No. 12-1226

IN THE

Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

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

BRIEF *AMICUS CURIAE* OF AMERICAN TRUCKING ASSOCIATIONS, INC. IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT. 2

ARGUMENT. 3

I. The Pregnancy Discrimination Act Is An Anti-Discrimination Amendment To Title VII, Not An Accommodation Law. 3

II. Treating The PDA As An Accommodation Provision Would Obliterate Otherwise Lawful Distinctions Between Different Categories Of Employees. 6

III. Trucking Companies Are Constrained In Their Ability To Accommodate Employees, Including Pregnant Workers, Who Cannot Fulfill The Essential Functions Of The Job.. 10

CONCLUSION 13

TABLE OF CITED AUTHORITIES

Page

CASES

Albertson's, Inc. v. Kirkingburg,
527 U.S. 555 (1999) 10

Am. Electric Power Co. v. Connecticut,
131 S. Ct. 2527 (2011) 1

Am. Trucking Ass'ns v. City of Los Angeles,
133 S. Ct. 2096 (2013) 1

California Federal Sav. & Loan Ass'n v. Guerra,
479 U.S. 272 (1987) 3, 4

Collins v. Yellow Freight Sys., Inc.,
942 F. Supp. 449 (W.D. Mo. 1996) 10

CSX Transp., Inc. v. Ala. Dep't of Revenue,
131 S. Ct. 1101 (2011) 1

General Electric Co. v. Gilbert,
429 U.S. 125 (1976) 4

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993) 6

Herrera v. CTS Corp.,
183 F. Supp. 2d 921 (S.D. Tex. 2002) 10

Cited Authorities

Page

Ky. Ret. Sys. v. EEOC,
554 U.S. 135 (2008). 6

N.Y. Cent. R.R. Co. v. White,
243 U.S. 188 (1917) 8

Newport News Shipbuilding & Dry Dock Co. v. EEOC,
462 U.S. 669 (1983). 4

Raytheon Co. v. Hernandez,
540 U.S. 44 (2003). 6

Reeves v. Swift Transp. Co.,
446 F.3d 637 (6th Cir. 2006) 10

Ricci v. DeStefano,
557 U.S. 557 (2009). 4

St. Laurent v. United Parcel Service, Inc.,
416 F. Supp. 2d 212 (D. Mass. 2006). 10

Trans World Airlines, Inc. v. Hardison,
432 U.S. 63 (1977). 6

Univ. of Texas Southwestern Med. Ctr. v. Nassar,
133 S. Ct. 2517 (2013) 4

Page

STATUTES AND OTHER AUTHORITIES

42 U.S.C. § 2000e. 4, 8

Bob Costello, *Truck Driver Shortage Update 2013* . . .12

Lynn Adler, *Companies Pile on Perks to Keep Drivers Truckin'*, Reuters (Aug. 10, 2012) 13

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INTEREST OF *AMICUS CURIAE*

American Trucking Associations, Inc. ("ATA") is the national trade association of America's trucking industry, comprising motor carriers, state trucking associations, and national trucking conferences.[1] ATA was created to promote and protect the interests of the national trucking industry. Its direct membership includes approximately 2,000 trucking companies and industry suppliers of equipment and services; and in conjunction with its affiliated organizations, ATA represents over 30,000 companies of every size, type, and class of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies and others. ATA regularly represents the common interests of the trucking industry through litigation in courts across the nation, including on numerous occasions before this Court. *See, e.g.*, *Am. Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct. 2096 (2013); *Am. Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011); *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101 (2011).

This case directly impacts the interests of ATA and its members. Many of ATA's members are subject to the Pregnancy Discrimination Act ("PDA"). Petitioner offers a construction of the PDA that transforms a straightforward non-discrimination law into perhaps the most burdensome accommodation statute conceivable. This interpretation of

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* ATA certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

the PDA not only badly misreads the statute, it may force ATA members to violate numerous agreements that they have reached with their employees. Further, compliance would be costly and in many cases impossible as trucking companies often do not have the option of offering women alternative positions during their pregnancy. ATA and its members therefore have a strong interest in ensuring the PDA is interpreted according to its ordinary meaning.

SUMMARY OF ARGUMENT

The PDA made a one-sentence amendment to Title VII by adding "because of or on the basis of pregnancy" to the definition of sex discrimination. As every circuit court has held, a claim for pregnancy discrimination therefore invokes the traditional anti-discrimination protections of Title VII. It is not an independent cause of action requring special accommodation for pregnant women unavailable to similarly situated employees. According to Petitioner, however, the PDA requires the employer to offer pregnant women *any* accommodation offered to *any* other employee with similar restrictions. In other words, Petitioner asks this Court to convert a statute designed to ensure that pregnant women are not singled out for disfavored treatment into a law that affords them "'most favored nation' status." Pet. App. 19a. Petitioner's interpretation is untenable as a matter of basic statutory construction.

But even if this were a close question, which it is not, the practical problems following from Petitioner's view counsel against adopting this sweeping interpretation of the PDA. Adopting Petitioner's version of the PDA would impose substantial new burdens on employers. According "most favored nation" status to pregnant employees would

dissolve the neutral distinctions that employers routinely draw between classes of employees for the purpose of allocating benefits. Refashioning the PDA in the manner Petitioner advances thus would impose on employers substantial new obligations to accommodate pregnant workers. Faced with increased liability, employers may be forced to scale back the accommodations they afford to all workers, providing only the minimum required by law.

Petitioner's expansive interpretation of the PDA would be especially burdensome for ATA's members. By the nature of their business, trucking companies have the ability to offer few, if any, alternate accommodations for those drivers who are unable to perform the job's essential functions. There just are not "light duty" trucker positions. This relative lack of available accommodations makes it a virtual certainty that a ruling in favor of Petitioner would result in trucking companies pulling back sharply on the accommodations they offer, and at a time when the industry is experiencing an unprecedented shortage of drivers.

ARGUMENT

I. The Pregnancy Discrimination Act Is An Anti-Discrimination Amendment To Title VII, Not An Accommodation Law.

The PDA is a simple one-sentence amendment to the "Definitions" section of Title VII. The first clause "add[s] pregnancy to the definition of sex discrimination prohibited by Title VII." *California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987). The second clause "explains the application of the general principle

to women employees," *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 n.14 (1983), by clarifying that "women affected by pregnancy ... shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work." Pub. L. No. 95-555 (amending 42 U.S.C. § 2000e).

The PDA's text, structure, and history all show that it extends Title VII's anti-discrimination prohibition to pregnant employees. *See* Resp. Br. 26-49. The PDA's text outlaws discrimination "because of or on the basis of pregnancy," Pub. L. No. 95-555 (amending 42 U.S.C. § 2000e(k)) just as Title VII bans discrimination "because of an individual's race." *Ricci v. DeStefano*, 557 U.S. 557, 579 (2009). Congress's structural decision to house the PDA within the definitional section of Title VII confirms this understanding. *See Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013) ("Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices."). As a matter of history, moreover, the PDA was enacted as corrective legislation in direct response to *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in which this Court held that Title VII's prohibition on sex discrimination did not extend to discrimination on the basis of pregnancy. *See Guerra*, 479 U.S. at 284-85. Accordingly, the PDA ensures that women are not singled out for disfavored treatment because they are pregnant.

Petitioner nevertheless asks the Court to interpret the PDA countertextually to require employers to provide accommodations to pregnant workers "even if still other nonpregnant workers do not receive accommodations." Pet. Br. 28. There can be no doubt, then, that Petitioner seeks

to "radically transform" the PDA from "a discrimination statute into an accommodations statute." Resp. Br. 41. The PDA would cease to be a remedial statute designed to provide make-whole relief to those injured by intentional acts of discrimination; instead, it would become a forward-looking statute affirmatively mandating that employers accommodate pregnant employees on an ongoing basis. *See id.* at 48.

Worse still, Petitioner's refashioned PDA would be no ordinary accommodations law. As Petitioner reads the statute, the PDA would require employers to afford to a pregnant employee *any* accommodation accorded to *any* other employee "similar in their ability or inability to work." *See id.* at 26-27, 45. As a practical matter, such a construction would "imbue the PDA with a preferential treatment mandate," Pet. App. 23a, that would effectively confer upon pregnant employees "most favored nation" status, *id.* at 29a.

Put simply, a pregnant employee would be entitled to any benefit afforded to any class of employee, even if she were not otherwise a member of that class. Employers thus could no longer decline to offer accommodations to pregnant employees based on neutral criteria adopted for the purpose of allocating benefits. Respondent illustrates by example: "if an employer has a policy of granting paid leave for temporary disabilities to only full-time management employees who have been employed for at least 15 years, under petitioner's reading, the employer also must provide this paid leave to every pregnant employee, including brand-new, part-time hourly employees." Resp. Br. 46. As explained below, Petitioner's sweeping interpretation of the PDA would cause serious problems for the trucking industry.

II. Treating The PDA As An Accommodation Provision Would Obliterate Otherwise Lawful Distinctions Between Different Categories Of Employees.

Most businesses have different classes of employees. For many reasons, those different classes often are treated differently by their employer. They may be compensated differently. They may receive different benefits packages. They may be accommodated differently if they are injured or disabled. Thus, a CEO may receive "company provided transportation for a back injury" even though a "mailroom clerk" might not. Resp. Br. 45. Indeed, it is quite rational for companies to make economic distinctions in deciding which classes of employees will be eligible for certain accommodations.

Employers often draw distinctions between classes of employees for other reasons as well. Seniority, union membership, full-time/part-time status, and job type are all taken into consideration when companies structure employee benefits and accommodation rules. And, as a general matter, such distinctions are entirely lawful as they do not "rely on any of the sorts of stereotypical assumptions" regarding a trait protected under the federal discrimination laws. *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 146 (2008). This is true even if the classifications result in the denial of benefits to employees of protected status, so long as those distinctions are applied on a neutral and even-handed basis. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 54-55 (2003); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611-12 (1993); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-80 (1977).

This case provides an apt illustration. Pursuant to its collective-bargaining agreement, UPS may assign "temporary alternative work" (TAW) to bargaining unit employees who have a lifting restriction resulting from an on-the-job injury. TAW is light-duty work, generally limited to 30 days as part of a structured rehabilitative program designed to help injured workers restore full functionality so that they can return to heavy-duty work. Resp. Br. 2-3; Pet. App. 3a-4a. It is unavailable to employees with lifting restrictions resulting from off-the-job injuries. When an employee is under a lifting restriction resulting from an off-the-job injury or condition, he or she must take a leave of absence until the restriction is removed. Pet. App. 34a-35a.

When Petitioner advised UPS that her medical providers had placed her under a lifting restriction and requested a light-duty reassignment, UPS granted her leave instead. Petitioner thus was treated *exactly the same* as the class of employees of which she is a member—those with a lifting restriction resulting from an off-the-job injury or condition. Resp. Br. 30. Given that UPS had applied its policy evenhandedly, Petitioner resorted to attacking the distinction UPS draws between employees who have suffered on-the-job injuries and those who have not. She construes the PDA to negate this distinction and require UPS to afford her a light-duty accommodation because UPS affords the same to employees with heavy-lifting restrictions resulting from on-the-job injuries, even though her "restrictions ar[o]se from her (off-the-job) pregnancy." Pet. App. 22a.

But the line UPS drew here is not of recent vintage. Employers routinely treat differently those employees who

are injured on the job and those who are not. This "long-standing neutral criterion ... has been the centerpiece of worker's compensation law since the early 20th century." Resp. Br. 45 (citing *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 196 (1917)). Petitioner's reading of the PDA would dissolve this distinction, undermining the ability of employers to invoke it as a legitimate, neutral basis for allocating accommodations. That cannot be right. As the Fourth Circuit explained, "[t]he CBA provision requiring UPS to accommodate those employees injured while carrying out job duties for the company but not while pursuing other activities reasonably places a heightened obligation on UPS to accommodate the former group. The PDA does not render this distinction unlawful." Pet. App. 28a.

Worse still, Petitioner's reasoning extends far beyond the desire for a light-duty accommodation while pregnant. Rather, she makes the remarkable claim that when an employer offers an accommodation to "a[ny] group of workers who are 'similar in their ability or inability to work,' pregnant workers must 'be treated the same.'" Pet. Br. 29 (quoting 42 U.S.C. § 2000e(k)); *see also* Pet. Br. 28. Her version of the PDA thus would entitle a pregnant employee to the benefit of *any* accommodation accorded to *any* other employee with the same work restriction. In other words, Petitioner's interpretation would convert the PDA into a "most favored nation" mandate for pregnant employees, Resp. Br. 13, 49, thus "imbu[ing] the PDA with a preferential treatment mandate that Congress neither intended or enacted," Pet. App. 23a.

Recasting the PDA as a super-accommodation law is not only legally unsustainable, it is counter-productive.

Such a regime would impose on employers expansive new obligations to accommodate pregnant workers. Any accommodation offered to any employee from any job class would need to be afforded to a pregnant worker with similar physical restrictions. This all-or-nothing approach could force employers to scale back the accommodations they offer to workers with seniority, for example, because they are not in a position to extend that accommodation more broadly. Faced with such increasing liability, employers may be forced to offer employees only those accommodations required by law.

Yet Petitioner seems comfortable with that result. She notes that her PDA claim—under her unsustainable legal theory—arose because of "the employer's decision to accommodate only a subset of workers in the first place" and she emphasizes that the "employer is free to accommodate *none* of its workers." Pet. 28-29. The Court should not find this comforting. Congress did not enact the PDA to deny employers the ability to accommodate workers with seniority differently than those who have been on the job two weeks. Congress enacted the PDA to ensure that women are not discriminated against because they are pregnant. Its purpose was to ensure equal treatment by requiring employers *to raise the bar for pregnant workers, not to lower the bar for everyone else*. The PDA should serve its purpose. Giving the law its natural interpretation would accomplish that goal.

III. Trucking Companies Are Constrained In Their Ability To Accommodate Employees, Including Pregnant Workers, Who Cannot Fulfill The Essential Functions Of The Job.

Construing the PDA to require employers to provide to pregnant employees any accommodation received by any other employee with similar work restrictions would be particularly burdensome for trucking companies. The nature of the trucking business leaves them with few means for accommodating employees with pregnancy-related physical restrictions. The Court should hesitate before adopting a construction of the law that would place this important industry in an untenable position.

"The quintessential function" of being a truck driver "is to be able to drive a commercial truck in interstate commerce." *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 579 (1999) (Thomas, J., concurring). But the job carries other responsibilities too. One of those responsibilities is heavy lifting, *i.e.*, loading and unloading payloads. It is an "essential function" of the position. *See, e.g.*, *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 638 (6th Cir. 2006) (commercial truck driver required to lift 75 pounds and use a dolly to push or pull freight weighing up to 200 pounds); *St. Laurent v. United Parcel Service, Inc.*, 416 F. Supp. 2d. 212, 215 (D. Mass. 2006) (commercial truck driver required to lift as much as 70 pounds). And, most non-driving positions at trucking companies similarly require heavy-duty work. *See, e.g.*, *Herrera v. CTS Corp.*, 183 F. Supp. 2d 921, 927-28 (S.D. Tex. 2002) (essential function of shipping clerk position is to lift packages over 40 pounds and up to 90 pounds); *Collins v. Yellow Freight Sys., Inc.*, 942 F. Supp. 449, 450 (W.D. Mo. 1996) (road "hostler" job requiring movement of 1,000-pound dollies).

This case proves the point. The record demonstrates that for UPS drivers, like other truck drivers, the ability to lift packages weighing up to 70 pounds is an essential function of their job. Pet. App. 3a, 31a-32a. The record demonstrates that non-driving "inside" jobs are not, as Petitioner suggests, "light duty" jobs; "inside jobs" typically involve heavy-duty work at a UPS facility in positions as loaders, unloaders, and sorters. J.A. 261. Naturally, these jobs involve the very same heavy-lifting requirements as UPS drivers. Pet. App. 32a. To be sure, some particular "inside" *tasks* do not require heavy lifting, but, as Respondent explains, "any employee afforded an 'inside' job accommodation must be physically able to perform all the essential functions of that position, often moving between tasks that do and do not include heavy lifting." Resp. Br. 4 (citing J.A. 269-70, 274, 281). Employees with lifting restrictions therefore are not qualified to perform "inside" jobs. J.A. 305.

The scarcity of non-heavy-lifting jobs means that trucking companies have few options for accommodating *any* employee with physical restrictions. They do not have readily available "light duty" jobs to offer. They have jobs driving trucks. Those jobs require the driver to be able to lift moderate to heavy weight. Trucking companies thus might be forced to, for example, assign a second employee to provide lifting assistance for a pregnant driver with a physical restriction if Petitioner were to prevail here. That is simply not feasible from an economic perspective.

As a result, whatever other industries might do, it is a virtual certainty that the trucking industry would react to a decision in favor of Petitioner by sharply reducing the accommodations it now offers to employees. That

would be bad for everyone except Petitioner. It would harm the ability of employers to help workers rehabilitate from injuries suffered on the job. It would harm those employees who have earned the right to an accommodation through their tenure with the company. It would treat unfairly those employees who have negotiated certain workplace rules through their union representative. And it would undermine company morale and thus hamper the industry's ability to compete for workers.

This would all come at a very precarious juncture for the trucking industry. The industry is currently in the midst of a severe driver shortage. Last year, ATA estimated a shortage of some 30,000 drivers in the for-hire truckload market alone, with an anticipated need for an average of 100,000 new drivers per year over a ten-year period to keep up with industry growth and driver attrition.[2] Ninety percent of carriers report that they are unable to find sufficient numbers of qualified drivers to haul the freight their shipper customers want them to move.[3]

This has led, predictably, to a concerted effort by trucking companies to attract and retain qualified drivers through, among other things, increased driver pay and

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2. Bob Costello, *Truck Driver Shortage Update 2013*, http://www.trucking.org/ATA%20Docs/News%20and%20Information/Reports%20Trends%20and%20Statistics/Driver%20Shortage%20Update%202 013.pdf.

3. *See, e.g.*, Mamata Badkar, *There's a Huge Shortage of Truck Drivers in America*, Business Insider (Aug. 4, 2014), http://www.businessinsider.com/americas-truck-driver-shortage-2014-7.

enhanced benefits and accommodations.[4] If forced to curtail accommodations that they would otherwise like to offer drivers and prospective drivers, this unprecedented shortage of drivers is only going to get worse.

CONCLUSION

Amicus curiae respectfully requests that the Court affirm the judgment below.

Respectfully submitted,

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4. *See, e.g.*, Sean Kilcarr, *New Solutions Being Aimed at Driver Shortage*, Fleet Owner (Aug. 4, 2014), http://fleetowner.com/fleet-management/new-solutions-being-aimed-driver-shortage; Micael Calia, *Con-Way Beefs Up Driver Pay Packages for Freight Carrier*, Wall St. J. (Sept. 30, 2014), http://online.wsj.com/articles/ con-way-beefs-up-driver-pay-packages-for-freight-carrier-1412087980; Lynn Adler, *Companies Pile on Perks to Keep Drivers Truckin'*, Reuters (Aug. 10, 2012), http:// www.reuters.com/article/2012/08/10/uk-usa-truckers-shortage-idUSLNE87900X20120810.