No. 12-____

In the Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

SHARON FAST GUSTAFSON
4041 N. 21st St.
Arlington, VA 22207
(703) 527-0147
sf.gustafson@verizon.net

SAMUEL R. BAGENSTOS
Counsel of Record
MICHIGAN CLINICAL
LAW PROGRAM
625 S. State St.
Ann Arbor, MI
(734) 647-7584
sambagen@umich.edu

Counsel for Petitioners

QUESTION PRESENTED

The Pregnancy Discrimination Act ("PDA") provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). The question presented is:

Whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are "similar in their ability or inability to work."

PARTIES TO THE PROCEEDING

Peggy Young was plaintiff-appellant in the proceedings below.

United Parcel Service, Inc. ("UPS") was defendant-appellee in the proceedings below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 7

A. The Fourth Circuit's Decision Directly Conflicts with the Text of the PDA 9

B. There is Longstanding Disagreement in the Circuits Regarding the Question Presented 16

CONCLUSION 21

APPENDIX

Opinion of United States Court of Appeals for the Fourth Circuit, *Young* v. *United Parcel Service, Inc.* (4th Cir. 2013) 1a

Opinion of the United States District Court for the District of Maryland, *Young* v. *United Parcel Service, Inc.* (D. Md. Feb. 14, 2011) 30a

TABLE OF CONTENTS—Continued

Page

Pregnancy Discrimination Act,
42 U.S.C. § 2000e(k) 84a

TABLE OF CITED AUTHORITIES

Page

CASES

Bates v. *United Parcel Service, Inc.*,
511 F.3d 974 (9th Cir. 2007) 14

California Fed. Sav. & Loan Ass'n. v. *Guerra*,
479 U.S. 272 (1987) 11, 13

Crawford v. *Metro. Gov't of Nashville & Davidson Cnty.*,
555 U.S. 271 (2009) 2

E.E.O.C. v. *Horizon/CMS Healthcare Corp.*,
220 F.3d 1184 (10th Cir. 2000) 10, 18, 19

Ensley-Gaines v. *Runyon*,
100 F.3d 1220 (6th Cir. 1996) 6, 17, 18, 20

Fed. Express Corp. v. *Holowecki*,
552 U.S. 389 (2008) 10

Geduldig v. *Aiello*,
417 U.S. 484 (1974) 12

Gen. Elec. Co. v. *Gilbert*,
429 U.S. 125 (1976) ..... *passim*

Int'l Union v. *Johnson Controls, Inc.*,
499 U.S. 187 (1991) 11, 15, 16

McDonnell Douglas Corp. v. *Green*,
411 U.S. 792 (1973) 5

Newport News Shipbuilding & Dry Dock Co. v. *E.E.O.C.*,
462 U.S. 669 (1983) 1, 12, 13

TABLE OF CITED AUTHORITIES— Continued

Page

Reeves v. *Swift Transp. Co.*,
446 F.3d 637 (6th Cir. 2006) 18

Serednyj v. *Beverly Healthcare, LLC*,
656 F.3d 540 (7th Cir. 2011) 20, 21

Skidmore v. *Swift & Co.*,
323 U.S. 134 (1944) 10

Spivey v. *Beverly Enters., Inc.*,
196 F.3d 1309 (11th Cir. 1999) 20, 21

Urbano v. *Cont'l Airlines, Inc.*,
138 F.3d 204 (5th Cir. 1998) 20, 21

STATUTES AND RULES

Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000e *et seq.*..... *passim*

Pregnancy Discrimination Act of 1978,
42 U.S.C. § 2000e(k)..... *passim*

29 C.F.R. § 1604 App. 10

49 C.F.R. § 391.41(b) 4

49 C.F.R. § 391.43 4

TABLE OF CITED AUTHORITIES— Continued

Page

OTHER

S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977) 14

H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978) 15

Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities: Meeting of the U.S. Equal Employment Opportunity Commission (Feb. 15, 2012) 7, 8

Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415 (2011) 16

Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167 (2004) 16

Jamie L. Clanton, Note, *Toward Eradicating Pregnancy Discrimination at Work: Interpreting the PDA to 'Mean What it Says,'* 86 IOWA L. REV. 703 (2001) 16, 17

Jessica Carvey Manners, Note, *The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 66 OHIO ST. L.J. 209 (2005) 17

OPINIONS BELOW

The opinion of the court of appeals is reported at 707 F.3d 437, and reprinted in the Appendix ("App.") at 1a. The opinion of the district court granting summary judgment is reported at 2011 WL 665321. It is reprinted at App. 30a.

JURISDICTION

The court of appeals entered judgment on January 9, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e(k), is reprinted at App. 84a.

STATEMENT OF THE CASE

A. This case involves Petitioner Peggy Young's claim that Respondent UPS violated the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). Congress enacted the PDA to overturn this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976). *See Newport News Shipbuilding & Dry Dock Co.* v. *E.E.O.C.*, 462 U.S. 669, 670 (1983). *Gilbert* held that pregnancy discrimination is not sex discrimination for purposes of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and that an employer's disability insurance plan was "facially

nondiscriminatory" when it provided benefits for nonoccupational sickness or accidents but not for pregnancy. *Gilbert*, 429 U.S. at 138. The PDA responded to *Gilbert* by adding a subsection to Title VII that provides that (1) "[t]he terms 'because of sex' or 'on the basis of sex'" include "because of pregnancy, childbirth or related medical conditions" and (2) "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

B. Respondent UPS hired Petitioner Young in 1999; in January 2002, she began working as a part-time, early-morning "air driver." App., *infra*, at 4a, 31a. [1] In that job, Young was responsible for "meet[ing] a shuttle from the airport bearing letters and packages for immediate delivery" and delivering them by 8:30 that morning. *Id.* at 4a–5a, 32a–33a. "Young typically finished her work responsibilities by 9:45 or 10 in the morning, and then proceeded to her second job at a flower delivery company." *Id.* at 5a, 33a. Because "[a]ir delivery is more expensive by weight than ground delivery," air drivers "often carr[y] lighter letters and packs, as opposed to heavier packages." *Id.* at 31a. Although UPS's list of essential job functions purports to require air drivers to be able to "lift, lower, push, pull, leverage and manipulate" letters and packages "weighing up to 70 pounds" and to "[a]ssist in moving packages weighing

[1] Because this case arises out of the district court's grant of summary judgment to UPS, all facts in the record must be viewed, and all reasonable inferences drawn, in favor of Young as the nonmoving party. *See Crawford* v. *Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 274 (2009).

up to 150 pounds," *id.* at 5a, 31a–32a, these lifting requirements were not a significant part of Young's day-to-day job: "[P]ackages heavier than 20 pounds were infrequent, she was able to use a hand truck, and other employees could and sometimes did take heavy packages for her." *Id.* at 32a (citations omitted).

In July 2006, Young sought, and UPS granted, a leave of absence so that she could undergo a round of *in vitro* fertilization. App., *infra*, at 5a. The round was successful, and Young became pregnant. *Id.* at 5a, 39a. In October 2006, Young gave her supervisor and UPS's occupational health manager a note from her midwife recommending that she not lift over twenty pounds during her pregnancy. *Id.* at 5a–6a, 40a. Young explained that she wanted to return to work, and "that she was willing to do either light duty or her regular job." App., *infra*, at 5a. The manager explained that "UPS offered light duty for those with on-the-job injuries, those accommodated under the ADA, and those who had lost [Department of Transportation] certification, but not for pregnancy," and that "UPS policy did not permit Young to continue working as an air driver with her twenty-pound lifting restriction." *Id.* at 6a–7a. In November, Young spoke to UPS's division manager, who "told her she was 'too much of a liability' while pregnant and that she 'could not come back into the [facility in which she worked] until [she] was no longer pregnant.'" *Id.* at 8a. As a result, Young was required to go on an extended, unpaid leave of absence, during which she lost her medical coverage. *Id.* She did not return to work until June 2006, just short of two months after she gave birth. *Id.* at 43a–44a.

C. By its own admission, UPS offers work accommodations to three categories of employees. First, the collective bargaining agreement that covered Young "provides temporary alternative work ('TAW') [also referred to as "light-duty" work] to employees 'unable to perform their normal work assignments due to an *on-the-job-injury*.'" App., *infra*, at 3a–4a (emphasis in Court of Appeals' opinion) (quoting the Collective Bargaining Agreement ("CBA")). But UPS also accommodates employees who acquire injuries and medical conditions off the job. Thus, the second category of employees that UPS accommodates consists of workers with "a permanent impairment cognizable under the [Americans with Disabilities Act]." *Id.* at 4a. And the third category consists of drivers who are ineligible for Department of Transportation ("DOT") certification to drive a commercial motor vehicle. *Id.* at 4a, 34a. An employee might lose DOT eligibility for any number of reasons, including vision impairments, high blood pressure, diabetes, sleep apnea, and impairments of the arm or legs. *See* 49 C.F.R. §§ 391.41(b), 391.43; R. 76, attach. 20 at 21–24. Disqualifying conditions like these can arise from diseases contracted outside of work, or even from out-of-work sports injuries. *See* R. 76, attach. 20 at 64. UPS offers drivers who are ineligible for DOT certification what it calls an "inside job." App., *infra*, at 4a. Such jobs "often involve[] heavy lifting," *id.*, but they do not always; when drivers have acquired injuries that have rendered them unable to lift, UPS has assigned them to inside jobs that do not require heavy lifting. R. 76, attach. 21 at 5–11 (driver who had a stroke and kidney disease assigned to clerk's job answering phone calls); R. 76, attach. 18 at 44–50,

61 (driver with ankle injury acquired outside of the workplace assigned to scan but not lift packages). But UPS refuses to offer such accommodations to workers who cannot lift because they are pregnant. App., *infra*, at 6a–7a, 35a.

D. After exhausting her remedies with the Equal Employment Opportunity Commission ("EEOC"), Young filed this lawsuit in October 2008 in the United States District Court for the District of Maryland. App., *infra*, at 8a, 44a. The complaint alleged, *inter alia*, that UPS violated the PDA by failing to provide Young the same accommodations as it provided to nonpregnant employees who were similar in their ability to work. *Id.* at 8a–9a. In February 2011, the district court granted summary judgment to UPS. *Id.* at 9a. The court concluded that UPS's determination not to accommodate Young's lifting restriction turned on "gender-neutral criteria," because UPS accommodates "only drivers (1) who suffered on-the-job injuries; (2) who were disabled under the Americans with Disabilities Act; or (3) [who] lost their DOT certification to drive." *Id.* at 56a. Because this policy was "gender-neutral," the district court concluded that it did not constitute direct evidence of discrimination. *Id.* Nor could it support an inference "that the employer has animus directed *specifically* at pregnant women," which the court thought necessary to support a prima facie case under the analysis of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). *See id.* at 61a.

The Fourth Circuit affirmed. *See* App., *infra*, at 3a. The court concluded that "UPS ha[d] crafted a pregnancy-blind policy" by "limiting accommodations to those employees injured on the job, disabled as defined under the ADA, and stripped of their DOT

certification." *Id.* at 18a. Although Young had argued that UPS's limitation of accommodations to individuals in those three categories violated the PDA's requirement that pregnant women "shall be treated the same" as nonpregnant employees "similar in their ability or inability to work," 42 U.S.C. § 2000e(k), the Fourth Circuit held that the statute's "shall be treated the same" language "does not create a distinct and separate cause of action." *Id.* at 20a–21a. A contrary holding, the court concluded, would "imbue the PDA with a preferential treatment mandate that Congress neither intended nor enacted." *Id.* at 23a. The Fourth Circuit thus felt "compelled to disagree with" the Sixth Circuit's earlier decision in *Ensley-Gaines* v. *Runyon*, 100 F.3d 1220 (6th Cir. 1996), which had adopted the argument that Young pressed below. *See id.* at 23a.

Finally, the Fourth Circuit concluded 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." App., *infra*, at 27a. Unlike an individual with an ADA-qualifying disability, Young's limitation "was temporary and not a significant restriction on her ability to perform major life activities." *Id.* Unlike "employees guaranteed an inside job or light duty under the CBA provision for drivers who have lost DOT certification," there was "no legal obstacle" preventing Young from working—and unlike at least some of those drivers, who "maintained the ability to perform any number of demanding physical tasks," Young "labored under an apparent inability to perform tasks involving

lifting." *Id.* at 27a–28a (footnote omitted) (internal quotation marks omitted). Finally, the court concluded that "Young 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.

Based on these rulings, the Fourth Circuit agreed that Young had presented neither direct evidence of pregnancy discrimination, nor even a prima facie case of such discrimination. *See id.* at 24a, 29a.

REASONS FOR GRANTING THE PETITION

The question presented is exceptionally important. As the General Counsel of the EEOC recently observed, "[d]iscrimination against pregnant women and caregivers potentially affects every family in the United States." *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities: Meeting of the U.S. Equal Employment Opportunity Commission* (Feb. 15, 2012) (statement of P. David Lopez, General Counsel).[2] And the EEOC has recognized that the problem is not merely a potential one but an actual one; it filed more than 260 pregnancy discrimination suits in the ten fiscal years preceding 2012. *See id.* Denial of workplace accommodations to pregnant workers in circumstances in which other employees receive them is a particularly common fact pattern. *See id.* (statement of Sharon Terman) ("[L]ow-wage

[2] *Available at* http://www.eeoc.gov/eeoc/meetings/2-15-12/transcript.cfm.

pregnant women are routinely denied modest workplace accommodations that would enable them to keep working while maintaining healthy pregnancies."); *id.* (statement of Emily Martin) (failure to provide "slight job modifications" is "today one significant reason why pregnant women lose their jobs"); *id.* (statement of Joan Williams) ("[L]ifting restrictions today are playing the same role in pushing women out of the workplace that high school education requirements played in pushing African-Americans out of the workplace some decades ago.").

The Fourth Circuit's resolution of that exceptionally important question demands this Court's review. By holding that UPS is not required to provide workplace accommodations to a pregnant woman, even though the company provides those accommodations for three categories of workers "similar in their ability or inability to work," the court disregarded the plain statutory text, 42 U.S.C. § 2000e(k). The Fourth Circuit also disregarded this Court's and the EEOC's prior interpretations of that text, as well as the legislative history of the Pregnancy Discrimination Act. Indeed, the court's holding that "pregnancy-blind" rules can insulate an employer from PDA liability would render ineffective Congress's acknowledged effort to overturn *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), for the disability insurance plan at issue in *Gilbert* was "pregnancy-blind" in the same way UPS's accommodations policies are "pregnancy-blind" here. And although the Fourth Circuit noted that the three categories of workers UPS accommodates are different from pregnant workers in *other* respects, they are similar in the only respect the statutory text

makes relevant: "the[] ability or inability to work." 42 U.S.C. § 2000e(k).

The Fourth Circuit's utter disregard of the plain text of the statute, especially in resolving such an important issue, would alone be sufficient to warrant this Court's review. In addition, as numerous commentators have observed, the question presented is the subject of longstanding division within the circuits. The Fourth Circuit noted this division and expressly "disagree[d]" with a Sixth Circuit decision taking the opposite position. App., *infra*, at 23a. The Fourth Circuit's decision is also inconsistent with a decision of the Tenth Circuit, though it finds support in cases from the Fifth, Seventh, and Eleventh Circuits. This Court's intervention is necessary to resolve that disagreement.

A. The Fourth Circuit's Decision Directly Conflicts with the Text of the PDA

The summary judgment record demonstrates, and the Fourth Circuit did not deny, that UPS provided accommodations to three classes of employees: employees with work limitations acquired through on-the-job injuries; employees who have a "disability" as defined by the ADA; and employees with injuries or conditions that render them ineligible for Department of Transportation certification to drive a commercial vehicle. If an employee in one of those classes were, because of his or her condition, unable to lift more than twenty pounds, the summary judgment record indicates that UPS would accommodate that limitation. Peggy Young experienced the same lifting restriction. But although she was "similar in [her] ability or inability

to work" as employees in those classes, UPS did not treat her "the same for all employment-related purposes" as those employees. 42 U.S.C. § 2000e(k). Instead, the company denied Young's request for an accommodation. UPS therefore violated the plain, express terms of the PDA.

In denying that conclusion, the Fourth Circuit disregarded the clear statutory text—and this Court's own prior interpretations of that text.[3] The Fourth Circuit recognized that the plain language of the PDA's second clause—which provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work," 42 U.S.C. § 2000e(k)—was "unambiguous." App., *infra*, at 20a. But the court refused to read the statute's "shall be treated the same" language in accord with that unambiguous meaning. Instead, the Fourth Circuit believed it necessary "to reconcile" that plain meaning with "language in the [statute's]

---

[3] The Fourth Circuit also disregarded the Equal Employment Opportunity Commission's interpretation of the PDA. *See* 29 C.F.R. Pt. 1604 App. ¶ 5 ("If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function."); *E.E.O.C.* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1995–96 (10th Cir. 2000) (EEOC argued that an employer violated the PDA by providing work accommodations to employees injured on the job, an employee suffering endometriosis, and an employee with a knee injury from a car accident, while denying the same accommodations to pregnant workers). As the view of the agency that enforces Title VII and the PDA, this interpretation is "entitled to a measure of respect" under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *See Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008).

first clause," which the court read as "suggesting the PDA simply expands the category of sex discrimination (without otherwise altering Title VII)." *Id.*

But nothing in the PDA's first clause requires a court to work to reconcile it with the second—much less to "reconcile" the two clauses in a way that departs from the second clause's plain and unambiguous meaning. The PDA's first clause provides, simply, that in Title VII "[t]he 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." 42 U.S.C. § 2000e(k). There is nothing in that text that detracts from the plain meaning of the second clause—that if an employer accommodates nonpregnant employees who are "similar in their ability or inability to work" as pregnant employees, it must "treat[]" those pregnant employees "the same" by providing them the same accommodations. Indeed, this Court has recognized that "'[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.'" *Int'l Union* v. *Johnson Controls*, 499 U.S. 187, 204–05 (1991) (quoting *California Fed. Sav. & Loan Ass'n.* v. *Guerra*, 479 U.S. 272, 297 (1987) (White, J., dissenting)).

The Fourth Circuit held that Young was not similar to an employee with a twenty-pound lifting restriction caused by an ADA-qualifying disability, an on-the-job injury, or an injury or condition that disqualifies a driver from DOT certification. The court believed that such employees would not be

relevant comparators for PDA purposes, because they would receive accommodations pursuant to a "neutral, pregnancy-blind policy." App., *infra*, at 18a, 27a. By that, the court apparently meant that UPS would not deny accommodations to pregnant workers if they *also* had ADA-qualifying disabilities, on-the-job injuries, or DOT-disqualifying conditions. But that ruling disregards the plain text of the PDA. The statute does not ask *why* an employer refused to give a pregnant worker an accommodation that it extended to a nonpregnant employee; it simply asks whether the pregnant employee has been "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).

Far from applying the statutory text, the Fourth Circuit's "neutral, pregnancy-blind policy" rule is more consistent with this Court's analysis in *General Electric Co.* v. *Gilbert*, *supra*—the case Congress expressly sought to *overturn* by adopting the PDA. *See Newport News Shipbuilding*, 462 U.S. at 676 (concluding that "Congress, by enacting the Pregnancy Discrimination Act, not only overturned the specific holding in *General Electric* v. *Gilbert*, but also rejected the test of discrimination employed by the Court in that case") (citation omitted). The Court's opinion in *Gilbert*, after all, held that an employer's failure to cover pregnancy in its disability insurance plan was "facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.'" *Gilbert*, 429 U.S. at 138 (quoting *Geduldig* v. *Aiello*, 417 U.S. 484, 496–97 (1974)). This, of course, is exactly the same sense in which UPS's denial of

accommodations to Young was "neutral" and "pregnancy-blind"—there is no injury or condition for which nonpregnant workers are accommodated and pregnant workers are not. Indeed, the disability insurance plan at issue in *Gilbert* was "pregnancy-blind" under the same analysis. That plan provided both pregnant and nonpregnant workers coverage for "nonoccupational sickness or accident." *Id.* at 128. It simply failed to provide coverage for what the Court called the "*additional* risk" of pregnancy itself. *Id.* at 139. But, the Court concluded, "the failure to compensate [pregnant women] for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks." *Id.*

As this Court has recognized, when Congress enacted the PDA "it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision." *Newport News Shipbuilding*, 462 U.S. at 678. And this Court has explained that the PDA's second clause in particular "was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied." *California Fed.*, 479 U.S. at 285. By reviving *Gilbert*'s "facially nondiscriminatory" rationale, the Fourth Circuit's "neutral, pregnancy-blind policy" rule utterly subverts both the statutory text and expressed congressional intent.

The Fourth Circuit's disregard of the statutory text comes across particularly clearly when one examines the reasons the court gave for refusing to compare Young with the categories of employees whom UPS accommodates. The court refused to compare Young's treatment with that of employees with ADA-qualifying disabilities, because "her lifting

restriction is temporary and not a significant restriction on her ability to perform major life activities." App., *infra*, at 27a. Similarly, the court refused to compare Young's treatment with that of employees who lost DOT certification, because those employees face a legal obstacle to driving. *Id.* at 27a–28a.[4] But the *duration* of Young's restriction, its effect on *other* life activities, or the legal versus physical *nature* of the restriction do not answer the question the PDA asks: whether Young is "similar in the[] ability or inability *to work*" to employees who receive more favorable treatment, 42 U.S.C. § 2000e(k) (emphasis added).[5]

---

[4] In fact, the loss of DOT certification would present no legal obstacle for the many UPS drivers, like Ms. Young, who drive minivans or small trucks, since these drivers are not *legally* required to possess commercial driver's licenses. This requirement is imposed pursuant to UPS policy, not law. *See Bates* v. *United Parcel Service, Inc.*, 511 F.3d 974, 983 (9th Cir. 2007) (en banc). But even leaving aside this factual issue, the Fourth Circuit's ruling cannot be squared with the statutory text.

[5] The PDA's legislative history reinforces the text's plain meaning. The Senate report explained that the key question for employers under the statute would be pregnancy's "functional comparability to other conditions," and that "the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work." S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977). It concluded that "[p]regnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working." *Id.* And the House report addressed the precise situation of this case. It stated that "[t]he 'same treatment' " required by the statute "may include employer practices of

Young satisfies this test. Where an employee is unable to lift more than twenty pounds because of an ADA-qualifying disability or an injury that renders him ineligible for DOT certification, the summary judgment record indicates, UPS will accommodate that employee. But it refused to accommodate Young, even though she was "similar in the[] ability or inability to work." 42 U.S.C. § 2000e(k).

The Fourth Circuit's disregard of the statute is, if anything, even more apparent in its refusal to consider the accommodations that UPS concededly provides to workers injured on the job. The court's reason for that refusal was entirely tautological: "Finally, Young 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." App., *infra*, at 28a. But while Young may not be similar to such employees in the *source* of her inability to work, that is not the relevant question under the statutory text. The question is whether she is similarly able or unable to work as employees who receive accommodations for their on-the-job injuries. *See Johnson Controls*, 499 U.S. at 204 (holding that the PDA protects pregnant and potentially pregnant women who are "as capable of doing their jobs as their male counterparts"). Young was at least as able to work as those employees, and the Fourth Circuit did not deny that fact. Its refusal to compare Young to those employees flies in the face of the statute.

---

transferring workers to lighter assignments," but that such practices must be "administered equally for all workers *in terms of their actual ability to perform work*." H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 5 (1978) (emphasis added).

Contrary to the Fourth Circuit's view, reading the PDA in accord with its plain text would not create a "preferential treatment mandate." App., *infra*, at 23a. To the contrary, it would merely guarantee the equal treatment the statute demands. It would simply require an employer that accommodates nonpregnant employees' work limitations to do the *same* for pregnant workers who are just as able to do the job. The Fourth Circuit's decision, by contrast, authorizes employers to treat pregnant workers *worse* than they treat other employees who are no more capable of doing the job. That holding cannot be reconciled with the text of the statute. Because the Fourth Circuit disregarded this Court's pronouncement that "the PDA means what it says," *Johnson Controls*, 499 U.S. at 211, this case demands the Court's review.

B. There is Longstanding Disagreement in the Circuits Regarding the Question Presented

Numerous commentators have noted the longstanding division in the lower courts regarding the question presented.[6] Indeed, the Fourth Circuit

---

[6] *See* Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 482–83 (2011) (describing a "circuit split" between the Tenth and Sixth Circuits, on the one hand, and the Eleventh and Fifth Circuits, on the other); Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 191 (2004) ("Circuit courts are divided as to whether the precise comparison should be to employees similarly situated in their ability or inability to work regardless of the source of their injuries or to only those similarly abled employees suffering from nonoccupational injuries."); Jamie L. Clanton, Note, *Toward Eradicating*

itself noted the division and expressly "disagree[d]" with the Sixth Circuit's earlier decision to allow a similar PDA claim to proceed in *Ensley-Gaines* v. *Runyon*, 100 F.3d 1220 (6th Cir. 1996). *See* App., *infra*, at 23a. The Sixth Circuit in *Ensley-Gaines* concluded that, "instead of merely recognizing that discrimination on the basis of pregnancy constitutes unlawful sex discrimination under Title VII," the PDA "provided additional protection to those 'women affected by pregnancy, childbirth or related medical conditions' by expressly requiring that employers provide the same treatment of such individuals as provided to 'other persons not so affected but similar in their ability or inability to work.'" *Ensley-Gaines*, 100 F.3d at 1226 (quoting 42 U.S.C. § 2000e(k)). This conclusion, of course directly conflicts with the Fourth Circuit's holding that the PDA must be read merely as "expand[ing] the category of sex discrimination (without otherwise altering Title VII)." App., *infra*, at 20a.

The Sixth Circuit expressly rejected a rule similar to the one the Fourth Circuit applied here, "that a plaintiff [must] demonstrate that the

---

Pregnancy Discrimination at Work: Interpreting the PDA to 'Mean What it Says,' 86 IOWA L. REV. 703, 707 (2001) (stating that "[d]espite the Supreme Court's declaration in 1991 that 'the PDA means what it says,' there has been much confusion in lower courts as to how the PDA should be interpreted," and specifically identifying the dispute regarding the "shall be treated the same" language); Jessica Carvey Manners, Note, *The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 66 OHIO ST. L.J. 209, 210–11 (2005) ("The Federal Circuits differ substantially in their approaches, and the United States Supreme Court has yet to identify a class of employees similarly situated to pregnant workers.").

employee who received more favorable treatment be similarly situated *in all respects*." *Ensley-Gaines*, 100 F.3d at 1226 (emphasis added) (internal quotation marks omitted). Instead, following the plain statutory text, the Sixth Circuit held that a PDA plaintiff "need only demonstrate that another employee who was similar in her or his ability or inability to work received the employment benefits denied to [the plaintiff]." *Id.* Again in direct conflict with the Fourth Circuit, the Sixth Circuit held that the accommodations the employer gave to workers injured on the job must be considered in the PDA analysis. *See id.* Despite obvious differences between pregnant workers and workers injured on the job, the Sixth Circuit concluded that those differences did not pertain "to an employee's ability or inability to work, as provided in the PDA." *Id.*[7]

The Fourth Circuit's decision is also inconsistent with the Tenth Circuit's decision in *E.E.O.C.* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000). In *Horizon/CMS*, the EEOC sued on behalf of pregnant nursing assistants who sought accommodations to their employer's lifting requirements. The employer denied their requests on the ground that it provided accommodations only to employees whose limitations resulted from an on-

[7] The Sixth Circuit subsequently said that *Ensley-Gaines* "primarily dealt with whether a prima facie case had been established." *Reeves* v. *Swift Transp. Co.*, 446 F.3d 637, 641 & n.1 (6th Cir. 2006). But even if *Reeves* is read as confining *Ensley-Gaines* to the prima facie context, *Ensley-Gaines* still conflicts with the decision here, as the Fourth Circuit held that Young did not even make out a prima facie case. *See* App., *infra*, at 25a–29a. In this respect, it is notable that the Fourth Circuit felt compelled to expressly disagree with, and not merely distinguish, *Ensley-Gaines*.

the-job injury. *See id.* at 1189–90. Because the EEOC identified two instances in which the employer had accommodated nonpregnant employees whose limitations did *not* result from on-the-job injuries, the court did not ultimately decide whether an employer that uniformly limited accommodations to such injuries could be liable under the PDA. *See id.* at 1195–96. But it did make two key rulings that are directly inconsistent with the Fourth Circuit's decision here.

First, unlike the Fourth Circuit, the Tenth Circuit did not ask why the employer had accommodated the two nonpregnant employees who had no on-the-job injury. The Tenth Circuit treated it as sufficient that the employer had accommodated those employees, whatever the reason. *See id.* at 1197 & n.8. Had the Fourth Circuit applied the same analysis, it could not have disregarded the accommodations UPS provides to workers with ADA-qualifying disabilities or DOT-disqualifying conditions. Second, where the Fourth Circuit concluded that UPS's on-the-job injury policy was a "neutral, pregnancy-blind policy" that prevented Young from establishing even a prima facie case of discrimination, *see* App., *infra*, at 27a, the Tenth Circuit explicitly said that "[e]vidence that pregnant women were treated differently from other temporarily-disabled employees" is sufficient at the prima facie stage. *Horizon/CMS*, 220 F.3d at 1195 n.7. The Tenth Circuit explained that if a plaintiff were, at that point in the analysis, "compared only to non-pregnant employees injured off the job," her case would be improperly "'short circuited' at the prima facie stage." *Id.* That conclusion directly contradicts the Fourth Circuit's holding here.

To be sure, the Fourth Circuit's decision accords in significant respects with rulings of the Fifth, Seventh, and Eleventh Circuits—though none of those cases went so far as to hold, as the lower court did here, that an employer that accommodates employees who lose DOT certification need not accommodate similarly impaired pregnant workers. *See Serednyj* v. *Beverly Healthcare, LLC*, 656 F.3d 540, 548–49 (7th Cir. 2011) (holding that there was no PDA violation where employer accommodated employees injured on the job and those with ADA-qualifying disabilities but not pregnant workers); *Spivey* v. *Beverly Enters., Inc.*, 196 F.3d 1309, 1313 (11th Cir. 1999) ("[A]n employer does not violate the PDA when it offers modified duty solely to employees who are injured on the job and not to employees who suffer from a non-occupational injury."); *Urbano* v. *Cont'l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998) ("As long as pregnant employees are treated the same as other employees injured off duty, the PDA does not entitle pregnant employees with non-work-related infirmities to be treated the same under Continental's light-duty policy as employees with occupational injuries."), *cert. denied*, 525 U.S. 1000 (1998).

Like the Fourth Circuit's decision here, two of these cases expressly disagreed with the Sixth Circuit's decision in *Ensley-Gaines*. *See Spivey*, 196 F.3d at 1313 n.2; *Urbano*, 138 F.3d at 207–08. And like the Fourth Circuit's decision, each of these cases blessed the denial of accommodations based on "pregnancy-blind" rules and thus disregarded both the statutory text and Congress's acknowledged

intent to overturn *Gilbert*.[8] This Court's intervention is necessary to resolve the disagreement in the circuits and to reaffirm that the PDA should be read in accordance with its plain text.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

/Samuel R. Bagenstos/

SHARON FAST GUSTAFSON
4041 N. 21st St.
Arlington, VA 22207
(703) 527-0147
sf.gustafson@verizon.net

SAMUEL R. BAGENSTOS
Counsel of Record
MICHIGAN CLINICAL LAW PROGRAM
625 S. State St.
Ann Arbor, MI
(734) 647-7584
sambagen@umich.edu

Counsel for Petitioners

APRIL 8, 2013

[8] *See Serednyj*, 656 F.3d at 548–49 (holding that employer's policy limiting accommodations to on-the-job injuries and ADA-qualifying disabilities "is 'pregnancy-blind,' and therefore valid"); *Spivey*, 196 F.3d at 1312–13 (holding that requiring employer that accommodates on-the-job but not off-the-job injuries to accommodate limitations arising from pregnancy would impermissibly "require that employers give preferential treatment to pregnant employees"); *Urbano*, 138 F.3d at 206–07 (finding it dispositive that "Continental treated Urbano in exactly the same way it would have treated any other worker who was injured off the job" and concluding that finding liability would "effectuate[] discrimination contrary to the PDA—in favor of pregnant employees").