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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

REPLY BRIEF

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UPS spends the first quarter of its brief, after rearguing the lack of a circuit split, addressing such matters as: how the Postal Service treats *its* employees; the possibility that other recent statutes might provide a remedy for people like Ms. Young; and the company's eleventh-hour announcement that it will in the future accommodate pregnant drivers. UPS Br. at 12-25. As to that last point, we note that UPS insisted at the petition stage that providing such accommodations would violate its collective bargaining agreement (Br. in Opp. 4; UPS Supp. Br. 8-9) – a position it has now wisely abandoned. UPS's new policy also undermines the company's argument that pregnancy accommodations are uniquely burdensome (UPS Br. 54).[1] But these matters are a mere sideshow.

This case has always been, first and foremost, about the statutory text. The Pregnancy Discrimination Act contains two clauses. The first, which provides that "[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), simply prohibits employers from singling out pregnancy for disadvantageous treatment. The second clause goes further.

[1] Seemingly anticipating defeat in this Court, UPS argues (UPS Br. 32) that "[a]t a minimum," it "is not subject to punitive damages liability." But the lower courts never reached the issue of what damages are available, and it is not included in the question on which this Court granted certiorari. It should be addressed on remand.

That clause, separated from the first by a semicolon and introduced by the word "and," 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." *Id.*

The second clause requires an employer to give the same accommodations to an employee with a pregnancy-related work limitation as it would give *that employee* if her work limitation stemmed from a different cause but had a similar effect on her ability to work. UPS's contrary position treats the PDA's second clause as a nullity, despite this Court's prior refusal "to read the second clause out of the Act." *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 205 (1991). The company's position disregards Congress's acknowledged purpose to ensure that "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job." *Id.* at 204.

If Ms. Young's lifting restriction had stemmed from an on-the-job injury, the company would have allowed her to continue working without lifting heavy packages. See p. 21-22, *infra*. And though the company proceeds as if the on-the-job/off-the-job distinction were the only one at play here, the summary judgment record contains ample evidence that UPS would have similarly accommodated Ms. Young if her lifting restriction had stemmed from an *off-the-job injury or condition* that constituted an ADA disability or that

made her ineligible for DOT certification. See p. 22-25, *infra*. Tellingly, UPS's brief does not identify a *single non-pregnant driver* with a similar lifting restriction to Ms. Young's whom the company failed to accommodate, while we have identified many such drivers whom UPS did accommodate. And, indeed, a shop steward testified that pregnancy-related requests were the only accommodations requests that triggered resistance at the company. J.A. 504.

Because UPS failed to treat Ms. Young "the same" as it treated these three sizeable classes of drivers who were "similar in their ability or inability to work," 42 U.S.C. § 2000e(k), the company violated the PDA. The Fourth Circuit's judgment must be reversed.

I. UPS's Reading Conflicts with the Plain Statutory Text

A. UPS's Reading Treats the Second Clause as a Nullity

UPS consistently treats the PDA's second clause as if it has no independent effect. UPS states that "[a]ll that is 'plain' from the statutory text * * * is that it clarifies that traditional disparate-treatment principles apply to pregnant women," UPS Br. 27; that the second clause merely "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," *id.*; and that "the two halves merely define and clarify that the

PDA prohibits discrimination '*because of* pregnancy,'" *id.* at 34 (emphasis in UPS Br.).

But if that is all the PDA meant, the statute would have stopped after the first clause. The first clause explicitly defines "because of sex" to include "because of or on the basis of pregnancy," 42 U.S.C. § 2000e(k). Nothing more was needed to "clarif[y] that traditional disparate-treatment principles apply to pregnant women" or that "an employer must disregard the fact that an employee is pregnant and treat her the same way it treats other similarly situated employees."

The PDA's second clause – introduced by the word "and," which itself suggests that additional protection, and not mere clarification, is coming – does more than restate the requirements of the first clause. Rather, it makes clear that in a pregnancy-based sex discrimination claim the relevant comparison is between pregnant workers and others similar in the ability to work. As we showed in our opening brief (at 20-30), the second clause prohibits an employer from treating temporary disabilities caused by pregnancy less well than it treats temporary disabilities that have other causes but the same effect on "the ability or inability to work," 42 U.S.C. § 2000e(k) – even if the employer acts pursuant to a supposedly pregnancy-neutral policy that excludes disabilities caused by pregnancy.

Indeed, *General Electric v. Gilbert*, 429 U.S. 125 (1976) – the case Congress sought to overturn in the

PDA – was itself a case in which the employer acted pursuant to a supposedly pregnancy-neutral policy that excluded disabilities caused by pregnancy. GE's disability insurance plan covered any employee "who bec[a]me totally disabled as a result of a nonoccupational sickness or accident." *Id.* at 128. Because pregnancy is neither a sickness nor an accident, that plan did not cover an employee whose disability resulted from pregnancy alone. See *id.* at 136 (noting district court's findings that pregnancy "is not a 'disease' at all, and is often a voluntarily undertaken and desired condition"). If pregnant workers, while in the company's active employ, *also* experienced a sickness or accident that made them unable to work, GE provided them disability benefits.

GE's refusal to give disability benefits to pregnant workers because they had not experienced a sickness or accident thus was just as much a "neutral, pregnancy-blind policy" (UPS Br. 12), as was UPS's refusal to accommodate Ms. Young because she had not experienced an on-the-job injury, an ADA disability, or a DOT-disqualifying condition. In both cases, the employer's "pregnancy-neutral" definition, by its terms, excluded "women disabled as a result of pregnancy," *Gilbert*, 429 U.S. at 138, but it did not exclude pregnant employees who had another source of disability.

UPS acknowledges that the second clause prohibits employers from defining eligibility for benefits or accommodations in seemingly neutral ways that exclude pregnant women. UPS notes that, without

that clause, "any employer still could claim, as General Electric had done, that it was treating pregnancy differently from all other nonoccupational conditions, not 'because of pregnancy,' but because pregnancy was 'voluntary' or 'temporary' or not a 'disease' (or all of the above)." UPS Br. 30. The company suggests, however, that the clause applies only when pregnancy is the *sole* condition an employer excludes. See *id.* at 29-30 (characterizing GE's plan as providing insurance for all disabling conditions except pregnancy).

But this argument undermines the entire foundation of UPS's position. UPS concedes that the PDA's second clause prohibits an employer from providing benefits for every nonoccupational condition except pregnancy – even when the employer (a) does so pursuant to pregnancy-neutral criteria like providing benefits only to "diseases" or "injuries"; and (b) does not exclude pregnant women *who also satisfy those pregnancy-neutral criteria* from those benefits. If that is true, then the second clause does not permit an exception for "pregnancy-neutral" rules, and UPS's entire position collapses.

Moreover, the summary judgment record contains ample evidence that the three classes of work limitations UPS accommodates, taken together, account for virtually all of the non-pregnant UPS drivers with work limitations similar to Ms. Young's. Opening Br. 30-32. Again, UPS's briefing in this Court does not identify a single non-pregnant driver with a similar restriction whom UPS refused to accommodate. Even if Ms. Young was required to prove

that pregnancy was the only condition UPS excluded from accommodation, she satisfied her summary judgment burden.

Finally, UPS misreads *Gilbert*. Although the *dissenters* in that case characterized the GE plan as one that covered every source of disability except pregnancy, see *Gilbert*, 429 U.S. at 152 (Brennan, J., dissenting); *id.* at 161 (Stevens, J., dissenting), the majority never accepted that characterization, and the plan itself defined its eligibility based on the neutral terms of "sickness" and "accident." To be sure, this Court has noted that the PDA's congressional supporters endorsed the *legal theory* of the *Gilbert* dissents. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-679 (1978). But nothing in the statute expresses any view about the majority's characterization of the *facts* in that case.

Far from reading the statute "as a whole," (UPS Br. 33, internal quotation marks omitted), UPS's reading fails to give effect to the PDA's second clause. If Congress had intended to protect employers who acted pursuant to "pregnancy-blind" policies, it would have stopped after the first clause. Or it would have used language similar to the provision of the Equal Pay Act that explicitly protects pay distinctions "based on any other factor other than sex," 29 U.S.C. § 206(d)(1)(iv). But Congress specifically *rejected* application of the Equal Pay Act's defenses to the PDA. See *AT&T Corp. v. Hulteen*, 556 U.S. 701, 709 n.3 (2009) (noting that Congress specifically exempted the PDA from the Bennett Amendment, which applied Equal Pay Act defenses to Title VII). By

including the second clause, and forgoing the Equal Pay Act model, the PDA forecloses UPS's reading.

B. UPS's Other Statutory Arguments Lack Merit

1. UPS argues that because the PDA appears in the "'definitional section'" of Title VII, it can "'proscribe[ ] no conduct.'" UPS Br. 41 (quoting *Carr v. United States*, 560 U.S. 438, 450 n.6 (2010)). But *Carr* said only that the definitional section *at issue in that case* "merely elucidate[d] the meaning of certain statutory terms and proscribe[d] no conduct." 560 U.S. at 450 n.6. The PDA is crucially different. Although the PDA amended the definitional section of Title VII, its second clause does not simply define words or phrases. Rather, it speaks in plainly prescriptive terms: "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). This language specifically identifies the conduct that constitutes forbidden pregnancy discrimination. UPS can point to nothing that permits the Court to disregard the PDA's plainly prescriptive phrasing.

Indeed, the year before Congress enacted the PDA, this Court read an earlier amendment to Title VII's definitional section as not merely defining terms but also proscribing conduct. Section 701(j), the subsection that immediately precedes the PDA, provides

that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977), the Court held that Section 701(j) "ma[d]e it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."[2]

UPS seeks to distinguish *Hardison*, because Section 701(j) requires reasonable accommodation while the PDA does not. UPS Br. 41-42. But UPS conflates two distinct questions. The first is whether definitional provisions can impose substantive obligations. This Court's treatment of Section 701(j) in *Hardison* – decided while the PDA was pending in Congress – shows they can. *Hardison* thus fully

[2] UPS suggests (Br. 42) that *Hardison* read Section 701(j) as not requiring reasonable accommodation, even in the context of religion. That is incorrect. The Court found "the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship," to be "clear." *Hardison*, 432 U.S. at 75. The Court simply found that TWA had satisfied that obligation. See *id.* at 76.

disposes of UPS's argument that definitional sections cannot proscribe conduct.

The second question is *what* are the substantive obligations the relevant provision imposes. Section 701(j) imposes a reasonable accommodation requirement in the context of religion. The PDA does not impose an independent reasonable accommodation requirement – and we have never contended that it does. Rather, the plain terms of the PDA provide that an employer must accommodate pregnant workers *if and only if* it accommodates others "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). That is the obligation that UPS violated here.

2. UPS asserts that it did treat Ms. Young the same as at least *some* other employees who were similar in the ability to work – those with off-the-job injuries. UPS Br. 34-35. Once again, UPS's factual premise is mistaken. The summary judgment record contains ample evidence that UPS did accommodate individuals with off-the-job injuries that were ADA disabilities or DOT-disqualifying conditions. See p. 22-25, *infra*. Indeed, the record suggests that lifting restrictions arising from pregnancy may have been the only ones UPS failed to accommodate. Opening Br. 9-10, 31-32. And again, UPS's briefing in this Court does not identify a single non-pregnant driver with a similar limitation whom it failed to accommodate.

In any event, the PDA's unqualified and general phrasing – requiring pregnant employees to be treated

the same "as other persons" similar in the ability to work, rather than "as all other persons" or "only to the extent that all other persons get the same treatment" – makes clear that when an employer accommodates workers with some conditions, it must also accommodate workers whose pregnancies impose similar limitations on the ability to work. Opening Br. 28-30. UPS's reading of "as other persons," by contrast, would permit an employer to refuse to accommodate pregnant workers even if it accommodates *nearly all* non-pregnant employees with similar work limitations, so long as it can find *one* non-pregnant employee whom it failed to accommodate. That reading, once again, reduces the PDA's second clause to all but a nullity. It is hardly a plausible reading of a statute that was intended to eliminate the treatment of pregnant women as "marginal" or "second-class" workers. See Opening Br. 18-19.

3. UPS notes that Congress has recently failed to enact legislation that would require reasonable accommodation of pregnant workers. UPS Br. 15. But Congress's failure to pass a new statute in 2012 or 2013 tells us nothing about the meaning of the PDA when it was enacted in 1978. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (internal quotation marks omitted). See also *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history, like arguments based

on antecedent futurity, should not be taken seriously, not even in a footnote."). Subsequent legislative history "is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

Moreover, there is a crucial difference between the recent pregnancy-accommodation bills and the PDA's second clause. Those recent bills would have required employers to provide reasonable accommodations to all pregnant workers, at least absent undue hardship. *E.g.*, Pregnant Workers Fairness Act, S. 942, 113th Cong., 1st Sess. § 2. Although UPS repeatedly attempts to elide the distinction, that is emphatically *not* what we read the second clause to require. As we read that clause, it requires an employer to accommodate pregnant workers only if and to the extent that it accommodates non-pregnant workers who are "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). The proposed legislation would have gone well beyond that requirement. Congress's failure to pass that legislation is especially beside the point here.[3]

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[3] UPS notes that the ADA Amendments Act will entitle at least some pregnant women to accommodations. UPS Br. 21-22. But the fact that another statute may offer protection to some pregnant women says nothing about the protections the PDA affords. And even under the ADAAA pregnancy is not an "impairment" and thus cannot be a disability. Opening Br. 28.

(Continued on following page)

4. Finally, UPS argues that any challenge to a "pregnancy-blind" rule does not fit the disparate treatment doctrine, so it must proceed, if at all, under a disparate impact theory. UPS Br. 31-33. But UPS's decision to accommodate so many conditions *except* pregnancy – conditions that have a similar effect on a driver's ability to work – was plainly intentional, as evidenced by the company's refusal to accept the Teamsters' demand to include pregnancy accommodation in the CBA. Opening Br. 9-10. See also J.A. 345-346 (UPS managers told Ms. Young that "UPS does not offer light duty for pregnancy"). That is sufficient, under the text of the PDA's second clause, to show disparate treatment.

In any event, nowhere is it written, in the United States Code or the United States Reports, that disparate treatment and disparate impact are the only two categories of Title VII claims. To the contrary, in *Hardison* this Court recognized a third category of Title VII claim – a claim that the employer failed to reasonably accommodate the plaintiff's religious observance. See *Hardison*, 432 U.S. at 75. The Court did so based on the plain text of Section 701(j), which does not cleanly fit either the disparate treatment or

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Accordingly, the ADAAA fails to reach a significant class of pregnancy cases. Similarly, that some states have adopted laws mandating pregnancy accommodation (UPS Br. 22-23) says nothing about what the PDA requires – and offers cold comfort to pregnant workers in the vast majority of states that have not adopted these laws.

the disparate impact model. The PDA's second clause, unlike Section 701(j), does not impose an independent reasonable accommodation requirement. But it does impose on employers the requirement to treat pregnant workers the same as other persons "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Under that clause, an employer who fails to provide the same treatment has violated Title VII; the employer's *reason* for doing so is irrelevant. As in *Hardison*, it is the statutory text – and not an effort to force that text into a particular doctrinal category – that should guide this Court's decision.[4]

II. Giving Full Effect to the PDA's Second Clause Will Not Have the Consequences UPS Asserts

UPS argues that the Court must disregard the PDA's second clause, because the alternative will have a host of negative consequences. Giving effect to the second clause will, in UPS's view: "mandate special treatment for pregnancy, requiring an employer to provide an accommodation to a pregnant employee if the same accommodation has ever been

[4] UPS states that, in his *Gilbert* dissent, Justice Stevens suggested that a case like this should be brought under a disparate impact theory. UPS Br. 31. However one reads his brief dissent, one thing is clear: Justice Stevens was not purporting to interpret the "shall be treated the same" language in the PDA – language that was not even proposed in Congress until *after* the *Gilbert* decision.

provided to any other employee for any reason" (UPS Br. 12); entitle pregnant workers "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" (*id.* at 13); prohibit employers from using "seniority status, union status, full-time status, executive status, and veteran status, among many others," to allocate accommodations and benefits (*id.* at 44); and entitle pregnant workers to "choose their own comparators and select from a smorgasbord of options provided to any non-pregnant employees, regardless of circumstances" (*id.* at 45). UPS is incorrect.

The PDA requires an employer to give the same accommodations to an employee with a pregnancy-related work limitation as it would give *that employee* if her work limitation stemmed from a different cause but had a similar effect on her ability to work. That is because the PDA prohibits employers from treating work disabilities caused by pregnancy any less favorably than it treats work disabilities caused by other conditions. See *Newport News Shipbuilding*, 462 U.S. at 684 ("The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions."). But the statute does not require employers to give pregnant workers all of the benefits and privileges it extends to other employees when those benefits and privileges are granted not based on the source or type of

disability but instead based on the employee's tenure or position within the company.

The EEOC takes precisely the same position. The question, as the EEOC puts it, is whether the employer "offers benefits to pregnant workers on the same terms that it offers benefits to other workers similar in their ability or inability to work." EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues § I.C.1.b. (July 14, 2014). Thus, "an employer may treat a pregnant employee the same as other employees who are similar in their ability or inability to work with respect to other prerequisites for obtaining the benefit that do not relate to the cause of an employee's limitation." *Id.* § I.A.5.

This reading is evident from the statutory text, which is necessarily premised on the employer's decision to give some employees benefits or accommodations based on the degree of "ability or inability to work." 42 U.S.C. 2000e(k). Congress crafted this language as a direct response to *Gilbert*, in which this Court blessed an employer's rule that distinguished between pregnancy-related disabilities and other disabilities based on the source of the limitation. See S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977) (stating that "this bill would prevent employers from treating pregnancy and childbirth differently from other causes of disability").

When an employer gives a non-pregnant employee a benefit or accommodation for reasons related to

the employee's rank, status, or tenure within the company – or an external criterion like veteran status (Chamber Comm. Br. 16) – the PDA does not grant pregnant employees any right to the same benefit, because the employer is not discriminating based on the source of the work limitation. And of course where a distinction based on a reason like seniority is specifically "required by" federal law (cf. UPS Br. 44), the other federal law will trump. Cf. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 421-422 (2002) (Souter, J., dissenting) (stating that Section 301 of the Labor Management Relations Act, which makes collective bargaining agreements enforceable, trumps the ADA's general requirement of reasonable accommodation).[5]

UPS is therefore simply wrong to say that, under our plain-language reading, "[i]f 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," and if "full-time management employees who have been employed for at least 15 years" receive paid leave, so too must "every pregnant employee, including brand-new, part-time

[5] UPS argues (at 43) that the PDA cannot be read to undermine what it calls the "fundamental distinction in employment law between on-the-job and off-the-job conditions." But the PDA's text includes no exception for policies favoring on-the-job injuries, and this Court lacks power to create one. See *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79-80 (1998).

hourly employees." UPS Br. 45. An employer is free to adopt policies declaring that some classes of employees are entitled to accommodations that others are not. And it is free to say that it will not provide *any* employee an accommodation that is unreasonable or imposes undue hardship. What it is *not* free to do is adopt policies declaring that some conditions trigger accommodations that pregnancy does not, at least when those conditions have a similar effect on the ability to work. In enacting the PDA, Congress barred employers from treating pregnant workers as marginal or second-class employees; it did not bar employers from erecting such distinctions between management employees and other employees.

For these reasons, UPS misses the mark by asserting that giving effect to the second clause would "transform an antidiscrimination statute into an accommodations statute" or "require this Court to treat pregnancy more favorably than any other trait protected by federal law." UPS Br. 47-48 (emphasis deleted).[6] Rather, giving effect to the second clause will simply read the PDA as this Court did in *Newport News Shipbuilding*, 462 U.S. at 684, as prohibiting

[6] UPS asserts that Young "sought an accommodation that *no* employee was entitled to." UPS Br. 49. This assertion comes too late. In the lower courts UPS argued that it was entitled to treat Ms. Young differently than workers with on-the-job injuries, *not* that a worker with an on-the-job injury would not be entitled to the accommodation she sought. In any event, the summary judgment record belies UPS's assertion. See p. 21-25, *infra*.

employers from "treat[ing] pregnancy-related conditions less favorably than other medical conditions."

III. The EEOC Has Consistently Endorsed Ms. Young's Reading of the PDA

The EEOC is the federal agency that administers and enforces Title VII. As we showed in our opening brief, the EEOC has made clear since 1979 that the PDA requires an employer "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, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc." 29 C.F.R. Pt. 1604 App. ¶ 5. Since then, the Commission has consistently adhered to that reading of the statute, in a string of pronouncements culminating in its recent enforcement guidance. Opening Br. 21-22.[7]

UPS dismisses this unbroken line of EEOC statements, made in regulatory and guidance documents, as a mere "litigating position." UPS Br. 21 (internal quotation marks omitted). But it is UPS, not

[7] UPS points (at 18) to the decision of the director of the EEOC's Office of Federal Operations (not the Commission itself) in *Webb v. Frank*, 1991 WL 1187564 (Aug. 28, 1991). But the on-the-job/off-the-job distinction was not decisive in the director's decision, as the individuals the employer accommodated there had "medical restrictions [that] were not as limiting as were appellant's." *Id.* at *2.

Ms. Young, that relies on government litigating positions. UPS points, in particular, to briefs filed by United States Attorneys' offices in three individual cases defending the Postal Service. UPS Br. 15-17. The longstanding views of the agency that administers and enforces the statute count for far more than the positions that three United States Attorneys' offices took in defending three individual cases. In any event, the litigating positions of those offices cannot trump the plain statutory text.

IV. Even if *McDonnell Douglas* Applies, Ms. Young Has Presented Sufficient Evidence to Overcome Summary Judgment

UPS argues that this Court must apply the judicially created burden-shifting approach of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). UPS Br. 50-51. But *McDonnell Douglas* "does not apply in every employment discrimination case." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002). This Court crafted *McDonnell Douglas* to solve a particular problem – to smoke out hidden intent in cases in which the plaintiff's claim required proof of discriminatory motivation. Opening Br. 47-48. But the PDA's second clause does not require proof of such motivation. UPS's PDA violation is evident on the face of its policies. The *McDonnell Douglas* analysis has no place in this case, just as it has no place in a case alleging a denial of reasonable accommodation under Section 701(j). See *Hardison*, 432 U.S. at 76-81 (applying the requirements of

Section 701(j)'s plain text, without engaging in *McDonnell Douglas* burden-shifting).

Even if *McDonnell Douglas* does apply, Ms. Young has presented sufficient evidence to defeat summary judgment. UPS argues that Ms. Young did not make out a *prima facie* case, because she was not similarly situated to the non-pregnant drivers whom the company did accommodate. UPS Br. 55-56. To a large extent, this argument rests on UPS's broader argument that a "pregnancy-blind" policy insulates it from PDA liability. UPS does, however, make a series of factual arguments. These arguments reflect a highly selective and one-sided account of the summary judgment record. As the non-moving party, Ms. Young is entitled to have the record viewed in the light most favorable to her, with all of her evidence to be believed, and all justifiable inferences drawn in her favor. See, *e.g.*, *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (*per curiam*).

First, UPS argues that Ms. Young was not similarly situated to drivers given light duty for on-the-job injuries, because "[t]hose 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." UPS Br. 55. But neither the collective bargaining agreement nor any other company document UPS provided in discovery mentions "work hardening," nor does the CBA place a time limit on light-duty work for on-the-job injuries. See J.A. 547-548. Even in her own declaration, UPS's occupational health manager said only

that light-duty work for on-the-job injuries was "generally" limited to 30 days. J.A. 569. UPS's Rule 30(b)(6) deponent also acknowledged that the 30-day period was not a "restriction" but only a "guideline" that could be extended at the discretion of the district's human resources and health and safety managers. J.A. 269. And the record contains 24 examples of bargaining-unit employees in Ms. Young's district who received Temporary Alternate Work (*i.e.*, light duty) for over 30 days for on-the job injuries – 15 of which involved periods of 40 or more days, including periods of 58, 62, 63, 73 (twice), and 510 days. See, *e.g.*, C.A.J.A. 1527-1541 (filed under seal).

Second, UPS argues that Ms. Young was not similarly situated to drivers with ADA disabilities, because her lifting restriction was temporary and did not substantially limit major life activities. UPS Br. 55. But the ADA requires employers to accommodate temporary lifting restrictions caused by conditions that constitute disabilities under the statute. Opening Br. 38-39. And the fact that Ms. Young's pregnancy did not substantially limit major life activities does not mean it was not similar in its effect on her ability to work to the ADA disabilities UPS accommodated. See *id.* at 39-40.

Third, UPS argues that Ms. Young was not similarly situated to drivers who lost their DOT certification, because "those who lost their DOT certification still needed to be able to engage in heavy lifting." UPS Br. 55-56. UPS again implicitly resolves factual disputes in its favor. UPS points to testimony

that a driver who lost her DOT certification due to a stroke was assigned to a job that required her to lift packages "over twenty-five – twenty pounds." UPS Br. 4 n.1. But the same driver testified that, when she returned from her stroke, she was assigned to a job as a clerk, in which she "[m]ade phone calls on packages that needed to be readdressed." J.A. 406. When asked, "What did you do other than making phone calls?" she answered, "That's it." *Id.* This factual dispute obviously cannot be resolved at summary judgment.

UPS also says, very generally, that "[a]ll 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." UPS Br. 4 n.1. Yet examination of the cited pages reveals ample evidence that individuals who lost DOT certification were not always required to lift heavy loads. At page 647, for example, driver Mia Lynch testified that when she "lost [her] DOT card due to high blood pressure," she was reassigned to a job where she "only scanned packages and made address corrections, and put on address labels. [She] did not have to lift the packages, but [she] did have to flip them on the belt." The testimony at page 366 that a *different* driver, Yndia Brown, was required to lift heavy packages does not contradict that statement. And at pages 448 to 449, still *another* driver, Tammy Gatton, testified that when she returned to work after an off-the-job injury, she was initially required to do all of her original job tasks. But as the surrounding pages

of her deposition make clear (pages cited in our opening brief at 9), when Ms. Gatton proved unable to perform her original job tasks without accommodation, UPS allowed her temporarily to do a job that involved scanning, but not lifting, packages. J.A. 446-452.

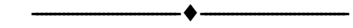
UPS also contends that Ms. Young was not similar to drivers who lost DOT certification, because she could still drive while they could not. UPS Br. 56. Even if the factual premise for UPS's argument were true (but cf. Opening Br. 45), the argument is perverse. If UPS accommodates non-pregnant drivers who cannot perform the "quintessential function" of "be[ing] able to drive a commercial truck in interstate commerce," *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 579 (1999) (Thomas, J., concurring), then the PDA requires it to accommodate pregnant drivers who *can* still perform that function.

Even under *McDonnell Douglas*, an employer's choice of a *less* qualified non-pregnant employee over a *more* qualified pregnant one would be probative of discrimination. See *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (observing that "the employer has discretion to choose among *equally qualified* candidates") (emphasis added); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-457 (2006) (*per curiam*) (plaintiffs' "evidence that their qualifications were superior to those of the two successful applicants" may "suffice, at least in some circumstances, to show pretext"). By using the phrase "similar" – not "the same" – "in their ability or inability to work," 42

U.S.C. § 2000e(k), the PDA adopts that same principle. If, as the record reflects, UPS accommodates drivers who have conditions that impose lifting restrictions and make them ineligible for DOT certification, it must treat pregnant drivers with similar lifting restrictions (but who retain DOT certification) the same.

Finally, UPS argues that Ms. Young forfeited the opportunity to establish pretext by not raising the pretext question in her petition. UPS Br. 56. But the court of appeals never reached the pretext question, so it would not have been proper to raise it in the petition. In any event, our petition-stage papers repeatedly argued that Ms. Young presented sufficient evidence of pretext. See Reply to Br. in Opp. 9 n.9; Young Supp. Br. 6-7.

As we showed in our opening brief (at 49-50), there was ample evidence of pretext. Most notably, even in its briefing before this Court UPS cannot identify a single non-pregnant driver with a similarly limiting condition to whom it denied an accommodation.



CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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