal-treatment principles apply to pregnant employees. Employers cannot *single out* pregnant employees for less favorable treatment. But they can apply the same neutral terms and conditions to pregnant employees as to other similarly situated employees. For example, an employer may offer certain benefits, such as paid leave, to full-time but not part-time employees. Denying paid leave to a part-time pregnant employee pursuant to that policy would not violate the PDA. Here, the fact that UPS denied light-duty work to "*other*" employees "not so affected" by pregnancy compels the conclusion that UPS did not treat employees differently "because of" pregnancy.[6]

The gravamen of petitioner's complaint is that she did not receive an accommodation available to one group of employees—those with a lifting restriction resulting from an on-the-job injury. But she was treated *exactly the same* as another group of employees similarly situated in their ability to work—those with a lifting restriction resulting from an off-the-job injury or condition. Nothing in the PDA *requires* UPS to align pregnant employees with one group or the other. The statute contains no "most favored nation" clause.

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[6] To be sure, such neutral policies could violate Title VII if they were shown to have a disparate *impact* on pregnant women. But petitioner did not preserve a disparate-impact claim.

2. Petitioner's main objection to applying the statute as written is that it "would render the PDA's second clause entirely superfluous" because the first clause already prohibits discrimination "because of" pregnancy. Pet. Br. 22-23. Petitioner contends that the second clause creates an independent and affirmative obligation to accommodate pregnant women. *Id.* But this reading ignores how the second clause interacts with the first, as confirmed by this Court's precedents.

a. *Gilbert*'s disparate-treatment holding, reasoning, and dissents confirm that the PDA prohibits employers from *singling out* pregnancy for disfavored treatment, but permits employers to deny benefits to pregnant employees on neutral, evenhanded terms. *Cf. Guerra*, 479 U.S. at 284-85 (interpreting PDA in light of *Gilbert*'s reasoning and holding); *Newport News*, 462 U.S. at 678-79 (interpreting PDA in light of *Gilbert*'s reasoning, holding, and dissents).

The disability plan at issue in *Gilbert* wholly exempted pregnancy and pregnancy-related illnesses from coverage in two ways. It "compensate[d] employees for all temporary disabilities except one"—those arising from pregnancy. *Gilbert*, 429 U.S. at 146 (Brennan, J., dissenting). And coverage for all disabilities, whether pregnancy-related or not, terminated only when an employee "cease[d] active work because of total disability or pregnancy." *Id*. at 129 n.4 (majority opinion). That is, once an employee left work because of pregnancy, she could not receive any benefits, even if she subsequently suffered an unrelated and otherwise covered nonoccupational illness or injury. *Ibid*. The disability plan in *Gilbert* thus was facially discriminatory

towards pregnant employees. *Ibid*.; *see Newport News*, 462 U.S. at 677-78.

The *Gilbert* majority upheld the plan after refusing to hold that discrimination "'because of . . . sex'" encompassed discrimination because of pregnancy, reasoning that pregnancy was "often . . . voluntarily undertaken" and not a "'disease at all.'" *Gilbert*, 429 U.S. at 136, 145-46 (citations omitted). The *Gilbert* dissenters, in contrast, argued that the policy "discriminate[d] on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male." *Id*. at 161-62 (Stevens, J., dissenting); *see id*. at 149 (Brennan, J., dissenting). The dissenters also pointed out that the "lone exclusion of pregnancy" from the benefits plans was not sex-neutral because pregnancy affected women alone. *Id*. at 151-52 (Brennan, J., dissenting); *see also id*. at 161-62 (Stevens, J., dissenting).

To overrule *Gilbert* and adopt the position taken by the dissents, Congress enacted two clauses within Title VII that work together. The first clause of the PDA equates pregnancy with sex. That change alone, however does not fully encompass the dissenters' view that placing pregnancy "in a class by itself" and thereby uniquely disadvantaging women was *inherently* discriminatory. 429 U.S. at 161 (Stevens, J., dissenting); *id.* at 151-52 (Brennan, J., dissenting). After all, any employer still could claim, as General Electric had done, that it was treating pregnancy differently from all other non-occupational conditions, not "because of pregnancy," but because pregnancy was "voluntary" or "temporary" or not a "disease" (or all of the above). *See id.* at 136 (majority opinion). To overrule *Gilbert*'s holding, then, Congress needed to add a second

clause clarifying that employers could not *single out* pregnancy for exclusion. And that is precisely what the second clause does. *See Guerra*, 479 U.S. at 285; *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans* v. *Norris*, 463 U.S. 1073, 1085, n.14 (1983) (Marshall, J., concurring) ("the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles"); *see Guerra*, 479 U.S. at 288-89 ("the PDA extends [Title VII principles and objectives] to cover pregnancy").

b. Petitioner's objection to *any* exclusion of pregnancy-related conditions—irrespective of whether the employment decision to exclude such conditions was based on neutral criteria that also exclude other conditions (Pet. Br. 28-29)—cannot be squared with Justice Stevens's dissent in *Gilbert* (which Congress endorsed in the PDA). Justice Stevens explicitly considered a plan that excluded pregnancy *and* other conditions using "neutral criteria, such as whether an absence was voluntary or involuntary, or perhaps particularly costly." 429 U.S. at 161 (Stevens, J., dissenting). Such a plan might still have been struck down, but the "appropriate" legal theory, he concluded, would have been under disparate *impact*, not disparate treatment. *Ibid*.

Petitioner's reading of the PDA and her bold assertion that UPS could be held liable on her disparate-treatment claim "without any inquiry into subjective intent" (Pet. Br. 17) ignores Justice Stevens's distinction, and "conflat[es] the analytical framework for disparate-impact and disparate-treatment claims." *Raytheon*, 540 U.S. at 51.

In several cases, this Court has explained that "disparate treatment is the most easily understood

type of discrimination. The employer simply treats some people less favorably than others *because of* their race, color, religion, sex, or other protected characterization." *Id*. at 52 (alterations and internal quotation marks removed) (emphasis added); *see also Hazen*, 507 U.S. at 609; *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). In other words, "[l]iability in a disparate-treatment case depends on whether the protected trait *actually motivated* the employer's decision." *Raytheon*, 540 U.S. at 52 (alterations and internal quotation marks omitted) (emphasis added); *Ricci*, 557 U.S. at 577 ("A disparate-treatment plaintiff must establish that the defendant had a discriminatory intent or motive for taking a job related action") (internal quotation marks omitted).

Critically, this Court has held that the routine application of a "neutral, generally applicable" policy, like UPS's previous policy, "can, in no way, be said to have been motivated by" a protected classification and therefore cannot constitute disparate *treatment*. *Raytheon*, 540 U.S. at 55. Indeed, the Postal Service has—and the Justice Department defended—the same policy, and it can hardly have been intentional discrimination for UPS to follow suit. At a minimum, UPS is not subject to punitive damages liability. *Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 548 (1999) (Stevens, J., concurring).

"By contrast, disparate-*impact* claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Raytheon*, 540 U.S. at 52 (internal quotation marks omitted) (emphasis added). Unlike under a disparate-

treatment theory, under "a disparate-impact theory of discrimination, a facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer's subjective intent to discriminate." *Id*. at 52-53 (alterations and internal quotation marks omitted).

This Court could ignore UPS's intent only if petitioner were pursuing a disparate-impact claim (which she is not). To accept petitioner's theory would require this Court to fuse together the disparate-impact and disparate-treatment theories of discrimination—in contravention of traditional Title VII analysis and its guidance that "courts must be careful to distinguish between these two theories." *Raytheon*, 540 U.S. at 53.[7]

3. The text of the PDA also directly forecloses petitioner's position for at least three reasons.

First, petitioner's interpretation violates the "cardinal rule" that a "statute is to be read as a whole." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Indeed, it is petitioner—not UPS—that ignores a clause. Petitioner *starts* with the second clause (Pet. Br. 20), and then reads that clause in isolation as creating a "distinct and independent" remedy (*id.* at 26). That is not the statute enacted by Congress.

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[7] In *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991), the Court indicated that, although distinctions based on "childbearing capacity" violated Title VII, a distinction based on "fertility alone" would not, as the former classification affected women only but the latter classification affected women and men alike. *Id*. at 197-98. UPS likewise drew distinctions that affected women and men alike.

Congress crafted the PDA as a single sentence comprised of two halves separated by a semicolon. That semicolon does not permit this Court to divorce the first half from the second; both halves must be considered *together*. Because the second clause "cannot be interpreted apart from context," its meaning "become[s] clear when [it] is analyzed in light of the terms that surround it." *Smith* v. *United States*, 508 U.S. 223, 229 (1993). So analyzed, the two halves merely define and clarify that the PDA prohibits discrimination "*because of* pregnancy." Again, UPS engaged in no such discrimination.

Second, petitioner's interpretation misinterprets the key phrase that pregnant workers "shall be treated the same . . . as other persons." In essence, petitioner asks this Court to read into the statute the words "any other person" where the words "other persons" are. But the statute does not prescribe treating pregnant employees the same as "*any* other person" of similar work ability or even any *particular* "group" (Pet. Br. 29) or "se[t]" (*id.* at 20) or "subset" (*id.* at 28) or "clas[s]" (*id.* at 31) of other persons. Rather, it mandates that employers treat pregnant women like unspecified "other persons," *i.e.*, "different" employees or "additional" employees. *Webster's Third International Dictionary* 1598 (1978) (defining "other"). In other words, the amendment states that employers cannot categorically exempt pregnant employees from policies that apply to "other" employees similar in their ability or inability to work.

Even though the same lifting restriction could result from an on-the-job *or* an off-the-job injury, petitioner argues that the PDA requires UPS to treat her the same as employees in the former group rather than the latter group. Yet she provides no

basis (let alone a principled one) for why she should be treated the same as one group, but not the other. She expressly disavows, for example, that, with respect to her ability to work, she is *more* similar to those injured on the job than those injured off the job. Pet. Br. 17 ("The statute does not ask whether a pregnant worker is similar to other employees in the *source* of her workplace limitation"). The only way to avoid this arbitrary selection among various groups of employees is to read the statute as precluding employers from treating pregnant women less favorably by placing them in a class of their own. But UPS did not single out pregnant women in this manner.

Third, petitioner's reading of the PDA would *mandate* the accommodation of pregnant workers. Petitioner, to be sure, tries to sidestep this problem on the ground that "an employer is free to accommodate *none* of its workers." Pet. Br. 29. That is nonsense. The ADA affirmatively requires UPS to provide reasonable accommodations to disabled persons. *See* 42 U.S.C. § 12101 *et seq*. And once UPS provides accommodations to persons with ADA-qualifying disabilities—as it must, by law—petitioner admits that her reading of the PDA would require UPS to provide those same accommodations to non-disabled women with pregnancy-related lifting restrictions too. *See* Pet. Br. 32.

The government, for good reason, tries to distance itself from this bizarre position. *See* U.S. Br. 20-21. It would be contrary to the congressional design to conclude that the PDA, adopted 14 years previously, automatically requires employers to

grant pregnant women any accommodation that might be provided in accordance with the ADA.[8]

B. History

The history of the PDA amendment confirms that the plain reading of the text is correct. The PDA "simply add[ed] a new subsection to Title VII's definitions" and, in so doing, merely clarified that Title VII principles of equal treatment apply to pregnant women. 123 Cong. Rec. 7,671 (1977) (Statement of Sen. Williams).

1. The PDA was corrective legislation that "merely reestablish[ed] the law as it [had been] understood prior to *Gilbert*." S. Rep. No. 95-331, at 8. Both the House and the Senate Reports emphasized that the PDA "reflect[ed] no new legislative mandate" "nor effect[ed] changes in practice" "beyond those intended by Title VII." H.R. Rep. No. 95-948, at 3; *see* S. Rep. No. 95-331, at 3-4 (the Bill "defines

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[8] UPS individually crafts every ADA accommodation (*see* J.A. 548-49), and nothing in the PDA requires employers to replicate that process for pregnant employees. Moreover, petitioner does not point to any evidence that UPS has granted light-duty assignments as an ADA accommodation to any employee with a lifting restriction. Petitioner's alternative suggestion that she should be compared to those who lost their DOT cards fares no better: Those employees are entitled to "inside" jobs under the CBA, but that is not light-duty work. Employees in this category must continue to lift packages up to 70 pounds and thus petitioner and the government err in suggesting that they make proper comparators. Petitioner's only comprehensible claim is that she should have been treated like an employee with a lifting restriction resulting from an on-the-job injury; but that argument fails as a matter of both law and fact. *See* Parts II.A.1.c. & III.2.a.

sex discrimination . . . to include th[e] physiological occurrences peculiar to women; it does not change the application of title VII to sex discrimination in any other way"). Legislative supporters also confirmed that the PDA was "simply corrective legislation" (123 Cong. Rec. 29,387 (1977) (Statement of Sen. Javits)), that did "not really add anything to title VII" (*id*. at 10,581 (Statement of Rep. Hawkins)). *See Newport News*, 462 U.S. at 679 n.17 (collecting sources).

In responding to *Gilbert*, Congress endorsed the views of the dissenting Justices—but went no further. Indeed, the Senate Report stated that the dissenting Justices in *Gilbert* had "correctly express[ed] both the principle and the meaning of title VII." S. Rep. No. 95-331, at 2. The House Report agreed that "the dissenting Justices correctly interpreted the Act." H.R. Rep. No. 95-948, at 2. Numerous legislators endorsed the dissenters' views in expressing their own support for the bill. *See Newport News*, 462 U.S. at 679 n.17 (collecting citations). As explained above, petitioner's view contravenes those dissents. *See* Part I.A.2.b, *supra*.

2. Petitioner cites a handful of congressional statements that purportedly support her interpretation. *See* Pet. Br. 18, 21, 25 n.4, 36-37 n.12. These snippets, however, when placed in proper context, do not support petitioner's position, nor do they detract from the rest of the legislative record, which is inconsistent with petitioner's view.

Petitioner cites, for example, a portion of the Senate Report stating that the PDA would "'prevent employers from treating pregnancy and childbirth differently from other causes of disability.'" Pet. Br. 18 (quoting S. Rep. No. 95-331, at 4). But the previ-

ous sentence of that report makes clear that the different treatment referred to was the kind of exclusion that occurred in *Gilbert*, *i.e.*, an exclusion that disadvantaged pregnancy alone. *See* S. Rep. No. 95-331, at 4 ("The *Gilbert* case itself dealt with the exclusion of disability arising from pregnancy").

Petitioner also relies on a single quote from the House Report, requiring that light-duty work assignments be "'administered equally for all workers in terms of their actual ability to perform work.'" Pet. Br. 21 (quoting H.R. Rep. No. 95-948, at 5). But this statement does no more than restate the basic charge of the PDA, which requires employers to treat similarly situated employees the same, regardless of pregnancy.

Finally, petitioner and her *amici* try to justify their expansive interpretation by claiming that a new cause of action was needed to address a number of barriers women faced in the workplace. *See*, *e.g.*, Pet. Br. 28, 30, 34, 41 (perception that pregnant women are marginal workers); *id.* at 19 (mandatory leave for or automatic firing of pregnant women); *id.* at 18-19 (discrimination based on antiquated stereotypes about women). But it is clear that Congress believed that Title VII itself addressed those concerns already, and that the PDA was needed only to clarify that Title VII covered pregnancy discrimination. *See*, *e.g.*, S. Rep. No. 95-331, at 3 (describing "the central purpose" of Title VII's prohibition on sex discrimination as addressing "the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace").

Indeed, Congress repeatedly emphasized that the PDA "reflect[ed] no new legislative mandate" and instead restored Title VII's "mandat[e]" of "equal

access to employment and its concomitant benefits for female and male workers." H.R. Rep. No. 95-948, at 3; 124 Cong. Rec. 21,435 (1978) (Statement of Rep. Hawkins); *see* 123 Cong. Rec. 29,387 (1977) (Statement of Sen. Javits) ("This legislation does not represent a new initiative in employment discrimination law").

3. The legislative history is replete with statements clarifying that employers who provide benefits for employees who have suffered on-the-job injuries are not obligated to provide the same benefits to pregnant employees. Representative Sarasin, for example, noted that the PDA "would not require extending coverage beyond job-related disability if that is all the existing coverage provides." 124 Cong. Rec. 21,436 (1978). Senator Culver agreed that the legislation required only that employers "treat pregnancy-related disabilities the same as any other nonwork related disability with regard to benefits and leave policies." 123 Cong. Rec. 29,663 (1977); *see also id*. at 29,660 (Statement of Sen. Biden) ("disability due to pregnancy must be treated the same as any other non-work-related disability"); *id*. at 7,541 (Statement of Sen. Brooke) (the PDA "will simply mean that employers who do provide a disability plan must treat disability due to pregnancy or any related medical condition the same as all other nonwork-related disability"); *id*. at 8,146 (the PDA will require employers "to treat disability due to pregnancy . . . the same as any other nonwork-related disability"). These statements make clear that an employer could, consistently with the PDA, treat pregnant employees the same as those with

similar physical restrictions resulting from off-the-job injuries or conditions (*i.e.*, a "nonwork related disability").[9]

The legislative history also makes clear that employers can require that pregnant employees receive benefits on the same neutral terms and conditions as other employees. For instance, the Senate Report mentions that employers could "conditio[n] disability benefits upon an intent to return to the job upon recovery." S. Rep. No. 95-331, at 5. The House Report adds that an employer could require a physician's certification, or a physical examination, as a pre-condition to receiving benefits. H.R. Rep. No. 95-948, at 6. These neutral eligibility requirements are no different than UPS's requirement that only employees who are injured on the job are entitled to a temporary work accommodation.

C. Structure

"Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices." *Univ. of Tex. Sw. Med. Cen.* v. *Nassar*, 133 S. Ct. 2517, 2529 (2013). By locating the PDA in Title VII itself, Congress confirmed that the amendment simply clarifies that Title VII's protections apply to preg-

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[9] Petitioner's suggestion that UPS "misreads" these statements (Pet. Br. 35) is insupportable. There would have been no reason for these legislators to specifically use the phrase "nonwork related disability" if they were not endorsing a distinction between on-the-job and off-the-job disabilities. And, indeed, the context in which they made these statements—while "dispel[ling]" "myths" about the bill—makes it clear that they were endorsing this precise distinction. *See*, *e.g.*, 123 Cong. Rec. 29,660 (1977).

nancy. Petitioner's contrary position would radically transform a discrimination statute into an accommodations statute.

1. Congress deliberately confirmed its choice to clarify that traditional anti-discrimination protections apply to pregnant employees by placing the PDA in the "Definitions" section of Title VII, 42 U.S.C. § 2000e, and titling it an act "[t]o amend Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy." As this Court has recognized, "a definitional section" merely "elucidates the meaning of certain statutory terms"—*i.e.*, "because of" or "on the basis of" sex—but "proscribes no conduct." *Carr* v. *United States*, 130 S. Ct. 2229, 2237 n.6 (2010). The title of the PDA, too, confirms that the amendment simply accords pregnant women the same protections against sex discrimination as non-pregnant women.

Petitioner concedes that the PDA is a definitional amendment (Pet. Br. 26), but contends that is not dispositive because so, too, is the religious discrimination provision of Title VII, 42 U.S.C. § 2000e(j), which requires employers to affirmatively accommodate religious beliefs (Pet. Br. 26 n.5 & 27). Yet that very provision points up the error in petitioner's analogy, since unlike the PDA it expressly contemplates an employer's "reasonabl[e] accommodation" of religion. 42 U.S.C. § 2000e(j). That no such language appears in the PDA "reinforc[es] the conclusion that Congress acted deliberately when it omitted" a requirement to provide accommodations to pregnant women. *Nassar*, 133 S. Ct. at 2529. "If Congress had desired" to require some accommodation of pregnant women, "it could have used lan-

guage similar to that which it invoked in § [2000e(j)]." *Ibid*.

If the PDA required employers to provide accommodations to pregnant employees, Congress would have included such an affirmative mandate in the statute as it did with respect to religion. The absence of any such requirement respecting pregnancy is an important structural indicator that petitioner is wrong. Indeed, petitioner can point to no other federal statute that requires accommodations without expressly so stating.

Even the religious accommodation provision has not been interpreted as broadly as petitioner asks this Court to construe the PDA. In *Hardison*, the Court explained that, despite the "reasonable accommodation" language in section 2000e(j), that provision did *not* require an employer to accommodate the religious preferences of one of its employees. *Hardison*, 432 U.S. at 81. Even though there was *specific language* in the provision requiring "reasonable accommodation," the Court held that "Title VII does not require an employer to go that far." *Ibid*. Here, there is no such language; *a fortiori*, the PDA does not require an employer like UPS to "go that far" and accommodate pregnant employees by making light-duty work available to them.

2. If accepted, petitioner's reading of the PDA would work a wholesale expansion of discrimination law—in conflict with basic principles of Title VII, employment law, and the ADA. That Congress did not silently enact that sweeping reform is clear: Congress does not "hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

a. Petitioner asks this Court to declare unlawful a fundamental distinction in employment law between on-the-job and off-the-job conditions. But the entire purpose of anti-discrimination law is to eliminate only those distinctions that "rely on . . . stereotypical assumptions" about a protected trait. *Ky. Ret. Sys.* v. *EEOC*, 554 U.S. 135, 146 (2008). As this Court has explained, a disparity that "is simply an artifact of [policy] rules that treat one set of workers more generously" than another—but is not "actually motivated" by bias against a protected group—is never disparate treatment. *Ibid*. This is true even where there is a strong correlation between the protected classification and the neutral criteria used to grant or deny the benefit—as this Court has long recognized. *See id.* at 148 (pension eligibility plan which depended on years of service and typically went hand-in-hand with age did not discriminate "because of" age); *Hazen*, 507 U.S. at 611 (a decision to fire someone to stop his pension plan from vesting was not a form of discrimination "because of" age); *see also Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 277-78 (1979) (veteran preference statute was not a form of discrimination "because of gender" even though 98% of veterans were men). As this Court has noted, "because of" language must be interpreted consistently across all federal antidiscrimination statutes. *Nassar*, 133 S. Ct. at 2534.

The distinction between on- and off-the-job injuries represents a long-standing neutral criterion that has been the centerpiece of workers' compensation law since the early 20th century. *See*, *e.g.*, *N.Y. Cent. R.R. Co.* v. *White*, 243 U.S. 188, 196, 209 (1917) (upholding the constitutionality of New York's workers' compensation law). Indeed, Congress has long endorsed this distinction under the Federal Employ-

ee Compensation Act of 1916, 5 U.S.C. §§ 8101-8193, which provides compensation for lost wages and medical expenses for federal employees who suffer job-related injuries.

If petitioner's reading were accepted, employers would be prohibited from using a host of well-established neutral criteria for making available accommodations and other employee benefits. Such criteria include seniority status, union status, full-time status, executive status, and veteran status, among many others. These distinctions are enshrined in—and, in some cases required by—a wide variety of state and federal labor and employment laws. *See*, *e.g.*, Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*; Labor Management Relations Act, 29 U.S.C. §§ 401-531; Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4335.

Employment policies that track such "Congressionally-mandated distinction[s] . . . d[o] not violate the Pregnancy Discrimination Act." Govt. Br., *Guarino*, 2004 WL 3020921, at *7. To hold otherwise would threaten to undermine employers' ability to rely on these distinctions at all.

b. Petitioner's reading would have implications that reach far beyond this case. The PDA requires that pregnant employees "be treated the same for *all employment-related purposes*" 42 U.S.C. § 2000e(k) (emphasis added). This particular case concerns assignment accommodations, but petitioner's reading necessarily extends across the gamut of employment benefits—including leave policies, office or parking space, technology, and transportation, among many others.

Under petitioner's construction, a pregnant employee would be entitled to receive the same benefits as any other employee—including just *one* employee—"similar in [his or her] ability or inability to work." If the CEO receives company-provided transportation as an accommodation for a back injury, then so too must the pregnant mailroom clerk, merely because they have the same physical capability to work. If an employer has a policy of granting paid leave for temporary disabilities to only full-time management employees who have been employed for at least 15 years, under petitioner's reading, the employer also must provide this paid leave to every pregnant employee, including brand-new, part-time hourly employees.

Under petitioner's approach, pregnant employees could choose their own comparators and select from a smorgasbord of options provided to any non-pregnant employees, regardless of circumstances (*e.g.*, light-duty work, additional leave, technological or ergonomic adjustments to the workplace). That would be absurd.

c. Petitioner's understanding of the PDA also cannot be squared with the ADA because it would require *greater* accommodation of pregnant employees under the PDA than that provided in the ADA, which is an actual accommodations statute.

The ADA requires employers to provide reasonable accommodations for disabled workers. But, at the time of petitioner's complaint, even the ADA did not include temporary impairments like lifting restrictions within its definition of "disability." *Williams* v. *Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996); *Aucutt* v. *Six Flags Over Mid-Am., Inc.*, 85 F.3d 1311, 1319 (8th Cir.

1996). Petitioner indisputably was not entitled to an ADA accommodation—she brought that claim, and lost.[10] In essence, then, petitioner contends that she is entitled to an accommodation under an *antidiscrimination* statute that she was not entitled to under an accommodations statute. That makes no sense.

Petitioner's effort to transform the PDA into an accommodations statute also ignores many statutory safeguards designed to balance the interests of employers and employees alike. Accommodations statutes generally require only reasonable accommodations, and then only where a specific accommodation would not impose an "undue hardship" upon the employer or pose safety risks to others. *See*, *e.g.*, 42 U.S.C. § 12112; *id*. § 2000e(j). Additionally, federal accommodations law allows the employer to choose among effective, reasonable accommodations. *See*, *e.g.*, 29 C.F.R. pt. 1630 app. § 1630.9.

Nevertheless, petitioner's view of the PDA would require an employer to provide an accommodation to a pregnant employee whenever and however it provided an accommodation to any other employee, even if doing so would, in the specific circumstances, be unreasonable or unduly burdensome or unsafe.

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[10] Employers *now* may be required in certain cases to accommodate a pregnant employee's request for light-duty work or similar arrangements under the ADAAA. *See* Part I.B.1, *supra*. But that statute's application is not at issue here. And it would be anomalous to assume that the ADAAA—which is not retroactive—somehow confirms that an earlier, unrelated statute required the same accommodations. *Cf. Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998) (later-enacted laws "do not declare the meaning of earlier law").

That result would lay waste to the carefully calibrated interactive process between employers and employees that is the bedrock of federal accommodations law under the ADA. *See* 29 C.F.R. § 1630.2(o)(3).

Petitioner's preferred remedy—work reassignment—is also a remedy contemplated not by discrimination law, but by accommodations law. Title VII is primarily backward-looking, purposely designed to "mak[e] persons whole for injuries suffered through *past* discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975) (emphasis added). The ADA, in contrast, is forward-looking, compelling employers to affirmatively "accommodate [a person's] disability" on an ongoing basis. *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 688 (2001).

In short, petitioner asks this Court to transform an *antidiscrimination* statute into an *accommodations* statute, the likes of which Congress has *never* enacted. But the ADA only "reinforces the conclusion that Congress acted deliberately when it omitted" accommodation claims from the PDA. *Nassar*, 133 S. Ct. at 2529; *Arabian Am. Oil Co.*, 499 U.S. at 256 (congressional amendment of Age Discrimination in Employment Act (ADEA) on a similar subject coupled with congressional failure to amend Title VII weighs against conclusion that the ADEA's standard applies to Title VII). Petitioner thus presents a prospective, aspirational vision of what pregnancy protections might be desirable, but not what the PDA requires.

3. Petitioner's construction of the PDA would also compel the absurd result that pregnancy alone—of all protected traits—would enjoy a super-protected

status. This, too, is evidence of its wrongness. *See United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

Petitioner's interpretation of the PDA would require this Court to treat pregnancy more favorably than *any* other trait protected by federal law solely on the ground that the second clause of the amendment states that employers must treat pregnant employees the same as unspecified others. As this Court has held, it is not discrimination to deny an accommodation through an evenhanded application of a neutral policy. *See*, *e.g.*, *Hardison*, 432 U.S. at 79-80 (employer does not engage in religious discrimination when it denies an employee's accommodation request in accord with a neutral policy); *Raytheon*, 540 U.S. at 54-55 (employer does not engage in disability discrimination when it refuses to rehire a disabled person in accord with a neutral policy); *cf*. *Feeney*, 442 U.S. at 277-78 (statute did not violate equal protection by providing preferences for veterans even though 98% of veterans were men). But, in petitioner's view, it *would* be discrimination to deny a pregnant woman such an accommodation.

This case is a striking example of what petitioner's reading would require of employers. Petitioner claims to have sought equal treatment, but, given the nature of UPS's previous accommodations policy, she obviously sought more. After all, UPS's policy did not contemplate the provision of light-duty work to *any* employee for nine months. Rather, those injured on the job were provided TAW, intended to rebuild strength, for *one month*. Those with a permanent disability received an accommodation that may or may not have been "light duty" depending on the nature of their disability and hardship to UPS. And those who lost their DOT certification did not

receive a light-duty assignment at all; rather—unlike petitioner—they could not drive, but they still could lift, and were required to do so. UPS is, after all, in the business of delivering packages.

Petitioner thus sought an accommodation that *no* employee was entitled to; she asked for preferential—not equal—treatment. Tellingly, petitioner does not point to *any* employee who received the same accommodation she sought. *See Burdine*, 450 U.S. at 258 ("it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally").

Petitioner's request for special treatment cannot be reconciled with this Court's interpretation of the PDA in *AT&T Corp.* v. *Hulteen*—a case in which the Court explained that the PDA does *not* bestow most favored nation status on pregnant women. There, a pregnant employee challenged her employer's pension plan, which gave less retirement credit for pregnancy than for medical leave. The employer argued that its pension plan came within the exemption for bona fide seniority systems. 556 U.S. 701, 707-08 (2009). Although the plaintiff pointed to the PDA's second clause to explain why the exemption should not apply, this Court rejected that argument, reasoning that the plaintiff's reading of the PDA "would result in the odd scenario that pregnancy discrimination, alone among all categories of discrimination (race, color, religion, other sex-based claims, and national origin), would receive dispensation from the general application of [this exemption]." *Id*. at 709 n.3.

In sum, the PDA clarifies that disparate treatment of pregnant workers is sex discrimination. It does not require employers to provide a special accommodation to a woman who has a pregnancy-

related lifting restriction when that employee is otherwise ineligible for an accommodation under a neutral accommodations policy. Adherence to the text, history, and structure of the statute requires affirmance of the decision below.

III. PETITIONER FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO HER DISPARATE-TREATMENT CLAIM

Applying well-established Title VII principles, the court of appeals correctly affirmed the district court's conclusion that petitioner had failed to raise a genuine issue of material fact with respect to her disparate-treatment claim. Both courts below correctly recognized that the application of UPS's previous "pregnancy-blind" policy did not constitute disparate treatment on the basis of pregnancy and so could not serve as "direct evidence" of discrimination. *See* Pet. App. 9a, 18a. And they correctly rejected petitioner's so-called "indirect evidence"—the policy (again) and statements by persons with no decision-making authority—as insufficient to raise a genuine issue of material fact. *See id*. at 25a. Petitioner's attempt to reargue these case-specific rulings should be rejected.

1. Because petitioner proceeds only under a disparate-treatment theory of discrimination, she must prove that she suffered *intentional* discrimination at UPS's hands. *Burdine*, 450 U.S. at 253. Intentional discrimination may be proved by either direct or indirect evidence of discriminatory animus. *U.S. Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 714 (1983).

Petitioner invents an altogether new method of proving disparate-treatment "discrimination" by

pointing to UPS's neutral former policy as "direct evidence" of discrimination. But "direct evidence" is evidence that, "if true, proves a fact"—here, discrimination *because of* pregnancy—"without inference or presumption." *Black's Law Dictionary* 636 (9th ed. 2009).[11]

Here, UPS took no employment action against petitioner "because of" her pregnancy. Rather, UPS treated petitioner exactly the same as other employees—those with off-the-job injuries or conditions. *See*, *e.g.*, J.A. 576, 693-94. And, consistent with that policy, UPS denied petitioner an accommodation and required her to take leave not because she was pregnant, but because she did not meet any of the neutral criteria that would have rendered her eligible for an accommodation or to continue working (*i.e.*, on-the-job injury, ADA disability, loss of a DOT card, or no physical restrictions). Because petitioner has no direct evidence of pregnancy discrimination, her disparate-treatment claim must be evaluated under the indirect *McDonnell Douglas* burden-shifting framework.

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[11] Petitioner badly misreads *Johnson Controls*, 499 U.S. at 199, and *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 122 (1985), for the proposition that UPS's policy is direct evidence of discrimination. *See* Pet. Br. 34, 40, 47. Both cases concerned facially discriminatory policies and are therefore inapposite. *See Johnson Controls*, 499 U.S. at 199 (facially discriminatory policy that explicitly excluded fertile female employees from certain jobs); *Thurston*, 469 U.S. at 120-21 (facially discriminatory policy that excluded employees of at least 60 years of age from automatic eligibility to transfer to a different position).

2. Petitioner failed to make out a disparate-treatment claim under the *McDonnell Douglas* framework. Under that framework, petitioner "has the burden of proving by the preponderance of the evidence a prima facie case of discrimination." *Burdine*, 450 U.S. at 252-53. If and only if she succeeds, the burden shifts to UPS "to articulate some legitimate, nondiscriminatory reason" for its actions in denying her the accommodation. *Id.* at 253 (internal quotation marks omitted). The burden then shifts back to petitioner to show that the articulated reason was merely a pretext for intentional discrimination. *Ibid*. The evidence in this record precludes a finding for petitioner at every step.

a. Petitioner tries to circumvent the requirement to make a prima facie case of discrimination, under which she "must prove by a preponderance of the evidence" that UPS's decision to deny her an accommodation took place "under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253. Some courts, including the court below, have held that a plaintiff can make out a prima facie case of pregnancy discrimination by reference to four elements, including whether similarly situated employees outside the protected class received more favorable treatment than the plaintiff. Pet. App. 26a-27a. Petitioner argues that she was similarly situated to those who received accommodations under UPS's neutral policy. Pet. Br. 48-49. But petitioner can "no more successfully" indirectly attack UPS's policy "than she could directly" (Pet. App. 27a) for at least two reasons.

First, petitioner is not similarly situated to those who were eligible to receive light-duty assignments. Petitioner contends that she need only be similar in

her ability to work—but not similar in any other respect—as her identified comparators. But "the expansion of the concept of 'comparators' to those who merely have similar work restrictions runs counter to the underlying rationale for the use of comparators as evidence of intentional discrimination under Title VII." Barker Memo at 2. As this Court has recognized, a prima facie case requires "evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion." *O'Connor* v. *Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) (alterations, internal quotation marks, and some emphasis omitted). In other words, "there must be at least a logical connection between each element of the prima facie case and the illegal discrimination." *Ibid*. (holding that certain comparator evidence was "not a proper element of the *McDonnell Douglas* prima facie case" because it "lack[ed] probative value").

As explained above, however, there is no "logical connection" between UPS's application of the pregnancy-blind policy and petitioner's alleged discrimination because that policy drew no distinctions "because of" or "on the basis of" pregnancy. *See* Part III.1, *supra*. Comparing petitioner to those who were entitled to an accommodation, therefore, would not create any inference that UPS's decision to deny her an accommodation was "based on an illegal discriminatory criterion" such as her pregnancy. *O'Connor*, 517 U.S. at 312 (alterations, internal quotation marks, and emphasis omitted). It would only reveal that UPS provided accommodations to some persons, but not others.

Relatedly, petitioner fails to explain to whom she contends she was similarly situated in other re-

spects. In any population of workers, there will be many who cannot lift 70 pounds and are therefore similar to petitioner with respect to this particular job requirement. Such lifting restrictions might stem from a variety of sources: some will not be able to lift 70 pounds because they are too small or frail; others because of some non-disabling medical condition like arthritis; others because of a gardening or sports injury; others because of a sprain sustained on the job; and still others because of a medical condition like cerebral palsy that rises to the level of an ADA-cognizable disability. Petitioner provides no reason why she should be compared to the one with cerebral palsy or the one who sustained a sprain on the job, rather than any of the others. Instead she simply insists—with no support whatsoever—that the "*source*" of the limitation is irrelevant. Pet. Br. 17.

UPS, on the other hand, has provided the reason why petitioner should be compared to the arthritis sufferer and the overzealous gardener, rather than the one with the ADA-cognizable disability or the one injured on the job. UPS was required by law to accommodate those with ADA-cognizable disabilities and it accommodated those injured on the job for the sake of workforce continuity and to assist them in returning to their regular jobs as quickly as possible. J.A. 254, 569. Because these short-term temporary assignments rarely lasted longer than 30 days, UPS could make work available to those injured on the job without disrupting the seniority system. Petitioner, on the other hand, needed an assignment that would last for up to nine months, and was not able to lift for reasons entirely exogenous to her work. UPS, therefore, was lawfully permitted to choose not to provide an accommodation.

At bottom, petitioner asks for much more than equality. She insists that she is entitled to her pick of accommodations and benefits. But UPS, as the employer, is entitled to decide how to structure its operations, so long as it does so lawfully. There is no doubt that it acted within the bounds of the law here.

Second, even if this Court were to find that the similarly situated analysis is concerned only with physical ability to work, petitioner was *not* similarly situated in her ability to work as those workers who were eligible for accommodations.

Petitioner was not similar in her ability to work as an employee with an occupational injury who received TAW under the CBA. Those with occupational injuries were capable of doing "work hardening" assignments to build up their muscles such that they could return to their regular job in a month. J.A. 254, 569. Petitioner was not similarly situated to such employees because her doctor forbade her from lifting more than 20 pounds for *nine* months. *Id*. at 580.

Petitioner was also dissimilar in work ability to an employee with an ADA-cognizable disability because petitioner's lifting restriction was only temporary and not otherwise "a significant restriction on her ability to perform major life activities." Pet. App. 27a; *see* U.S. Br. 20-21. The undisputed fact that petitioner did not have an ADA-qualifying disability (under pre-ADAAA law) conclusively establishes that she was not similarly situated to those who were disabled under the ADA.

Petitioner was also dissimilar to an employee who lost his or her DOT certification. To receive an "inside job," those who lost their DOT certification

still needed to be able to engage in heavy lifting. Pet. App. 27a. Petitioner, however, had a lifting restriction that prevented her from engaging in heavy lifting and thus from performing many "inside" job tasks. Moreover, unlike those who lost their DOT certification, petitioner could still perform the driving part of her job. Petitioner and those who lost their DOT certification were, therefore, not "similar in their ability to work."

b. In any event, even if petitioner could make out a prima facie case, the application of UPS's pregnancy-neutral policy was a non-discriminatory reason for its actions that renders the prima facie case obsolete. Petitioner asserts that "the PDA's plain terms are inconsistent with" finding the policy nondiscriminatory. Pet. Br. 49. But, again, the text does not obliterate an employer's right to rely on neutral policies: the PDA was enacted to overturn *Gilbert*, not *McDonnell Douglas*. The burden, therefore, shifts back to petitioner to proffer evidence of pretext. *See Burdine*, 450 U.S. at 254-56.

Petitioner did not challenge in her petition for a writ of certiorari the district court's determination, undisturbed by the Fourth Circuit, that UPS's reasons for denying the requested accommodation were not pretextual. She therefore forfeited this issue, which is in any event fact-bound and beyond this Court's ordinary purview. *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task").

Regardless, petitioner's last-gasp contention that the district court erred in this respect (Pet. Br. 49-50) is based on misrepresenting two isolated comments

by individuals who had no involvement either in the creation of the policy in the CBA or the specific decision to deny petitioner light duty.

Petitioner first implies that a shop steward stated that UPS provides accommodations to everyone but pregnant employees. Pet. Br. 49. But even aside from the fact that this individual is not a manager with authority to bind UPS, her comment was wrenched out of context. The shop steward simply stated that she did not *personally* know of persons (other than pregnant persons) who were not accommodated (*see* J.A. 503-04), but *admitted* that she knew of (1) pregnant supervisors who were accommodated because they were non-bargaining unit employees (*see id.* at 478-79, 485, 503-04) and (2) others who were permitted to work throughout their pregnancy (*see id.* at 479).

Petitioner next relies on a stray comment allegedly made by a UPS manager to the effect that petitioner was a "liability." Pet. Br. 50. But the district court found that manager neither had decision-making authority over petitioner nor sought to influence someone who did. Pet. App. 53a-54a; *see* note 2, *supra*. Moreover, as the court of appeals explained, this statement "stand[s] alone as the only explicit evidence of a pregnancy-related comment, derogatory or otherwise." Pet. App. 25a. Such an isolated and stray remark—by a non-decisionmaker no less—is insufficient to raise a genuine issue of material fact as to pretext. *See*, *e.g.*, *Autry* v. *Fort Bend Indep. Sch. Dist.*, 704 F.3d 344, 348 (5th Cir. 2013).

c. Finally, petitioner asks the Court to abandon the *McDonnell Douglas* framework (Pet. Br. 17, 47-48) for the simple reason that she cannot prevail

under that standard. Every court to consider the issue, however, has applied that framework. *See* Part I.A.1, *supra*. A PDA claim is nothing other than a specific type of Title VII claim; it must be analyzed the same way as any other Title VII claim. The government agrees on this point. *See* U.S. Br. 12-14, 17-18.

Petitioner's insistence that UPS's intent was irrelevant cannot be squared with Title VII as it has consistently been applied by this Court. Indeed, petitioner radically seeks to transform an antidiscrimination statute under which money may be awarded only upon proof of intentional wrongdoing into a strict-liability accommodations statute without any of the procedural protections Congress historically has provided when mandating accommodations. Because UPS's decision under a neutral policy to deny petitioner special treatment was not intentional discrimination, the courts below correctly granted and affirmed summary judgment against petitioner.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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October 24, 2014

APPENDIX

Date: October 24, 2014
* * *
Subj: Pregnancy Accommodations Policy

UPS takes pride in attaining and maintaining best practices in the area of equal opportunity and employment, and has elected to change our approach to pregnancy accommodations. Effective January 1, 2015, UPS's new policy will make temporary light duty work available to more of our pregnant employees with lifting or other physical restrictions. The policy reflects pregnancy-specific laws recently enacted in a number of states where UPS conducts business, and is consistent with guidance on pregnancy-related accommodations newly issued by the Equal Employment Opportunity Commission. Although these state laws vary, they generally require employers to provide leave or other accommodations to pregnant workers with medically verifiable physical restrictions resulting from pregnancy.

With respect to pregnancy-related conditions, UPS's longstanding policy has been: "A light duty request, certified in writing by a physician, shall be granted in compliance with state or federal laws, if applicable." Consistent with our commitment to fair and equal employment opportunities, the new policy stated below will provide temporary light duty work when available to pregnant employees to the same extent as accommodations are made to workers injured on the job. The new policy will serve to strengthen UPS's commitments to treating all workers fairly and supporting women in the workplace.

Temporary Light Duty for Pregnant Workers

Light duty work will be provided as an accommodation to pregnant employees with lifting or other physical restrictions to the same extent as such work is available as an accommodation to employees with similar restrictions resulting from on-the-job injuries.

Please share this information with your leadership teams beginning Monday, October 27. Also on Monday, the new policy will be available for all employees on UPSers.com. Additional information for H.R. staff will be provided before the effective date: please follow the existing process until January 1, 2015.

* * *