No. 12-1226

In the Supreme Court of the United States

PEGGY YOUNG, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The Pregnancy Discrimination Act, 42 U.S.C. 2000e(k), provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." The question presented is whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide comparable work accommodations to pregnant employees who are "similar in their ability or inability to work."

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INTEREST OF THE UNITED STATES

This case presents the question whether, and in what circumstances, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, as amended by the Pregnancy Discrimination Act (PDA), 42 U.S.C. 2000e(k), requires an employer that provides work accommodations to nonpregnant employees with work limitations to provide comparable work accommodations to pregnant employees who are "similar in their ability or inability to work." 42 U.S.C. 2000e(k). The Attorney General enforces Title VII against public employers, 42 U.S.C. 2000e-5(f)(1), and the United States Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers, 42 U.S.C. 2000e-5(a) and (f)(1). In addition, Title VII applies to the United States in its capacity as the Nation's largest employer. 42 U.S.C. 2000e-16. The

United States, as the principal enforcer of the federal civil rights laws and the Nation's largest employer, has a substantial interest in the proper interpretation of Title VII, as amended by the PDA. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, makes it unlawful for an employer to, *inter alia*, "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment[] because of such individual's * * * sex." 42 U.S.C. 2000e-2(a). In 1976, this Court held that an employer's refusal to cover pregnancy under a disability-benefits plan did not violate Title VII's prohibition on sex discrimination. *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 135-140. In 1978, Congress overruled that holding by enacting the Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 670 (1983). The PDA added the following subsection to Title VII's "Definitions" section:

> 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, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection

> shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. 2000e(k).

b. On July 14, 2014 (after this Court granted the petition for a writ of certiorari in this case), the EEOC issued updated enforcement guidance on the application of the PDA and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, to pregnant workers. EEOC, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* (July 14, 2014), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (*EEOC Pregnancy Guidance*); cf. U.S. Petition-stage Amicus Br. 21-22. The guidance expands on the Commission's long-held view that "[a]n employer is required under Title VII to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other employees similar in their ability or inability to work, whether by providing modified tasks, alternative assignments, or fringe benefits such as disability leave and leave without pay." *EEOC Pregnancy Guidance* Pt. I.C. In particular, the guidance explains that "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's

limitation (e.g., a policy providing light duty only to workers injured on the job)." *Id.* Pt. I.A.5; see *id.* Pt. I.C.1.b ("[A]n employer cannot lawfully deny or restrict light duty based on the source of a pregnant employee's limitation. Thus, for example, an employer must provide light duty for pregnant workers on the same terms that light duty is offered to employees injured on the job who are similar to the pregnant worker in their ability or inability to work.").

2. Petitioner began working for respondent in 1999. Pet. App. 4a. In 2002, petitioner started driving a delivery truck for respondent, and by 2006, she was working as a part-time early-morning driver (also known as an "air driver"). *Ibid.* Her responsibilities included pickup and delivery of packages that had arrived by air carrier the previous night. *Ibid.* She and other drivers met a shuttle from the airport, transferred packages to their vans, and delivered the packages. *Id.* at 4a-5a, 31a-33a. Respondent required air drivers such as petitioner to be able to "lift, lower, push, pull, leverage and manipulate" items "weighing up to 70 pounds" that were not oddly shaped. *Id.* at 3a, 31a-33a.

In July 2006, petitioner was granted a leave of absence from work to pursue in vitro fertilization treatments. Pet. App. 5a. Petitioner became pregnant and sought to extend her leave. *Ibid.* In September 2006, before she was ready to return to work, petitioner provided her supervisor with a physician's note indicating that petitioner "should not lift more than twenty pounds for the first twenty weeks of her pregnancy and not more than ten pounds thereafter." *Ibid.* During a follow-up phone call, petitioner's supervisor told her that respondent's policy would not permit

petitioner to return to work while she had a 20-pound lifting restriction. *Ibid.* Petitioner protested that she was rarely called upon to lift more than 20 pounds in her role as an air driver. *Ibid.* In October 2006, petitioner obtained a note from a midwife confirming that petitioner should not lift more than 20 pounds. *Id.* at 5a-6a.

Petitioner later contacted her supervisor and requested to return to work. Pet. App. 6a. She was referred to respondent's occupational health manager (Carol Martin), who determined that petitioner was unable to perform the essential functions of her job and was ineligible for reassignment to a light-duty position. *Id.* at 5a-6a. Respondent offered light-duty work assignments (on a temporary or permanent basis) only to (1) employees who were injured on the job; (2) employees who were eligible for accommodations under the ADA; and (3) drivers who had lost their Department of Transportation (DOT) certification because of a failed medical exam, a lost driver's license, or involvement in a motor vehicle accident. *Id.* at 3a-4a, 6a-7a. Martin explained to petitioner that respondent did not offer such accommodations to employees with pregnancy-related limitations. *Id.* at 7a.

In November 2006, petitioner approached her Division Manager and explained her desire to return to work. Pet. App. 7a-8a. The manager told petitioner that she was "too much of a liability" while pregnant and that she could not come back into the building until she was no longer pregnant. *Id.* at 8a. When petitioner's leave expired later that month, she took an extended leave of absence without pay and ultimately lost her medical coverage. *Ibid.* She returned

to work for respondent after giving birth in April 2007. *Ibid.*

3. In July 2007, petitioner filed a charge with the EEOC, alleging discrimination on the basis of race, sex, and pregnancy. Pet. App. 8a. After the EEOC issued a right to sue letter, petitioner filed suit seeking damages for intentional race and sex discrimination under Title VII and for disability discrimination under the ADA. *Id.* at 8a-9a. In February 2011, the district court granted summary judgment to respondent.[1] *Id.* at 9a-10a, 30a-83a.

With respect to petitioner's PDA (sex-discrimination) claim, the district court concluded first that petitioner had not provided any direct evidence of discrimination. Pet. App. 51a-57a. In particular, the district court concluded that respondent's policy of providing assignment accommodations only to limited groups of employees was not facially discriminatory because respondent identified those groups without reference to gender. *Id.* at 55a-57a. The court then held that petitioner had not established a prima facie case of discrimination because she had not identified similarly situated employees who were treated more favorably than she. *Id.* at 57a-62a. Finally, the dis-

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[1] The district court granted summary judgment to respondent on petitioner's race-discrimination claim and petitioner did not appeal that ruling. Pet. App. 9a n.5, 63a-66a. The district court also granted summary judgment to respondent on petitioner's disability-discrimination claim. *Id.* at 9a, 66a-77a. The court of appeals affirmed that ruling, *id.* at 11a-16a, and petitioner does not challenge that holding in her petition for a writ of certiorari. In addition, the court of appeals upheld the district court's denial of petitioner's motion to amend her complaint to include a disparate-impact claim, *id.* at 10a n.6, and petitioner does not challenge that holding in her petition.

trict court held that, even if petitioner had established a prima facie case, she had not demonstrated that respondent's proffered nondiscriminatory reason for not allowing her to return to work (*i.e.*, that she could not perform the essential duties of the job of air driver) was pretextual. *Id.* at 62a-63a.

4. The court of appeals affirmed. Pet. App. 1a-29a.

First, the court agreed with the district court that petitioner had not presented any direct evidence of sex discrimination because respondent's policy of "limiting accommodations to those employees injured on the job, disabled as defined under the ADA, and stripped of their DOT certification" is "pregnancy-blind." Pet. App. 18a; see *id.* at 17a-24a. The court of appeals rejected petitioner's argument that, as amended by the PDA, Title VII requires employers to treat pregnant workers as favorably as it treats nonpregnant workers who are similar in their ability to work, even when the employer does not provide the same favorable treatment to *all* nonpregnant employees who are similar in their ability to work. *Id.* at 18a-24a. The court acknowledged that Title VII provides that "women affected by pregnancy, child-birth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." *Id.* at 19a-20a (quoting 42 U.S.C. 2000e(k)). In spite of what the court viewed as the "unambiguous" language of that statutory text, the court concluded that that language "does not create a distinct and independent cause of action" and does not require that pregnancy "be treated more favorably than any other basis." *Id.* at 20a-21a.

Second, the court of appeals agreed with the district court that petitioner failed to establish a prima facie case of discrimination under the burden-shifting analysis established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Pet. App. 25a-29a. Under that framework, the court explained, a plaintiff must show "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) that similarly-situated employees outside the protected class received more favorable treatment." *Id.* at 25a-26a (quoting *Gerner* v. *County of Chesterfield*, 674 F.3d 264, 266 (4th Cir. 2012)). The court of appeals concluded that petitioner had made the first three required showings, but had failed to raise a genuine issue of fact as to whether similarly situated employees outside her protected class received more favorable treatment. *Id.* at 26a-29a. The court reasoned that a pregnant worker subject to a temporary lifting restriction is "not similar in her 'ability or inability to work' to an employee disabled within the meaning of the ADA or an employee either prevented from operating a vehicle as a result of losing her DOT certification or injured on the job." *Id.* at 27a. The court explained that petitioner was dissimilar to an employee entitled to an ADA accommodation because petitioner's "lifting limitation was temporary." *Ibid.* The court further explained that petitioner was not similar to those who had lost DOT certification both because "no legal obstacle stands between [petitioner] and her work," and because those individuals "maintained the ability to perform any number of demanding physical tasks." *Id.* at 27a-28a. Finally, the court explained that petitioner "is not similar to employees injured on the job because, quite

simply, her inability to work does not arise from an on-the-job injury." *Id.* at 28a. The court ultimately concluded that, because petitioner had not "establish[ed] that similarly situated employees received more favorable treatment than she did," she had failed to "establish the fourth element of the prima facie case for pregnancy discrimination." *Id.* at 29a.

SUMMARY OF ARGUMENT

A. Respondent violated Title VII when it refused to provide petitioner with the accommodation it provided to other employees similar to petitioner in their ability or inability to work. Congress enacted the Pregnancy Discrimination Act in 1978 to overturn this Court's holding in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), that an employer's policy of treating pregnancy-related disabilities less favorably than all other disabilities did not violate Title VII. The PDA amended Title VII to make clear—as the court of appeals conceded, "unambiguous[ly]" clear, Pet. App. 20a—that an employer discriminates on the basis of sex when it treats pregnant employees with work limitations less favorably than nonpregnant employees who are "similar in their ability or inability to work," 42 U.S.C. 2000e(k).

A plaintiff can establish a violation of Title VII's prohibition on sex discrimination by introducing direct evidence of an employer's policy that treats a class of nonpregnant employees with work limitations more favorably than it treats employees with comparable limitations related to pregnancy. Such a policy cannot be justified with reference to the source of an individual plaintiff's work limitation. The text of Title VII focuses entirely on whether a pregnant employee is similar in her ability to work to a nonpregnant em-

ployee, not on why each employee has the relevant limitation. In this case, it is undisputed that respondent treats at least some nonpregnant employees (employees who sustain on-the-job injuries) more favorably than it treats pregnant employees with similar limitations. That is sufficient to establish a violation of Title VII, and the courts below erred in holding otherwise. Such a policy discriminates on the basis of pregnancy even when it does not mention pregnancy by name—by extending a benefit to some nonpregnant employees with work limitations but not to pregnant employees with similar limitations, an employer fails to treat pregnant employees "the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. 2000e(k).

Because petitioner presented direct evidence of sex discrimination, the courts below had no need to resort to the analytical framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), which is used to ferret out hidden motives. But even if the use of that framework had been appropriate, the district court and court of appeals erred in applying it. To establish a prima facie case under *McDonnell Douglas*, a plaintiff must demonstrate, *inter alia*, that she was treated less favorably than a similarly situated employee. The courts below erred in concluding that petitioner was not similarly situated to employees injured on the job because the source of each employee's limitation was different. As noted, Title VII provides that similarly situated employees are those who are similar in their ability or inability to work, without reference to the source of the limitation on their ability or inability to work.

B. The court of appeals' incorrect interpretation of Title VII, as amended by the PDA, undermines the purposes of the statute. Although the court of appeals appeared to understand that the statutory text, taken at face value, requires respondent to offer the same accommodation to pregnant women that it offers to similarly limited nonpregnant employees who sustain on-the-job injuries or lose their DOT certification, the court rejected the unambiguous text because it found that result "anomalous." Pet. App. 21a. The decisions whether to extend antidiscrimination protection to anyone, and to whom or in what circumstances, are quintessentially legislative judgments. Congress understood the vital role that working mothers play in American families and made the policy decision to protect the ability of such women to provide for their families at the very time they are becoming mothers. In addition, Title VII's mandate is limited. It does not require employers to accommodate pregnant women with work limitations in every conceivable circumstance. It merely requires that, when an employer accommodates nonpregnant employees who are similar in their ability or inability to work, it also accommodates pregnant women to the same degree.

C. Finally, the court of appeals' interpretation of Title VII is out of step with that of the EEOC, the federal agency primarily charged with enforcing Title VII. The EEOC recently issued guidance explaining the application of Title VII and the recently amended ADA to pregnant employees. The 2014 guidance is consistent with much earlier EEOC guidance issued closer to the enactment of the PDA. The EEOC has consistently explained that employers are required to offer employment benefits on the same terms to preg-

nant employees and to nonpregnant employees with similar limitations. In the 2014 guidance, the EEOC states explicitly that an employer may not distinguish between pregnant employees and nonpregnant employees based on the source of their limitations, including when the nonpregnant employees' limitations arise from on-the-job injuries. The EEOC's guidance is entitled to respect and reinforces the plain reading of Title VII's text.

ARGUMENT

TITLE VII REQUIRES EMPLOYERS TO TREAT PREGNANT EMPLOYEES WITH WORK LIMITATIONS AS FAVORABLY AS OTHER GROUPS OF NONPREGNANT EMPLOYEES WHO ARE SIMILAR IN THEIR ABILITY OR INABILITY TO WORK

A. The Text Of Title VII Prohibits The Type Of Policy Employed By Respondent

1. In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), this Court held that an employer's policy of excluding pregnancy from its disability-benefits plan did not violate Title VII's prohibition on sex discrimination. *Id.* at 135-140. Two years later, Congress legislatively overruled that interpretation of Title VII when it enacted the PDA. See, *e.g.*, *AT&T* v. *Hulteen*, 556 U.S. 701, 705 (2009); *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 276-277 (1987); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 678 (1983). The PDA added Subsection (k) to Title VII's "Definitions" provision, 42 U.S.C. 2000e. Subsection (k) provides in relevant part:

> 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, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. 2000e(k).

The first clause of Subsection (k) prohibits employers from treating any employee less favorably on the basis of pregnancy, childbirth, or related medical conditions—it establishes that any such distinction is discrimination on the basis of sex. By adding pregnancy to the definition of sex discrimination prohibited by Title VII, "the first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert*." *Guerra*, 479 U.S. at 284-285. The second clause "explains the application of th[at] general principle to women employees," *Newport News Shipbuilding & Dry Dock Co.*, 462 U.S. at 678 n.14, by specifying the appropriate comparator for determining whether an employer's differential treatment of an employee is based on pregnancy, childbirth, or a related medical condition (*i.e.*, is based on sex for purposes of Title VII). Congress thus directed that "women affected by pregnancy, childbirth, or related medical conditions" (herein referred to as "pregnant women" or "pregnant employees") "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).

A Title VII plaintiff may establish a violation using either direct evidence of discrimination or the burden-

shifting framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), to uncover discriminatory motive. In a case like this one, both approaches boil down to the same question: whether an employer treats pregnant employees with work limitations less favorably than other nonpregnant employees who are similar in their ability or inability to work.

Shifting the focus of the discrimination analysis to an employee's ability to work was one of the principal purposes of the PDA. See, *e.g.*, S. Rep. No. 331, 95th Cong., 1st Sess. 4 (1977) (*Senate Report*) ("Pregnant women who are able to work must be permitted to work on the same conditions as other employees."); H.R. Rep. No. 948, 95th Cong., 2d Sess. 4-5 (1978) ("The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work."). As this Court has explained, "[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated with respect to their ability or inability to work." *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 204-205 (1991) (brackets in original) (quoting *Guerra*, 479 U.S. at 297 (White, J., dissenting)). "[T]his statutory standard," the Court noted, "was chosen to protect female workers from being treated differently from other employees simply because of their capacity to bear children." *Id.* at 205. Title VII's prohibition on sex discrimination therefore requires that, "[u]nless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all em-

ployment-related purposes.'" *Id.* at 204 (quoting 42 U.S.C. 2000e(k)).

2. a. When, as here, a plaintiff challenges an employer's policy, she can prevail by proving that the policy provides a benefit or accommodation to a class of nonpregnant employees who are limited in their ability to work but does not offer the same benefit or accommodation to pregnant employees with comparable limitations. The court of appeals rejected petitioner's direct-evidence case, reasoning that respondent's temporary-reassignment policy is pregnancy neutral because it does not specifically mention pregnancy. See Pet. App. 18a ("It is certainly true that an explicit policy excluding pregnant workers would violate antidiscrimination law."). That was error. A policy need not explicitly mention pregnancy-related work limitations in order to be facially discriminatory under Title VII, as amended by the PDA. Under the statute's definition of discrimination "on the basis of sex" or "because of sex" in Section 2000e(k), a practice or policy discriminates when it treats pregnant employees with work limitations less favorably than other employees with comparable limitations. A policy that provides a benefit *only* to enumerated groups of nonpregnant employees with work limitations discriminates on its face against pregnant women who are similar in their ability or inability to work.

Although the court of appeals acknowledged that the meaning of Section 2000e(k)'s second clause is "unambiguous," Pet. App. 20a (citing *Johnson Controls, Inc.*, 499 U.S. at 204-205), it nevertheless held that the PDA does not prohibit an employer from treating a pregnant employee less favorably than it treats at least some nonpregnant employees who are

similar in their ability to work, *id.* at 20a-24a. Under the court of appeals' logic, as long as an employer does not single out pregnant employees with work limitations for exclusion from a benefit that the employer offers to all other employees with comparable limitations, it does not violate Title VII. That is incorrect.

As discussed, Section 2000e(k) requires that, "[u]nless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'" *Johnson Controls, Inc.*, 499 U.S. at 204 (quoting 42 U.S.C. 2000e(k)). Nothing in the PDA indicates that a pregnant employee faces discrimination within the meaning of Title VII *only* when she receives less favorable treatment than *every* other employee who is similar in his or her ability or inability to work. The plain text of the statute prohibits treating pregnant employees less favorably (for *any* "employment-related purpose[]") than "other persons not so affected but similar in their ability or inability to work." 42 U.S.C. 2000e(k). When an employer offers a benefit to some employees who are limited in their ability to work but not to pregnant employees who are similarly limited, the employer treats those pregnant employees less favorably than "other persons not so affected but similar in their ability or inability to work." Such a policy is facially discriminatory under Title VII, as amended by the PDA. The courts below therefore erred in viewing petitioner's direct evidence of discrimination as insufficient to establish a violation of Title VII.[2]

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[2] The Department of Justice, on behalf of the United States Postal Service, has previously taken the position that pregnant employees with work limitations are not similarly situated to

b. Because petitioner presented sufficient direct evidence of sex discrimination to establish a violation, there was no need for the district court and court of appeals to resort to the *McDonnell Douglas* framework to ferret out discriminatory motive. See *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 511 (2002) ("[I]f a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case."); *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121-122 (1985) (*McDonnell Douglas* test inapplicable where plaintiff presents "direct evidence of discrimination," such as when employer's policy is "discriminatory on its face"). But most courts of appeals have used the *McDonnell Douglas* analysis to evaluate claims such as petitioner's. Those courts (including the court below) have erred in their application of that framework.

In a typical Title VII sex-discrimination case, a female employee may establish a prima facie case under *McDonnell Douglas* by demonstrating that (1) she is a woman, (2) she is qualified for the job or job benefit she seeks, (3) she did not obtain the job or job benefit she seeks, and (4) a similarly situated man did receive the job or job benefit. See *McDonnell Douglas*, 411

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employees with similar limitations caused by on-the-job injuries. See, *e.g.*, *Ensley-Gaines* v. *Runyon*, 100 F.3d 1220, 1222 (6th Cir. 1996). That is no longer the position of the United States. The United States 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. In light of the EEOC's new guidance, the enactment of the ADA Amendments Act of 2008, Pub. L. No. 100-325, 122 Stat. 3553, and the pendency of this case, the Postal Service is considering its options with respect to those policies.

U.S. at 802. When a sex-discrimination claim is based on pregnancy, the statute directs that the fourth prong should focus on the relative treatment of nonpregnant employees who are similar in their ability or inability to work instead of on the relative treatment of men. The court of appeals erroneously held that petitioner failed to establish a prima facie case of discrimination because other employees who are eligible for temporary work assignments are not similarly situated to petitioner. Because the source of each employee's limitation is different, the court of appeals reasoned, a pregnant employee with a lifting restriction is not similar in her ability or inability to work as a nonpregnant employee who has an identical lifting restriction as a result of an on-the-job injury. Pet. App. 27a-28a. That is incorrect.

Under the clear language of Title VII, a pregnant employee establishes a prima facie case of pregnancy-based sex discrimination when she identifies a category of nonpregnant employees who are similar in their ability or inability to work and who are treated more favorably. In enacting the PDA, Congress did not distinguish among employees based on the *source* of their work limitations. Congress distinguished among employees based on the work-related *effect* of their work limitations. Title VII does not require employers to treat all employees with similar work-related limitations the same; but, under the PDA, a pregnant employee establishes a prima facie case of discrimination when she establishes that an employer treats pregnant employees with work limitations less favora-

bly than it treats at least one class of nonpregnant employees with similar limitations.[3]

Based on the evidence presented in this case, the court of appeals erred in concluding that petitioner failed to establish a prima facie case under *McDonnell Douglas*. Petitioner identified three categories of employees she viewed as similar to her in their ability to work: employees injured on the job, employees entitled to accommodations under the version of the ADA applicable at the time, and drivers who had temporarily lost their DOT certification and therefore required a non-driving job. Pet. App. 27a. The court of appeals concluded that none of the employees in those categories was similar to petitioner in his or her ability or inability to work. *Id.* at 27a-28a.

As discussed, the court of appeals was wrong with respect to employees with temporary lifting restrictions resulting from on-the-job injuries because the source of the employee's injury is not relevant in determining whether there was differential treatment for purposes of Title VII. See pp. 18-19, *supra*; Pet.

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[3] The court of appeals also repeated its erroneous view (discussed at pp. 15-16, *supra*) that respondent's treatment of pregnant women does not discriminate because some nonpregnant employees are also not entitled to temporary reassignments. Such reasoning has no place in a Title VII case, whether based on allegations of pregnancy discrimination or other forms of discrimination. If a female job applicant alleges discrimination in hiring on the basis of sex, an employer may not defeat that allegation merely by pointing out that some men were also not hired for a particular job. Under the statute's plain text, petitioner's allegation that a group of nonpregnant employees similar in their ability to work was accommodated is sufficient to satisfy the fourth prong of the prima facie case even though other nonpregnant employees similar in their ability to work were not accommodated.

App. 28a ("[Petitioner] is not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury."). Both sets of employees are similarly situated with respect to their "ability or inability to work."

The court of appeals also erred in finding no genuine issue of material fact about whether drivers who lose their DOT certifications are similar to petitioner in their ability to work. Pet. App. 27a-28a. Some drivers in that category lose their certification due to injuries (including injuries sustained off the job). See *id.* at 36a. Those drivers may well be similar to petitioner if their injuries impose lifting restrictions. Other drivers may lose their DOT certification as a result of losing their driver's license. *Ibid.* Those drivers may not be similarly situated in their ability to work—although they will require (and respondent will offer them) an "inside job" accommodation, they presumably can take jobs that require heavy lifting. Given the uncertainty about the range of ability to work within that category, the courts below should not have granted (and affirmed the grant of) summary judgment to respondent on the question whether those employees are proper comparators to pregnant employees such as petitioner under a *McDonnell Douglas* analysis.

Whether respondent violated the PDA by accommodating employees under the then-applicable version of the ADA while not extending the same accommodations to pregnant women is a more difficult question. Under the version of the ADA applicable in this case, employees with temporary impairments were generally not considered to be individuals with disabilities under that statute and thus were not entitled to ac-

commodations. See, *e.g.*, *Pollard* v. *High's of Balt., Inc.*, 281 F.3d 462, 468 (4th Cir.) (citing cases), cert. denied, 537 U.S. 827 (2002); but cf. pp. 24-25, *infra* (discussing amendments to the ADA). In some circumstances, individuals with permanent work limitations may require different types of accommodations in order to do their work than individuals with temporary limitations. The Court need not resolve whether the ADA-eligible employees respondent accommodated were similar to pregnant women such as petitioner with respect to their ability or inability to work because, as discussed, the district court plainly erred in granting summary judgment to respondent. In addition, because the ADA now covers individuals with temporary impairments, see pp. 24-25, *infra*, resolution of that question is largely academic going forward.

B. The Court Of Appeals' Interpretation Of Title VII Undermines The Statute's Purposes

The court of appeals refused to follow what it viewed as the "unambiguous" language of Section 2000e(k)'s second clause because doing so, in the court's mind, would have the "anomalous consequence" of treating pregnancy "more favorably than any other basis." Pet. App. 20a-21a. That assessment is mistaken. The PDA requires only that an employer treat pregnant workers "the *same*" as it treats workers who are not pregnant but who are "similar in their ability or inability to work." 42 U.S.C. 2000e(k) (emphasis added). If an employer does not otherwise accommodate employees with work limitations, it need not provide accommodations for pregnant employees. However, Congress has mandated that, when an employer can and does accommodate work limitations for

some nonpregnant employees, it must extend the same accommodations to pregnant employees who are similarly limited in their ability to work. The court of appeals elsewhere recognized that respondent's collective bargaining agreement "places a heightened obligation on [respondent] to accommodate" employees injured on the job. *Id.* at 28a. Title VII places the same "heightened obligation" on respondent to offer the same accommodation to pregnant employees who are similar in their ability or inability to work.

Moreover, the court of appeals misconstrued the legislative history—assuming that history to be relevant here—to the extent it viewed its decision as necessary to avoid a "preferential treatment mandate that Congress neither intended nor enacted." Pet. App. 23a. As this Court has previously noted, the legislative history reflects the views of many legislators that the PDA "in no way requires the institution of any new programs where none currently exist." *Guerra*, 479 U.S. at 287 (internal quotation marks omitted). Petitioner does not seek the introduction of a new program where none currently exists; she instead seeks the extension of an existing program to include pregnant employees. That is exactly what the PDA was designed to accomplish.

This Court has previously rejected arguments that Title VII's prohibition on sex discrimination should be judicially diluted to avoid unfairly burdening certain groups of employees: "[T]he question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful." *City of L.A. Dep't of Water & Power* v. *Manhart*,

435 U.S. 702, 709 (1978). The Court has likewise recognized that an employer's decision to provide benefits to one class of employees may trigger an obligation under the PDA to provide that same benefit to another class of employees, even when the employer's initial decision to withhold the benefit from pregnant employees was made entirely without animus. See, *e.g.*, *Guerra*, 479 U.S. at 290-291; *id.* at 295-296 (Scalia, J., concurring in the judgment). In enacting the unambiguous text of Section 2000e(k), Congress decided that employers must treat pregnant employees with work limitations at least as well as other employees with similar limitations. The court of appeals overstepped its role by ignoring Congress's clear mandate in favor of the court's own policy judgment.

When Congress enacted the PDA, it understood the vital role that working women play in American families and recognized that most women in the workforce "work out of hard economic necessity." *Senate Report* 9. At the time, 70% of working women contributed the only income source or a necessary income source to their families. Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. Davis L. Rev. 961, 995 (2013) ("The [Senate] committee cited studies establishing that 70% of working women were divorced, single, or widowed; their families' sole wage earner; or married to men who made less than $7,000 per year, approximately $27,000 in today's dollars."). Families today continue to rely heavily on working women. In 2009, 41% of all births were to single women, who generally have no legal claim to support for their own needs even when they can claim child support. *Id.* at 970. In

married households, working wives contribute an average of 37% of family incomes and earn more than their husbands 38% of the time. *Id.* at 971. Protecting pregnant women from workplace discrimination is therefore vital in safeguarding American families, including the 40% of all households in which the mother is the primary or sole earner. *Ibid.*

Congress has elsewhere implemented its policy judgment that employees with work limitations (including some pregnant employees) should be accommodated where reasonable. Title I of the ADA, 42 U.S.C. 12111 *et seq.*, requires employers to offer reasonable accommodations to employees with disabilities when doing so would not impose an undue hardship. Congress recently enacted the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553, which took effect after the events at issue in this case and does not apply retroactively. § 8, 122 Stat. 3559. The ADAAA (and its implementing regulations) expanded the definition of disability under the ADA to cover a broader scope of impairments, see 29 C.F.R. 1630.2(g) and (j), clarifying that impairments that substantially limit an individual's ability to lift, stand, or bend are disabilities under the ADA, 42 U.S.C. 12102(2)(A); 29 C.F.R. 1630.2(i)(1)(i). These amendments are consequential for pregnant workers with temporary work restrictions in two ways. First, although pregnancy in and of itself does not qualify as a disability, the amended ADA may require employers to accommodate pregnant women who are substantially limited in a major life activity as a result of a pregnancy-related impairment. Second, as amended by the ADAAA, the ADA now requires employers to accommodate at least some employees

with *temporary* restrictions on their ability to lift or stand even when the limitations arise from non-work-related causes. When a pregnant employee satisfies those criteria, she will be entitled to a work reassignment (or other accommodation) under the ADA to the same extent as any other employee with a similar limitation. The similar protection provided to such women by the ADA and Title VII confirms that Congress meant what it said in Section 2000e(k)—that employers must treat pregnant employees with work limitations as well as other employees with similar limitations.

In addition, Title VII does not require employers to accommodate pregnant employees with work limitations in circumstances in which the employer would not accommodate nonpregnant employees with similar limitations. For example, if an employer has a limited number of light-duty jobs available for employees with work limitations, the employer need not offer such an assignment to a pregnant employee if, at the time she requests reassignment, every job is already filled by other employees with work limitations. Because Title VII requires employers to treat pregnant employees "the same" as similarly limited nonpregnant employees, the employer satisfies that mandate by offering work accommodations to pregnant employees on the same terms as it does to any nonpregnant employee. See *EEOC Pregnancy Guidance* Pt. I.C.1.b ("[I]f an employer's light duty policy places certain types of restrictions on the availability of light duty positions, such as limits on the number of light duty positions or the duration of light duty assignments, the employer may lawfully apply those restrictions to pregnant workers, as long as it also applies the same re-

strictions to other workers similar in their ability or inability to work.").

C. The Court Of Appeals' Interpretation Of Title VII Is Inconsistent With That Of The EEOC

Recognizing that petitioner has established a violation of the PDA is consistent with the longstanding position of the EEOC, the agency principally charged with interpreting Title VII. This Court has held that the Commission's reasoned interpretations of Title VII are entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008).

The EEOC published expanded guidance on the application of Title VII and the ADA to pregnant employees in July 2014. EEOC's guidance confirms that "an employer is obligated to treat a pregnant employee temporarily unable to perform the functions of her job the same as it treats other employees similarly unable to perform their jobs, whether by providing modified tasks, alternative assignments, leave, or fringe benefits." *EEOC Pregnancy Guidance* Pt. I.A.5; *id.* Pt. I.C. In particular, the recent guidance specifies that "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job)." *Id.* Pt. I.A.5; *id.* Pt. I.C.1.b ("[A]n employer cannot lawfully deny or restrict light duty based on the source of a pregnant employee's limitation."). The expanded guidance also explains that "[a] plaintiff need not resort to the burden shifting analysis set out in *McDonnell Douglas Corp.* v. *Green* in order to

establish a violation of the PDA where there is * * * evidence that a pregnant employee was denied a light duty position provided to other employees who are similar to the pregnant employee in their ability or inability to work." *Id.* Pt. I.C.1.c; *id.* Pt. I.B.1 ("Discriminatory motive may be established directly, or it can be inferred from the surrounding facts and circumstances.").

The Commission's recent guidance is consistent with its longstanding and reasonable interpretation of the PDA. In 1979, the EEOC published guidance on the PDA in the form of questions and answers. 29 C.F.R. Pt. 1604 App.; 44 Fed. Reg. 23,805-23,809 (Apr. 20, 1979). In response to a question about an employer's duty to accommodate an employee's pregnancy-related inability to perform the functions of her job, the EEOC stated: "An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees." 29 C.F.R. Pt. 1604, App. ¶ 5. The Commission explained 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." *Ibid.* Nothing in those guidelines indicates that an employer's duty to accommodate a temporary restriction is dependent on the employer's offering an accommodation to *every* nonpregnant employee with a similar restriction. See EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* Pt. II.B (May 23, 2007), http://www.eeoc.gov/policy/docs/caregiving.html#pregnancy ("An employer also may not treat a pregnant worker who is

temporarily unable to perform some of her job duties because of pregnancy less favorably than workers whose job performance is similarly restricted because of conditions other than pregnancy."); EEOC, *Employer Best Practices for Workers with Caregiving Responsibilities*, http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (last modified Jan. 19, 2011) (listing as a prohibited practice "providing reasonable accommodations for temporary medical conditions but not for pregnancy"). The Commission has also explained in litigation that a pregnant employee is "most appropriately compared to all temporarily-disabled, non-pregnant employees whether they sustained their injuries on or off the job." *EEOC* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1194-1195 (10th Cir. 2000). When enacting the PDA, Congress relied on the Commission's pre-*Gilbert* guidelines, which "specifically required employers to treat disabilities caused or contributed to by pregnancy or related medical conditions as all other temporary disabilities." *Senate Report* 2.

As respondent has pointed out, the EEOC "waived off" the argument "that any distinction between non-work-related conditions and work-related conditions, in a modified duty policy, is per se unlawful" in its appeal in *EEOC* v. *Horizon/CMS Healthcare Corp.*, *supra*. Br. in Opp. 26 n.2 (quoting Resp. of EEOC to Pet. for Reh'g at 12, *Horizon/CMS Healthcare Corp.*, *supra* (No. 98-2328), available at http://www.eeoc.gov/eeoc/litigation/briefs/horizon.txt (EEOC *Horizon* Resp.)) (internal quotation marks omitted); see Resp. Supp. Br. 10 (same). The Commission explained in that brief, however, that its concession in that case was motivated by its choice to focus on "construct[ing]

a fact-specific argument, rooted in a substantial body of pretext evidence." EEOC *Horizon* Resp. 12. That choice, motivated by a case-specific litigation strategy, did not purport to represent the Commission's authoritative interpretation of Title VII. The EEOC's guidance issued before and after the filing of that brief has consistently supported the conclusion that an employer who offers temporary light-duty assignments to nonpregnant employees with on-the-job injuries but not to pregnant employees with similar work limitations violates Title VII.[4]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[4] Respondent's further reliance (Br. in Opp. 26 n.2; Resp. Supp. Br. 9) on the EEOC's 1996 guidance on the relationship between workers' compensation laws and the ADA is misplaced. That guidance does not purport to address Title VII or the PDA. See EEOC, *EEOC Enforcement Guidance: Workers' Compensation and the ADA*, http://www.eeoc.gov/policy/docs/workcomp.html (last modified July 6, 2000).