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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND A BETTER BALANCE, *ET AL.*, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Maryland is one of its regional affiliates. The ACLU, through its Women's Rights Project, has long been a leader in legal advocacy aimed at ensuring women's full equality and ending discrimination against women in the workplace, including pregnancy discrimination. The ACLU has appeared before this Court in numerous cases involving women's equality, both as direct counsel and as *amicus curiae*.

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through legislative advocacy, litigation, research, and public education, A Better Balance is committed to helping workers care for their families without risking their economic security. A Better Balance has been actively involved in advancing the rights of pregnant women in the workplace. The organization runs a legal clinic in which the discriminatory treatment of pregnant women can be seen firsthand.

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[1] The parties have lodged blanket letters of consent to the filing of *amicus* briefs in this case. No party has written this brief in whole or in part, and no one other than the *amici curiae*, their members or their counsel has made a monetary contribution to the preparation or submission of this brief.

9to5 is a national membership-based organization of women in low-wage jobs dedicated to achieving economic justice and ending discrimination. 9to5's members and constituents are directly affected by workplace discrimination, including pregnancy discrimination and poverty, among other issues. They experience first-hand the long-term negative effects of discrimination on economic well-being, and the difficulties of seeking and achieving redress. 9to5's toll-free Job Survival Hotline fields thousands of phone calls annually from women facing these and related problems in the workplace. The issues of this case are directly related to 9to5's work to end workplace discrimination and our work to promote policies that aid women in their efforts to achieve economic self-sufficiency. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their long-term economic well-being and that of their families.

The Center for WorkLife Law (WLL) at the University of California Hastings College of the Law is a national research and advocacy organization widely recognized as a thought leader on the accommodation of pregnant workers. WLL is known for its pioneering work in the area of family responsibilities discrimination and work/family conflict, and works with employers, employees, and lawyers representing both constituencies. One of WLL's most significant, ongoing projects is the Pregnancy Accommodation Working Group. This group, composed of legal scholars, leading employment litigators, and physicians, analyzes pregnancy accommodation in the workplace and the use of existing laws to obtain accommodations. WLL

has advocated for the use of the Pregnancy Discrimination Act to obtain accommodations for pregnant women who are similar in their ability to work to employees who have been accommodated pursuant to workplace injury policies, collective bargaining agreements, the Americans with Disabilities Act, and the like, which is directly at issue in this case.

Gender Justice is a non-profit law firm based in the Midwest that eliminates gender barriers through impact litigation, policy advocacy, and education. As part of its mission, Gender Justice helps courts, employers, schools, and the public better understand the roles that cognitive bias and unconscious stereotyping play in perpetuating discrimination, and what can be done to limit their harmful effects and ensure equality of opportunity for all. As part of its impact litigation program, Gender Justice acts as counsel in cases involving gender equality in the Midwest region, including providing direct representation of pregnant employees facing discrimination in the workplace. Gender Justice also participates as *amicus curiae* in cases that have an impact in the region. The organization has an interest in protecting and enforcing women's legal rights in the workplace, and in the proper interpretation of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act of 1978.

Legal Aid Society – Employment Law Center (Legal Aid) is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Since 1970, Legal Aid has represented low-wage clients in cases involving a broad range of employment-related issues, including

discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. Legal Aid has appeared before this Court in discrimination cases on numerous occasions both as counsel for plaintiffs, *see, e.g.*, *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); and *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an *amicus curiae* capacity. *See, e.g., Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), *U.S. v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Legal Aid has extensive policy experience advocating for the employment rights of pregnant women and new parents. Legal Aid has a strong interest in ensuring that pregnant women are granted the full protections of the Pregnancy Discrimination Act and other anti-discrimination laws.

The National Consumers League (NCL) is America's oldest consumer and labor organization, representing consumers and workers on workplace and marketplace issues since our founding in 1899. The issues raised in this brief are very close to NCL's mission and history. Under the direction of its first general secretary, Florence Kelley, NCL wrote and championed state minimum wage laws, got enacted the first state laws restricting child labor, and exposed scandalous working conditions for all workers, including minorities. NCL has advocated for women in the workforce since our founding. NCL

believes that vigorous enforcement of discrimination laws and other workplace employment laws is of paramount importance, especially for the millions of working women who rely on the laws to deter and remedy illegal employment discrimination.

The Southwest Women's Law Center is a legal and policy law center whose mission is to advance opportunities for girls and women in New Mexico. We collaborate with community members, organizations, attorneys, health care providers and public officials to address pregnancy fairness and accommodations for women in the workplace. We advocate for pregnant workers to ensure they are treated fairly and given accommodations when needed, and we advocate against employment practices that force pregnant workers to leave their places of employment causing them to suffer adverse economic consequences because of the loss of means to support their families.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici adopt the Statement of the case contained in the Brief for Petitioner.

Congress enacted the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, § 1, 92 Stat. 2076, codified at 42 U.S.C. § 2000e(k), to put an end to widespread practices of discrimination against women because of pregnancy. Women were routinely forced to leave the workforce when they became pregnant, with the result that women were subject, as a class, to economic disadvantages and to exclusion from the public sphere more broadly once they became mothers.

Such policies rested (and still rest) on paternalistic assumptions and outmoded stereotypes that have always been used to justify sex discrimination. To remedy this systemic discrimination, the PDA requires an employer to provide the same accommodation to pregnant workers as the employer gives to workers who are "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). This comparative remedy was necessary to address the class-based mistreatment to which women were uniquely subjected.

Policies, like Respondent's, that push pregnant workers out of the workplace when they need an accommodation that other workers receive perpetuate women's second-class status in the workforce and in society more broadly. When women are forced to leave the workplace because of pregnancy-related conditions, while other workers with similar limitations are provided light duty, women suffer the very discrimination that Congress sought to eradicate. They lose income, economic security, and benefits, including health insurance, often with devastating results. These are precisely the consequences Congress sought to avert with the passage of the PDA more than thirty-five years ago.

ARGUMENT

I. RESPONDENT'S REFUSAL TO PROVIDE PETITIONER WITH THE SAME ACCOMMODATIONS THAT OTHER UPS WORKERS RECEIVE UNDERMINES THE CENTRAL PURPOSE OF THE PDA TO ENSURE THAT WOMEN ARE NO LONGER SYSTEMATICALLY EXCLUDED FROM THE WORKFORCE BECAUSE OF THEIR PREGNANCIES.

Prior to the PDA's enactment, laws and workplace policies often forced women to stop working when they became pregnant, regardless of their capacity to work. Such policies relegated women to second-class status in the workplace and to economic disadvantage over the long term. Congress enacted the PDA to enable pregnant women to participate on an equal footing in the labor force. It did so by ensuring that pregnant women would not be treated worse than other workers who are similar in their ability or inability to work. By denying pregnant workers who are temporarily unable to perform their regularly assigned duties an accommodation that is available to other workers at UPS, the policy at issue in this case pushes pregnant women out of the workforce, undermining the purpose of the PDA and perpetuating the inequality the statute meant to address.

A. Congress Enacted The PDA To Eradicate Widespread Practices Requiring Women Who Became Pregnant To Leave The Workforce.

Congress enacted the PDA to end longstanding practices by which employers forced women out of the workplace as a matter of course when they became pregnant. These practices were based on the notions that pregnancy is incompatible with work, that a pregnant woman's proper place was at home, and that pregnancy should signal the end of a woman's working life. *See, e.g.*, 123 Cong. Rec. 7,539 (1977) (statement of Sen. Williams) (PDA intended to address "the outdated notion that women are only supplemental or temporary workers-earning 'pin money' or waiting to return home to raise children full-time"). These stereotypes implicated all women and emanated from the belief that women are, "and should remain, 'the center of home and family life.'" *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (quoting *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)).

A web of employer policies and laws defined pregnant women as incapable of working. Women were pushed out of a broad range of professions upon becoming pregnant, including the airline industry, *see Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1137 (4th Cir. 1980) (requiring that stewardesses "shall, upon knowledge of pregnancy, discontinue flying"); *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 673 (9th Cir. 1980) (same); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 363 (4th Cir. 1980) (same); teaching, *see Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 634-35 (1974) (forcing

pregnant teachers to take unpaid leave five months before they were due to give birth, with no guarantee of re-employment); *Clanton v. Orleans Parish Sch. Bd.*, 649 F.2d 1084, 1086-87 (5th Cir. 1981) (placing teachers on leave in the beginning of the sixth month of their pregnancy); insurance, *see Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146, 1155 (W.D. Pa. 1974) (requiring pregnant women either to "terminate employment or to take a leave of absence at the end of the eighth month"); utilities, *see Narragansett Elec. Co. v. R. I. Comm'n for Human Rights*, 374 A.2d 1022, 1023 (R.I. 1977) (requiring pregnant women to take leave after the fifth month of pregnancy); and the auto industry, *see EEOC v. Chrysler Corp.*, 683 F.2d 146, 147 (6th Cir. 1982) (requiring pregnant women to take leave in the fifth month of pregnancy).

When forced out of their jobs because of their pregnancies, women frequently lost benefits, including paid sick leave, medical insurance coverage, and accrual of seniority. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 127 (1977); *Harriss*, 649 F.2d at 673. Some workers also lost seniority when they sought pregnancy-related accommodations, such as transfers to ground positions. *See Burwell*, 633 F.2d at 363 (pregnant flight attendants lost all accumulated seniority if they transferred to ground positions). These policies thereby denied women the ability to maintain stable employment and progress in their careers, and resulted in broad-based gender inequality in the workplace and beyond.

Congress adopted the PDA to repudiate this discriminatory regime and thus promote equal opportunity and economic security for women. *See*

Cal. Fed. Savs. & Loan Ass'n, 479 U.S. at 289 (quoting 123 Cong. Rec. 29,658 (1977) (statement of Sen. Williams)) ("The entire thrust... behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."). Lawmakers recognized that "discrimination against pregnant women is one of the chief ways in which women's careers have been impeded and women employees treated like second-class employees," and they set out to change that state of affairs. 123 Cong. Rec. 10,582 (1977) (statement of Rep. Hawkins). They sought legislation that would permit millions of "working American women to assume their rightful place, and make a full contribution in our Nation's economy." 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams).

The PDA amends Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on sex (among other categories). The amended statute states:

> 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.

42 U.S.C. § 2000e(k).

Thus, the PDA does two things. The first clause clarifies that the statute's prohibition on discrimination "because of sex" includes discrimination because of pregnancy. As one of the bill's cosponsor's noted, "since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women." 123 Cong. Rec. 10,581 (1977) (statement of Rep. Hawkins). And the second clause requires employers 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). This provision requires employers to treat "disability based on pregnancy… as any other disability," so that pregnant women are not worse off simply because of their sex-based characteristic. 123 Cong. Rec. 29,641 (1977) (statement of Sen. Birch Bayh).

Nothing in the PDA refers to the reason for an employee's disability or suggests that it has any significance. The only relevant comparison under the statute is between pregnant employees and other employees "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). In other words, as one of the co-sponsors noted, "[i]f an employer permits other employees to continue working unless their doctors regard them as physically unable to work, it may not force pregnant women off the job, as many employers have done in the past," and "may not deprive women of seniority" for pregnancy-related absences. 123 Cong. Rec. 10,582 (1977) (statement of Rep. Hawkins).

B. Respondent's Policy Of Accommodating Some Workers, But Not Pregnant Women, Contravenes The PDA's Purpose Of Leveling The Playing Field And Eliminating Gender-Based Inequality.

As set forth in Petitioner's brief, the text and structure of the PDA require that the decision below be reversed. Pet. Br. 18-30. The statute's purpose of eradicating the historical discrimination described above supports this conclusion as well.

It is undisputed that UPS provides temporary accommodations, including light duty, to certain workers – those who are injured on the job, those who have impairments cognizable under the Americans with Disabilities Act (ADA), Pub. L. 101–336, 104 Stat. 327 (1990), codified at 42 U.S.C. § 12102, and those who have lost their Department of Transportation certification. Pet. App. 4a. It nonetheless denied Petitioner's request for a similar, temporary accommodation, notwithstanding the PDA's unequivocal directive that pregnant workers "shall be treated the same . . . as other workers not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e(k).

Respondent's purported justification for this disregard of the statutory command is that UPS does not provide accommodations to workers whose injuries arise off the job and who do not qualify for coverage under the ADA.[2] Respondent contends that

[2] Because recent amendments to the ADA expanded the pool of employees covered by that statute, including many more workers with temporary disabilities, almost no workers will remain in this category. ADA Amendments Act of 2008, Pub. L.

it is those who do not receive an accommodation under its policy, rather than those who do, who provide the relevant comparison group for PDA purposes.

That approach, however, turns the PDA on its head. The PDA was not designed to address the problem of individual workers who are injured off the job, whether they are male or female. It was designed to address the problem faced by women as a class when they are forced out of their jobs due to pregnancy. The only way to eradicate that gender-based discrimination is to ensure that pregnant women as a group are offered the same workplace accommodations offered to other employees. Having chosen to offer some of its employees a workplace accommodation due to their inability to work, whatever the cause of that inability may be, the PDA prohibits UPS from denying the same accommodation to Peggy Young and other pregnant workers.

Congress adopted the PDA because it was uniquely concerned with the systemic discrimination and economic disadvantage that women suffered as a class because the majority of women – and only women – become pregnant during their working lives. S. Rep. No. 95-331 (hereinafter, "Senate Report"), at 2-3, 9 (1977). And Congress understood that without a statute outlawing the systemic exclusion of workers who become pregnant, women would continue, "because of their capacity to become

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No. 110-325, 122 Stat. 3553. *See generally amicus* briefs filed by Law Professors and Women's and Civil Rights Organizations, and by the Leadership Conference on Civil and Human Rights.

pregnant," to be treated "as marginal workers not deserving the full benefits of compensation and advancement granted to other workers." 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams).

Congress recognized the harm to women's equality, as well as to families, when women are pushed out of the workforce. Legislators emphasized the "unjust and severe economic [and] social … consequences" that "countless women and their families" had to "suffer" as a result of being "forced to take leave without pay" when temporarily "disabled by pregnancy and childbirth." 123 Cong. Rec. 7,539 (1977) (statement of Sen. Williams). These "devastating effect[s]" included "loss of income," impairing the ability of families with working mothers "to provide their children with proper nutrition and healthcare," "dissipating family savings and security and being forced to go on welfare." *Id.* Members of Congress were concerned about women having to "forfeit the income which holds their family together" and having to shoulder "the dual cost of being forced to pay their medical costs plus losing their wages." 123 Cong. Rec. 7,541 (1977) (statement of Sen. Brooke).

These harms can only be addressed if, as Congress intended, women are accommodated when employers accommodate any other class of temporarily injured workers. To do so is not to afford pregnant workers "most favored nation" status, as the Fourth Circuit held, Pet. App. 19a, but rather to end the second-class status suffered by women who, by virtue of their sex, experience pregnancy. Comparisons to people who injure themselves lifting, *id.* at 22a, or engaging in other activities outside of

work, are inapt. This group, unlike women, is not subject to systemic, class-wide economic discrimination. That is precisely why Congress built into the comparative scheme a requirement that pregnant women be treated *as well as* others with similar abilities who receive benefits, even if the result is that the employer treats some other workers (also with similar abilities) worse, such as those who incur off-the-job injuries.

The effect of the decision below is to reinforce, rather than eliminate, the inequality at which the PDA takes aim. Indeed, as detailed below, the perverse result of decisions like the Fourth Circuit's is to return pregnant workers in some workplaces to their pre-PDA position at the bottom of the ladder and to ensure that the unfair treatment Congress sought to eradicate three and a half decades ago will continue.

II. EMPLOYER POLICIES AND PRACTICES THAT FORCE PREGNANT WORKERS OUT OF THE WORKFORCE SUBVERT CONGRESSIONAL INTENT BY PERPETUATING THE GENDER-BASED INEQUALITY THAT THE PDA WAS WRITTEN TO ELIMINATE.

When Congress enacted the PDA, it focused on the facts that a large and growing percentage of American women worked outside the home and that a substantial majority of American women became mothers in the course of their working lives. 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams). It sought to eliminate practices whereby pregnancy disadvantaged women by ending or

interrupting their ability to make a living and provide for their families. *Id.* Yet, despite that clear legislative intent, employer policies and practices remain in place that result in pregnant women, as a class, being pushed out of the workforce because they are denied accommodations that other workers receive. The result is that women, because of their unique ability to become pregnant, continue to suffer the class-based economic penalties in the workforce that Congress sought to eradicate.

A. The Hardships Suffered By Petitioner In This Case Are Shared By Many Other Pregnant Women Who Are Forced Out Of The Workplace.

What happened to Petitioner Peggy Young happens to many other women. By the time she was forced to stop working because of her pregnancy, she had already exhausted her paid medical leave and was compelled to go on unpaid leave. Pet. App. 43a. In addition to losing pay, she also lost benefits and, for the last six and a half months of her pregnancy, had to go without the health insurance UPS had previously provided. *Id.* Young could not even rely on short-term disability benefits during this period of unexpected income loss. She was told she did not qualify "because [her] doctor didn't give [her] a note saying that [she] couldn't work, that [she] just had a lifting restriction." Pet. App. 41a (alteration in original). Young thus faced the cruel bind of being neither permitted to work, nor to collect the benefits normally available to those who temporarily cannot work.

The financial and other harms Petitioner suffered are sadly typical of those faced by many other women who are pushed out of their jobs, whether permanently or temporarily, by virtue of being denied workplace accommodations that other workers receive. Some of these women's stories have been documented in recent years in court cases like Petitioner's, in testimony before Congress, and in a report co-authored by *amicus* A Better Balance along with the National Women's Law Center. Nat'l Women's Law Ctr., *It Shouldn't Be a Heavy Lift: Fair Treatment for Pregnant Workers* 6 (2013), *available at* http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf (hereinafter *Heavy Lift* report). Those stories help provide context for this case by illustrating the ways in which women who are denied accommodations during pregnancy continue to suffer the ills that motivated Congress to pass the PDA in the first place.

Appearing before Congress earlier this year, Armanda Legros testified that she was sent home by her manager at an armored truck company, indefinitely and without pay, when she was six and a half months pregnant and had to avoid heavy lifting. She also testified that a co-worker who injured his back on the job was granted the accommodation that she was denied. Legros described her struggle as a single mother with no other source of income. "Once my baby arrived, just putting food on the table for him and my four-year-old was a challenge. I was forced to use water in his cereal at times because I could not afford milk. I was scared every time I looked in my empty fridge." *Economic Security for Working Women: Hearing Before the S. Comm. On Health, Educ., Labor & Pensions*, 113th Cong. (2014)

(statement of Armanda Legros, Low-wage worker), *available at* http://www.help.senate.gov/imo/media/doc/Legros2.pdf. Legros lost her job, fell behind on rent payments, and nearly lost her apartment. "Even when I applied for emergency rental assistance, I didn't qualify because I didn't have any income coming in." *Id.* Ultimately, Legros had to turn to public benefits, applying for Medicaid for her own prenatal care and for her children. *Id.*

Natasha Jackson, whose story is documented in the *Heavy Lift* report, illustrates how denial of accommodations can send women in seemingly secure careers into a spiral of financial insecurity. Jackson reported that she saw her dream of home ownership unravel after being denied accommodations while pregnant. Jackson was the highest-ranking account executive and the only female employee at a Rent-A-Center in South Carolina. When she needed to avoid occasional heavy lifting required of her job, she was pushed onto leave. Coworkers with on-the-job injuries, in contrast, received accommodations, according to Jackson. "The timing could not have been worse. My husband and I had just made a down payment on a house… Without my income, we were forced to back out of the contract." Jackson ultimately lost her job. *Heavy Lift* report, *supra*, at 6.

As in Petitioner's case, the combination of being forced to go on leave when they are pregnant and having to use up whatever paid sick leave their jobs provide often results in women having to go without income for extended periods. Women who are not accommodated while pregnant must exhaust all of the paid leave that they planned to use after

giving birth. Diana Teigland, a letter carrier for the United States Postal Service for nine years, reported being forced to use paid sick days and other leave after her doctor placed her on a heat restriction while pregnant. "As a result, I didn't have any paid leave left when my baby was born. I was the primary breadwinner in the family, but during my maternity leave, it was all on my husband's shoulders. Going without my salary right when I had the added expense of a new baby was very difficult for me and my family." *Heavy Lift* report, *supra*, at 10.

Women who are forced to use up their *unpaid* leave (Family and Medical Leave Act of 1993 (FMLA)[3] leave) – including women whose employers do not provide any paid sick days – may lose their jobs altogether. While Peggy Young did not suffer this consequence, it is a predictable outgrowth of employer policies, like UPS's, that systematically deny accommodations to workers who become pregnant. For example, Amy Crosby, who is featured in the *Heavy Lift* report, described being denied accommodation of her lifting restriction by the hospital where she worked, although she reported that the hospital accommodated workers with disabilities and on-the-job injuries. "Because of my lifting restriction, the hospital placed me on 12 weeks of unpaid FMLA leave, which would run out a month and a half before my due date. The hospital told me I would not be permitted to return to work until I had no restrictions and that it would consider me to have

[3] The FMLA allows certain employees to take twelve weeks per year of unpaid, job-protected leave for reasons including the birth of a child and a serious health condition, including pregnancy, that make the employee unable to perform essential functions of her job. *See* 29 U.S.C. § 2612(a)(1).

'voluntarily resigned' if I failed to return to work without restrictions the day after my 12 weeks of leave expired, in the middle of my last trimester." *Heavy Lift* report, *supra,* at 8.

Even women who qualify for disability insurance – unlike Petitioner Peggy Young – may be forced to use up those benefits before the baby arrives. Yvette Nunez, another woman whose story is documented in the *Heavy Lift* report, worked at a New York City grocery store for eleven years. When she sought an accommodation to avoid endangering her high-risk pregnancy, she was fired. After being fired, her union helped her obtain disability benefits, but her 26 weeks of disability payments ran out one month before her due date, forcing her onto unpaid leave just as her household expenses were rising. *Heavy Lift* report, *supra*, at 11. When she lost her job, Nunez also lost her health insurance. She had to resort to Medicaid and other public benefits. "My family and I survived on food stamps and my savings. When I finally returned to work three months after giving birth, I had no savings left." *Heavy Lift* report, *supra*, at 11.

Women who are forced out of the workplace when pregnant also forfeit other earned long-term benefits, including 401K contributions, short-term disability benefits, seniority, pension, social security contributions, and other benefits. *See, e.g., Orr v. Albuquerque*, 531 F.3d 1210 (10th Cir. 2008) (police officers were forced to exhaust accrued sick leave and were not allowed to use accrued compensatory time for their pregnancy-related leaves, affecting their eligibility for early retirement). Systemically depriving women workers of these short- and long-

term job benefits when they become pregnant contributes to women's economic inequality over the long run.

B. Congress Was Concerned About The Financial Hardships Suffered By Women Who Are Deprived Of Income And Benefits When Forced Out Of The Workforce During Pregnancy.

The economic concerns of pregnant women and their families, such as those described above, were expressly addressed by Congress when it enacted the PDA. Congress discussed the need to ensure women's "financial security, and the security of their families." 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams). Members of Congress focused on the financial vulnerability of low-income women when excluded from the workforce while pregnant. *See Introduction of Pregnancy Disability Legislation, Extension of Remarks on H.R. 5055 in the House of Representatives*, 95th Cong. (1977) (opening statement by Rep. Hawkins), cited in *EEOC v. Joslyn Mfg. & Supply Co.*, 706 F.2d 1469, 1473 *vacated sub nom. EEOC v. Joslyn Mfg. & Supply Co.*, 724 F.2d 52 (7th Cir. 1983) (stating that exclusion of pregnant workers from benefits and other workplace protections would have "a particularly severe impact on low-income workers who may be forced to go on leave without pay for childbirth or pregnancy related disabilities"). Legislators were especially concerned about the effect of "loss of income" on workers, "especially low-income women," and sought to eliminate situations in which they had to use up savings and even "go on welfare." 123 Cong. Rec. 7,539 (1977) (statement of Sen. Williams).

Congress also recognized that income is not the only resource depleted by forced exit from work. Legislators focused on the discrimination women suffered when they were denied workplace benefits because of pregnancy, specifically including paid leave and health insurance benefits. *See* Senate Report at 2-4. Thus, Senator Williams highlighted "the loss or reduction of vacation and sick leave benefits" that pregnant women suffered when pushed out of the workforce. 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams). Similarly, Senator DeConcini focused on the "loss of income and . . . [its impact on] many [pregnant] women and their families" if excluded from health insurance benefits. *Discrimination on the Basis of Pregnancy: Hearings Before the Subcomm. on Labor of the S. Comm. on Human Res.*, 95th Cong. 168 (1977). Indeed, the exclusion of pregnant women from health benefits related to pregnancy was the immediate impetus for the statute's passage. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670 (1983).

Finally, in enacting the PDA, Congress expressly sought to eradicate policies that deprived pregnant workers of their seniority, pension credits, and other long-term benefits when they were forced onto unpaid leave. Pre-PDA employer policies often forced pregnant women off the job, and then treated them "as a new employee" who "started at the bottom of the seniority ladder" and lost "earned pension credit." 123 Cong. Rec. 10,582 (1977) (statement of Rep. Hawkins). Lawmakers recognized that loss of seniority, as well as loss of service credit toward a pension, "had a lifetime impact" on pregnant

workers' pay and benefits, and sought to end this disadvantage. *Id.*

C. The Concerns That Prompted Passage Of The PDA, Including Women's Economic Inequality, Persist Today.

Unfortunately, the concerns that prompted Congress to act in 1978 remain all too real for today's women, more of whom are now working than ever before. Half of all U.S. workers are women. Maria Shriver, Center for American Progress, *The Shriver Report: A Woman's Nation Changes Everything*, Exec. Summ. 17 (2009), *available at* http://cdn.americanprogress.org/wp-content/uploads/issues/2009/10/pdf/awn/a_womans_nation.pdf. Seventy-five percent of women will become pregnant during their working lives. Alexandra Cawthorne & Melissa Alpert, *Labor Pains: Improving Employment and Economic Security for Pregnant Women and New Mothers*, Parenting with Dignity, Center for American Progress (Aug. 3, 2009), http://www.americanprogress.org/issues/women/report/2009/08/03/6599/labor-pains/.

Women's income – before, during, and after pregnancy – is critical to their families' well-being, and the loss of that income imperils their family's financial security. Most families rely on women for critical household income and depend on that money to keep the family afloat when welcoming a new baby. Approximately half of middle-income working wives are breadwinners. Sarah Jane Glynn, *The New Breadwinners: 2010 Update, Center for American Progress*, 3 (April 2012), http://cdn.americanprogress.org/wp-content/uploads/issues/

2012/04/pdf/breadwinners.pdf. Nearly 64% of mothers with children under the age of six work. Bureau of Labor Statistics, U.S. Department of Labor, *Employment Characteristics of Families 2013*. Economic News Release, 2 (last modified April 25, 2014), http://www.bls.gov/news.release/pdf/famee.pdf. And "[i]n 2010 in nearly two-thirds (63.9%) of families with children women were either breadwinners or co-breadwinners." Glynn, *supra*, at 2.

Women's income is especially critical to the well-being of low-income and single-mother headed families, which rely disproportionately on mothers' earned income and have little cushion for emergencies. *See generally* Stephanie Bornstein, *Poor Pregnant and Fired: Caregiver Discrimination Against Low-Wage Workers* (2011), Ctr. For WorkLife Law, *available at* http://www.worklifelaw.org/pubs/PoorPregnantAndFired.pdf. In families in the bottom fifth of income distribution, 70% of working wives earn as much or more than their husbands. Glynn, *supra,* at 3.

In part for that reason, many women who become pregnant work long into their pregnancies. From 2006 to 2008, 81% of women who became pregnant while employed continued to work until one month or less before the birth of their first child, up from 34% in the period from 1961 to 1965. Lydia Laughlin, *Maternity Leave and Employment Patterns of First-Time Mothers, 1961-2008*, Household Economic Studies, Special Studies, Current Population Reports, U.S. Census Bureau 7, table 3 (Oct. 2011), http://www.census.gov/prod/2011pubs/ p70-128.pdf.

Policies that force women to leave the workforce when they are pregnant cut off vital income to families. *See* Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U. Cal. Davis L. Rev. 961, 970-78 (2013). They also contribute to persistent inequality in the wages earned by mothers who return to work after the birth of their child. *See generally* Michelle J. Budig, *The Fatherhood Bonus & the Motherhood Penalty: Parenthood and the Gender Gap in Pay*, Third Way NEXT 7-8, 13-17 (2014) (describing the negative effects of having children on women's wages, particularly low-wage women), *available at* http://www.thirdway.org/publications/853. This motherhood wage gap is significant. High-wage mothers earn an average of 4% less per child than non-mothers. For low-income women, the price is especially steep: each new child brings a pay penalty of 15%. *New Evidence on the Gender Pay Gap for Women and Mothers in Management: Hearing Before the U.S. Cong. Joint Econ. Comm.*, 111th Cong. 4-5 (Sept. 28, 2010) (statement of Michelle Budig, Associate Professor of Sociology, University of Massachusetts), *available at* http://www.jec.senate.gov/public//index.cfm?a=Files.Serve&File_id=3d4b47cf-4afb-4e53-a550-164b4b593266. Fathers do not pay the same price for having children: "While the wages of young women without children are close to those of men, mothers' wages are only 60% of those of fathers." Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 Harv. Women's L.J. 77, 77-78 (2003).

Breaks in workforce participation that are not accompanied by additional schooling are the single greatest contributor to the motherhood wage penalty. Jeremy Staff & Jeylan T. Mortimer, *Explaining the Motherhood Wage Penalty During the Early Occupational Career*, 49 Demography 1, 12 (2012). According to one study, women's wages decline by 11% when they accumulate 22 months of no work or school. *Id* at 14. Each time a woman is forced out of her job and spends months looking for work, she adds to her lifetime earnings penalty. Career interruptions – including unwanted ones – and the low-quality jobs they promote, contribute to women's lifetime earning being only 38% of men's. Joan C. Williams, *Keynote Address: Want Gender Equality? Die Childless at Thirty*, 27 Women's Rights. L. Rptr., Winter 2006, at 3, 4.

These financial consequences are further exacerbated by the fact that women pushed out of the workforce because of pregnancy face barriers to re-entering rooted in discrimination against pregnant women and mothers. Despite the PDA's clear prohibition on bias in hiring, securing a job while visibly pregnant remains nearly impossible. Guadalupe Hernandez, for example, another woman whose story is documented in the *Heavy Lift* report, was not able to obtain another job after being pushed out during her pregnancy, stating that "every time I went to a potential employer, they looked at my belly and said 'no.'" *Heavy Lift* report, *supra*, at 4. In a landmark study, participants presented with identical resumes differentiated solely by parental status were nearly twice as likely to recommend childless women over mothers for hire, and recommend a starting salary for mothers 7.4% lower

than that offered to non-mothers. Shelley J. Correll, et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 Am. J. of Soc. 1297, 1316 (March 2007), *available at* http://www.jstor.org/stable/ 10.1086/ 511799. Participants also judged mothers to be less competent and committed than women without children, whereas fathers were rated significantly more committed to their jobs than non-fathers. *Id.* at 1316-17.

When mothers move in and out of the workforce, whether by choice or compulsion, they not only lose wages and health insurance, but seniority, promotion opportunities, pension and other benefits of continuous employment that promote economic stability for their families. Many cycle through part-time jobs that lack benefits, where employers penalize them with "slower wage growth, lower promotion rates, poorer performance reviews, and worse work assignments relative to workers who work continuously and consistently full time." Julie A. Kmec et al., *Not Ideal: The Association Between Working Anything but Full Time and Perceived Unfair Treatment*, 41 Work and Occupations 63, 64 (2014). They also lose out on future social security benefits, as time without income is averaged into their lifetime earnings. *See* Ctr. for Cmty. Change & Older Women's Econ. Sec. Task Force, *Expanding Social Security Benefits for Financially Vulnerable Populations* 3 (2013) ("In 2012, the average annual Social Security income received by women 65 years and older was $11,999, compared with $16,295 for men.").

The long-term impact of these combined consequences is staggering. Having a child is now

"the single best predictor that a woman will end up in financial collapse." Elizabeth Warren & Amelia Warren Tyagi, *The Two-Income Trap: Why Middle-Class Parents are Going Broke* 6 (2003). One quarter of all poverty spells – periods of at least two months of income below the poverty threshold for a family – result from the birth of a child. Jane Waldfogel, *International Policies Toward Parental Leave and Child Care*, Future of Children, Spring/Summer 2001, at 99-100. In the United States, motherhood is the single biggest risk factor for poverty in old age. Ann Crittenden, *The Price of Motherhood: Why The Most Important Job in the World Is Still the Least Valued* 6 (2001).

Employer policies, like Respondent's, that unfairly deny pregnant women accommodations disadvantage women economically and undermine the core purpose of the PDA. They do so by forcing women who are eager and able to work to endure periods of compelled leave without income or benefits or to lose their jobs entirely. Members of Congress recognized that the "shocking statistics" concerning women's economic inequality could not be improved upon "unless working women are provided effective protection against discrimination on the basis of their childbearing capacity." 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams). Interpreting the statute to permit employer policies, like Respondent's, that push women out when pregnant, does not provide the "effective protection" Congress envisioned.

D. Inequality Is Magnified When Women Are Pushed Out Of Jobs From Which They Were Traditionally Excluded.

Policies like Respondent's have the additional result of reinforcing women's historical exclusion from certain sectors where "breadwinner" jobs (those offering stable full-time employment and benefits such as paid leave and health insurance) can be found. Traditionally male-dominated occupations such as package driver and police officer remain closed off in many ways to female employees. Women still made up less than 12% of police officers as of 2007, up from 7.6% in 1987. Bureau of Justice Statistics, DOJ, *Crime Data Brief: Women in Law Enforcement* 1987-2008, at 3 (2010), *available at* http://www.bjs.gov/content/pub/pdf/wle8708.pdf. And women make up only 22.6% of transportation and utilities workers, a sector that includes the postal service, couriers, messengers, and warehouse workers. Bureau of Labor Statistics, *Women in the Labor Force: A Databook* 50 tbl.14 (2013), *available at* http://www.bls.gov/cps/wlf-databook-2012.pdf. Yet these are some of the more financially secure jobs on the market, often affording benefits like insurance and paid vacation and sick time that women working in other sectors do not receive. *See supra*, Part II.A. Many of these occupations entail physically demanding or strenuous activities, which may necessitate accommodations for some women when they are pregnant. *See* Renee Bischoff & Wendy Chavkin, N.Y.C. Dep't of Health & Mental Hygiene & Columbia Univ. Mailman Sch. Of Public Health, *The Relationship Between Work-Family Benefits and Maternal, Infant and Reproductive Health* 5-6 (2008), *available at*

http://otrans.3cdn.net/70bf6326c56320156a_6j5m6fupz.pdf (detailing increased negative health risks of physically strenuous labor during pregnancy).

Women's capacity to break into these fields is greatly compromised when they are denied accommodations afforded to other workers. For example, women in the shipping industry, like Peggy Young, often already face a difficult time in a male-dominated workforce. *See Heavy Lift* report, *supra*, at 15. Policies like that of UPS treat pregnant women as unsuitable for the workplace, when they are as able as men afforded accommodation. They lose rank and seniority, and they sometimes lose their jobs. This pattern reaffirms gender stereotypes and conveys the message that men are meant to do certain types of work, to the exclusion of women workers, or at least the majority of women workers who become pregnant.

In a recent case filed with the EEOC, Florence, Kentucky Police Department patrol officer Lyndi Trischler alleged that she was forced onto unpaid leave at five months pregnant after a new city policy denied any modified duty for non-work related conditions. *See* Brigid Schulte, *Pregnant Women Fight To Keep Jobs Via 'Reasonable Accommodations,'* Wash. Post, Aug. 4, 2014, http://www.washingtonpost.com/national/health-science/pregnant-women-fight-to-keep-jobs-via-reasonable-accommodations/2014/08/04/9eb13654-1408-11e4-8936-26932bcfd6ed_story.html. Because of the heavy weight of her gun belt and the size of her bullet-proof vest, she could no longer physically do her job patrolling the city. She is one of only two female police officers on a staff of around 60.

The city's decision to no longer provide light duty for pregnant workers means that Officer Trischler must use up all of her paid sick days and vacation days to survive and feed her one-year-old daughter. All forms of payment will be exhausted long before her medically-recommended eight weeks of childbirth recovery time are completed. She alleged she was also told by Human Resources that her health benefits would cut off when she stopped receiving a paycheck.

The exclusion of women, and pregnant women in particular, from entire workplace sectors consisting of "breadwinner" jobs undermines Congress's original intent in drafting the PDA. *Discrimination on the Basis of Pregnancy: Hearing on S. 955 Before the S. Comm. On Human Res.*, 95th Cong. 34 (1977) (statement of Alexis M. Herman, Director of Women's Bureau, Department of Labor). Lawmakers were aware that many families relied solely or primarily on mothers' income, *see id.* at 309 (statement of Bella S. Abzug, Presiding Officer, National Commission on the Observance of International Women's Year, Department of State) (noting that "1973 data shows that the husband was the only earner in less than three out of eight husband-wife families"), a phenomenon that has only increased in the years since the PDA's passage.

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Policies like those challenged in this case directly contradict Congressional intent and recreate for classes of women the 1970's-era world where women were forced out of their jobs because of their pregnancies. This world, in which pregnant women

lose income and benefits while other workers similar in their ability to work are permitted to stay in the labor force, undermines efforts to combat sex discrimination in the workplace. Respondent's policy thus perpetuates women's unequal status and reinforces outdated stereotypes about women's capacities and roles. Congress adopted the PDA precisely to prevent these results.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully Submitted,

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