No. 12-1226

In the Supreme Court of the United States

PEGGY YOUNG, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k), provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." The question presented is whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide comparable work accommodations to pregnant employees who are "similar in their ability or inability to work."

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, makes it unlawful for an employer to, *inter alia*, discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment[] because of such individual's * * * sex." 42 U.S.C. 2000c-2(a). In 1976, this Court held that an employer's exclusion of pregnancy from coverage under a disability-benefits plan did not violate Title VII's prohibition on sex discrimination. *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 135-140. In 1978, Congress overruled that holding by enacting the Pregnancy Discrimination Act

(PDA), Pub. L. No. 95-555, § 1, 92 Stat. 2076. See *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 670 (1983). The PDA amended Title VII by adding the following subsection to the Act's "Definitions" section:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

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

2. In 1999, petitioner began working for respondent United Postal Service. Pet. App. 4a. In 2002, petitioner started driving a delivery truck for respondent, and by 2006, she was working as a part-time early-morning driver (also known as an "air driver"). *Ibid.* Her responsibilities included early-morning pick-up and delivery of packages that had arrived by air carrier the previous night. *Ibid.* She and other

drivers met a shuttle from the airport, transferred packages to their vans, and delivered the packages. *Id.* at 5a, 31a-33a. Respondent required air drivers such as petitioner to be able to "lift, lower, push, pull, leverage and manipulate" items "weighing up to 70 pounds" that were not oddly shaped. *Id.* at 3a, 31a-33a.

In July 2006, petitioner was granted a leave of absence from work in order to pursue in vitro fertilization treatments. Pet. App. 5a. Petitioner sought to extend her leave after becoming pregnant. *Ibid.* In September 2006, before she was ready to return to work, petitioner provided her supervisor with a physician's note indicating that petitioner "should not lift more than twenty pounds for the first twenty weeks of her pregnancy and not more than ten pounds thereafter." *Ibid.* During a follow-up phone call, petitioner's supervisor told her that respondent's policy would not permit petitioner to return to work while she had a 20-pound lifting restriction. *Ibid.* Petitioner protested that she was rarely called upon to lift more than 20 pounds in her role as an air driver. *Ibid.* In October 2006, petitioner obtained a note from a midwife confirming that petitioner should not lift more than 20 pounds. *Id.* at 5a-6a.

Petitioner later contacted her supervisor and requested to return to work. Pet. App. 6a. She was referred to respondent's occupational health manager (Carol Martin), who determined that petitioner was unable to perform the essential functions of her job and was ineligible for a light-duty assignment. *Id.* at 5a-6a. Pursuant to respondent's internal policies and the applicable collective bargaining agreement (CBA), respondent offered light-duty work assignments (on a

temporary or permanent basis) only to (1) employees who were injured on the job; (2) employees who were eligible for accommodations under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*; and (3) drivers who had lost their Department of Transportation (DOT) certification because of a failed medical exam, a lost driver's license, or involvement in a motor vehicle accident. Pet. App. 3a-4a, 6a-7a. Martin explained to petitioner that respondent did not offer such accommodations to employees with pregnancy-related limitations. *Id.* at 7a.

In November 2006, petitioner approached her Division Manager and explained her desire to return to work. Pet. App. 7a-8a. The manager told petitioner that she was "too much of a liability" while pregnant and that she could not come back into the building until she was no longer pregnant. *Id.* at 8a (citation omitted). When petitioner's leave expired later that month, she took an extended leave of absence without pay and ultimately lost her medical coverage. *Ibid.* She returned to work for respondent after giving birth in April 2007. *Ibid.*

3. In July 2007, petitioner filed a charge with the United States Equal Employment Opportunity Commission (EEOC), alleging discrimination on the basis of race,[1] sex, and pregnancy. Pet. App. 8a. After the EEOC issued a right to sue letter, petitioner filed suit seeking damages for intentional race and sex discrimination under Title VII and for disability discrimination under the ADA. *Id.* at 8a-9a. In February 2011,

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[1] Petitioner, who is white, alleged that respondent permitted pregnant African-American employees to work. Pet. App. 8a n.4.

the district court granted summary judgment to respondent. *Id.* at 9a-10a, 30a-83a.[2]

With respect to petitioner's PDA (sex discrimination) claim, the district court concluded first that petitioner had not provided any direct evidence of discrimination. Pet. App. 51a-57a. In particular, the district court concluded that respondent's policy of providing assignment accommodations only to limited groups of employees was not facially discriminatory because respondent identified those groups without reference to gender. *Id.* at 55a-57a. The court then held that petitioner had not established a prima facie case of discrimination because she had not identified similarly situated employees who were treated more favorably than she. *Id.* at 57a-62a. Finally, the district court held that, even if petitioner had established a prima facie case, she had not demonstrated that respondent's proffered nondiscriminatory reason for not allowing her to return to work (*i.e.*, that she could not perform the essential duties of the job of air driver) was pretextual. *Id.* at 62a-63a.

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

First, the court agreed with the district court that petitioner had not presented any direct evidence of

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

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

Second, the court of appeals agreed with the district court that petitioner failed to establish a prima facie case of discrimination under the burden-shifting analysis established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Pet. App. 25a-29a. Under that framework, the court explained, a plaintiff must show "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) that similarly-situated employees outside the protected class received more

favorable treatment." *Id.* at 25a-26a (quoting *Gerner* v. *County of Chesterfield*, 674 F.3d 264, 266 (4th Cir. 2004)). The court of appeals concluded that petitioner had made the first three required showings, but had failed to raise a genuine issue of fact as to whether similarly-situated employees outside her protected class received more favorable treatment. *Id.* at 26a-29a. The court reasoned that a pregnant worker subject to a temporary lifting restriction is not "similar in her 'ability or inability to work' to an employee disabled within the meaning of the ADA or an employee either prevented from operating a vehicle as a result of losing her DOT certification or injured on the job." *Id.* at 27a. The court explained that petitioner was dissimilar to an employee entitled to an ADA accommodation because petitioner's "lifting limitation was temporary." *Ibid.* The court further explained that petitioner was not similar to those who had lost DOT certification both because "no legal obstacle stands between [petitioner] and her work," and because those individuals "maintained the ability to perform any number of demanding physical tasks." *Id.* at 27a-28a (citation omitted). Finally, the court explained that petitioner "is not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury." *Id.* at 28a. The court ultimately concluded that, because petitioner had not "establish[ed] that similarly situated employees received more favorable treatment than she did," she had failed to "establish the fourth element of the prima facie case for pregnancy discrimination." *Id.* at 29a.

DISCUSSION

A majority of the courts of appeals (including the court of appeals in this case) to have considered claims similar to petitioner's have erred in interpreting Title VII's requirement that employers treat employees with pregnancy-related limitations as favorably as nonpregnant employees who are similar in their ability or inability to work. Although the question presented is important and recurring, review is not warranted at this time because Congress's enactment of the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, may lead courts to reconsider their approach to evaluating a pregnant employee's claim that other employees with similar limitations on their ability to work were treated more favorably than she and may diminish the adverse effect of the courts of appeals' error. Further, the EEOC is currently considering the adoption of new enforcement guidance on pregnancy discrimination that would address a range of issues related to pregnancy under the PDA and the ADA. The publication of such guidance should clarify the Commission's interpretation of those statutes with respect to policies like the one at issue in this case, thus diminishing the need for this Court's review of the question presented.

A. The Court Of Appeals Erred In Concluding That Petitioner Failed To Establish A Prima Facie Case Of Sex Discrimination Under the *McDonnell Douglas* Framework Applied in Many Title VII Cases

1. In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), this Court held that an employer's policy of excluding pregnancy from its disability-benefits plan did not violate Title VII's prohibition on sex discrimination. *Id.* at 135-140. Two years later, Congress

legislatively overruled that interpretation of Title VII when it enacted the PDA. See, *e.g.*, *AT&T* v. *Hulteen*, 556 U.S. 701, 705 (2009); *California Fed. Savs. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 276-277 (1987); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 678 (1983). The PDA added Subsection (k) to Title VII's "Definitions" provision, 42 U.S.C. 2000e. Subsection (k) provides in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

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

The first quoted clause prohibits employers from treating any employee less favorably on the basis of pregnancy, childbirth, or related medical conditions—it makes clear that such a distinction is discrimination on the basis of sex. The second clause "explains the application of th[at] general principle to women employees," *Newport News Shipbuilding & Dry Dock Co.*, 462 U.S. at 678 n.14, by specifying the appropriate comparator for determining whether an employer's differential treatment of an employee is based on pregnancy, childbirth, or a related medical condition (*i.e.*, is based on sex). Congress thus directed that "women affected by pregnancy, childbirth, or related

medical conditions" (hereinafter referred to as "pregnant women" or "pregnant employees") "shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. 2000e(k).

In a typical Title VII sex-discrimination case, a female employee establishes a prima facie case by demonstrating that (1) she is a woman, (2) she is qualified for the job or job benefit she seeks, (3) she did not obtain the job or job benefit she seeks, and (4) a similarly-situated man did receive the job or job benefit. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). When a sex-discrimination claim is based on pregnancy, the statute directs that the fourth prong should focus on the relative treatment of employees who are similar in their ability or inability to work instead of on the relative treatment of men. Shifting the focus of the analysis to an employee's ability to work was one of the principle purposes of the PDA. See, *e.g.*, S. Rep. No. 331, 95th Cong., 1st Sess. 4 (1977) (*Senate Report*); H.R. Rep. No. 948, 95th Cong., 2d Sess. 4-5 (1978). As this Court has explained, "[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated in their ability or inability to work." *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 204-205 (1991) (brackets in original) (quoting *Guerra*, 479 U.S. at 297 (White, J., dissenting)). "[T]his statutory standard," the Court noted, "was chosen to protect female workers from being treated differently from other employees simply because of their capacity to

bear children." *Id.* at 205. Title VII's prohibition on sex discrimination therefore requires that, "[u]nless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'" *Id.* at 204 (quoting 42 U.S.C. 2000e(k)).

Petitioner argues (see Pet. 11-16) that the statutory language and this Court's reading of it in *Johnson Controls* means that a plaintiff can prove disparate treatment directly (*i.e.*, without use of the *McDonnell Douglas* burden-shifting inferences) by simply establishing that non-pregnant employees who are similar in their ability or inability to work are treated more favorably. Thus far, most courts have instead analyzed such claims under the conventional *McDonnell Douglas* framework for proving disparate treatment. In this case, the lower courts erred in their application of that framework.

2. a. The court of appeals erred in holding that petitioner failed to establish a prima facie case of pregnancy-related sex discrimination under the *McDonnell Douglas* framework. Although the court acknowledged that the meaning of the Section 2000e(k)'s second clause was "unambiguous," Pet. App. 20a (quoting *Johnson Controls, Inc.*, 499 U.S. at 204-250), it nevertheless held that the PDA does not prohibit an employer from treating a pregnant employee less favorably than it treats at least some nonpregnant employees who are similar in their ability to work, *id.* at 20a-24a. In the court of appeals' view, respondent is not required to accommodate petitioner's temporary lifting restriction even though it would accommodate a nonpregnant employee's identical lifting restriction if the restriction arose

from an on-the-job injury. *Id.* at 22a. The source of each employee's limitation, the court of appeals reasoned, renders them dissimilar in their ability or inability to work. *Id.* at 22a, 27a-28a. As a result, the court concluded, such a policy does not discriminate on the basis of sex because it "treats pregnant workers and nonpregnant workers alike." *Id.* at 23a. And because such a policy is "pregnancy-blind," the court of appeals held that petitioner could not rely on the more favorable treatment afforded to nonpregnant workers with temporary lifting restrictions that result from on-the-job injuries to establish a prima facie case. *Id.* at 27a. That reasoning is incorrect.

As discussed, Section 2000e(k) requires that, "[u]nless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'" *Johnson Controls, Inc.*, 499 U.S. at 204 (quoting 42 U.S.C. 2000e(k)). Nothing in the PDA indicates that a pregnant employee faces discrimination within the meaning of Title VII *only* when she receives less favorable treatment than *every* other employee who is similar in his or her ability or inability to work. If a pregnant employee can identify a category of nonpregnant employees who are similar in their ability to work and who are treated more favorably, that is sufficient to establish a prima facie case of pregnancy-based sex discrimination under Title VII. The same is true with respect to discrimination claims more generally under Title VII. If a female job applicant alleges discrimination in hiring on the basis of sex, an employer may not defeat that allegation merely by pointing out that some men also were not hired for a particular job. Under the statute's plain text,

petitioner's allegation that a group of nonpregnant employees similar in their ability to work were accommodated is sufficient to satisfy the fourth prong of the prima facie case even though other nonpregnant employees similar in their ability to work were not accommodated.

In enacting the PDA, Congress did not distinguish among employees based on the *source* of their work limitations. Congress distinguished among employees based on the work-related *effect* of their work limitations. Title VII does not require employers to treat all employees with similar work-related limitations the same; but a pregnant employee establishes a prima facie case of discrimination when she establishes that an employer treats pregnant employees with work limitations less favorably than it treats at least some nonpregnant employees with similar limitations. The court of appeals rejected that interpretation of Title VII because it would require employers to treat pregnancy "more favorably than any other basis." Pet. App. 21a. It is true that pregnancy is afforded more protection than many other characteristics of employees. The same can be said of race, sex (unrelated to pregnancy), religion, and national origin, all of which are protected by Title VII while other characteristics are not. That extra protection is not an "anomal[y]," *ibid.*; it is the point of the statute. The court of appeals elsewhere recognized that respondent's CBA "places a heightened obligation on [respondent] to accommodate" employees injured on the job. *Id.* at 28a. Title VII places the same "heightened obligation" on respondent to offer the same accommodation

to pregnant employees who are similar in their ability or inability to work.[3]

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

As discussed, the court of appeals was wrong with respect to employees with temporary lifting restrictions resulting from on-the-job injuries because the source of the employee's injury is not relevant at the prima facie case stage. See pp. 11-13, *supra*. Both sets of employees are similarly situated with respect to their "ability or inability to work."

A different analysis applies to the employees respondent accommodates pursuant to the ADA. Under the version of the ADA applicable to this case, employees with temporary impairments were generally not considered to be individuals with disabilities under that statute and thus were not entitled to accommodations. But cf. pp. 20-21, *infra* (discussing amendments to the ADA). The court of appeals may have been

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[3] Because a policy that treats employees with limitations resulting from on-the-job injuries more favorably than employees with comparable limitations resulting from pregnancy presents a prima facie case of discrimination, an employer cannot rebut such a prima facie case merely by pointing to the existence of the policy.

correct, therefore, that employees who were entitled to accommodations under the applicable version of the ADA (*i.e.*, employees who generally had longer-term or more severe impairments) were not similar to petitioner in their ability to work.

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

c. Recognizing that petitioner has established a prima facie violation of the PDA under the circumstances here is consistent with the longstanding position of the EEOC. This Court has held that the Commission's reasoned interpretations of Title VII are entitled to a "measure of respect" under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008) (citation omitted).

In 1979, the EEOC published guidance on the PDA in the form of questions and answers. 29 C.F.R. Pt. 1604 App. (44 Fed. Reg. 23,805 (Apr. 20, 1979)). In response to a question about an employer's duty to accommodate an employee's pregnancy-related inability to perform the functions of her job, the EEOC stated: "An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees." 29 C.F.R. Pt. 1604, App. ¶ 5. The Commission explained that, "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function." *Ibid.* Nothing in those guidelines indicates that an employer's duty to accommodate a temporary restriction is dependent on the employer's offering an accommodation to *every* nonpregnant employee with a similar restriction. See also *EEOC Enforcement Guidance: Unlawful Disparate Treatment Of Workers With Caregiving Responsibilities* II.B (May 23, 2007), http://www.eeoc.gov/policy/docs/caregiving.html#pregnancy ("An employer also may not treat a pregnant worker who is temporarily unable to perform some of her job duties because of pregnancy less favorably than workers whose job performance is similarly restricted because of conditions other than pregnancy."); *Employer Best Practices for Workers with Caregiving Responsibilities*, http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (last modified Jan. 19, 2011) (listing as a prohibited practice "providing reasonable accommodations for temporary medical conditions but not for pregnancy"). The Commission has also explained in

litigation that a pregnant employee is "most appropriately compared to all temporarily-disabled, non-pregnant employees whether they sustained their injuries on or off the job." *EEOC* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1194-1195 (10th Cir. 2000). When enacting the PDA, Congress relied on the Commission's pre-*Gilbert* guidelines, which "specifically required employers to treat disabilities caused or contributed to by pregnancy or related medical conditions as all other temporary disabilities." *Senate Report* 2.

3. As petitioner notes (Pet. 20), the court of appeals' erroneous holding—*i.e.*, that an employer's accommodation of temporary limitations arising from on-the-job injuries but not similar limitations related to pregnancy raises no suggestion of discrimination under the PDA—is consistent with the interpretations of the Fifth, Seventh, and Eleventh Circuits. See *Serednyj* v. *Beverly Healthcare, LLC*, 656 F.3d 540, 548 (7th Cir. 2011); *Spivey* v. *Beverly Enters., Inc.*, 196 F.3d 1309, 1311-1313 (11th Cir. 1999); *Urbano* v. *Continental Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir.), cert. denied, 525 U.S. 1000 (1998). Petitioner argues (Pet. 16-19) that the decisions of those courts conflict with decisions of the Sixth and Tenth Circuits; respondent contends (Br. in Opp. 20, 22-29) that any disagreement between the decision below and decisions of the Sixth and Tenth Circuits is either nonexistent or inconsequential. Although the Sixth and Tenth Circuits do differ from the court below in their analysis of whether a plaintiff in petitioner's position has established a prima facie case, it appears that petitioner's claim would not have fared any better in those circuits because they, too, would likely hold that

an employer may accommodate on-the-job injuries without accommodating pregnancy-related limitations, at least absent other evidence of animus or any suggestion that the policy was not applied uniformly.

In contrast to the Fourth Circuit's decision in this case, the Sixth Circuit in *Ensley-Gaines* v. *Runyon*, 100 F.3d 1220 (1996), held that an employee with pregnancy-related physical limitations had established a prima facie case of pregnancy-related sex discrimination when she established that her employer offered light-duty accommodations to employees whose temporary limitations resulted from on-the-job injuries but not to pregnant employees with similar temporary limitations. *Id.* at 1226. The Sixth Circuit did not consider in that case whether the plaintiff should ultimately prevail because it found genuine issues of material fact as to whether the defendant had established a legitimate nondiscriminatory reason for the differential treatment. In later cases raising materially identical factual claims, the Sixth Circuit has adhered to the *Ensley-Gaines* view with respect to the prima facie case. See *Reeves* v. *Swift Transp. Co.*, 446 F.3d 637, 641 & n.1 (2006); see also *Latowski* v. *Northwoods Nursing Ctr.*, 549 Fed. Appx. 478, 483-484 & n.3 (2013). In *Reeves*, however, the court held that the employer's distinction between pregnancy-related limitations on ability to work and similar limitations arising from on-the-job injuries did not violate Title VII. 446 F.3d at 640-643. The court relied on the reasoning of the Fifth and Eleventh Circuits in *Urbano* and *Spivey*, *supra*, concluding that the employer's differential treatment was not pregnancy-based. *Reeves*, 446 F.3d at 642-643. The panel reasoned that holding otherwise would require employers

to provide "preferential, not equal treatment" to pregnant employees, a result that "finds no support in the Act." *Ibid.* In *Latowski*, the panel also held that the employer's on-the-job/off-the-job distinction was a legitimate nondiscriminatory basis for treating pregnancy-related limitations less favorably, but remanded for resolution of a factual question about whether that basis was pretextual on the facts of that case. 549 Fed. Appx. at 478-484.

Similarly, the Tenth Circuit in Ho*rizon/CMS Healthcare Corp.*, *supra*, held that the EEOC had established a prima facie case of pregnancy-related sex discrimination by establishing that non-pregnant employees who sustained off-the-job injuries were treated more favorably than pregnant employees. 220 F.3d at 1195-1196. The Commission conceded in that case that the employer met its burden of articulating a facially nondiscriminatory reason for its denial of light-duty accommodations to pregnant employees—by stating that light-duty positions were available only to those suffering on-the-job injuries—but argued that the employer in that case did not apply the policy as described. *Id.* at 1197. The Tenth Circuit remanded the case for resolution of factual questions about whether the justification was pretextual. *Id.* at 1197-1200.

Thus, plaintiff's claim apparently would not fare any better in the Sixth Circuit than it did in the Fourth (or would in the Fifth, Seventh, or Eleventh) and it is unclear whether she could ultimately prevail in the Tenth Circuit. Although the Sixth and Tenth Circuits would likely agree with petitioner that the proper comparator at the fourth step of the prima facie case includes employees with temporary physical

limitations resulting from on-the-job injuries, at least the Sixth Circuit likely would not agree with petitioner that such a distinction runs afoul of the PDA.

B. The Question Presented Does Not Warrant Review At This Time

Because petitioner would be unlikely to prevail in the circuits that have considered claims like hers, this case is not a strong candidate for certiorari review. Even so, review by this Court of the question presented might be warranted at some point. In our view, most of the courts of appeals to have considered this issue have erred in interpreting the PDA by ignoring the textual requirement that a court compare pregnant employees to other employees "not so affected but similar in their ability or inability to work." 42 U.S.C. 2000e(k). Moreover, the question presented is important to many women in the workplace and to their families.

Nevertheless, review of the question presented is not warranted at this time in light of the recent enactment of the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553, which took effect after the events at issue in this case and does not apply retroactively. In relevant part, the ADAAA and its implementing regulations expanded the definition of disability under the ADA to cover a broader scope of impairments. See 29 C.F.R. 1630.2(j)(1)(ix). The ADAAA also clarified that impairments that substantially limit an individual's ability to lift, stand, or bend are disabilities under the ADA. 42 U.S.C. 12102(2)(A); 29 C.F.R. 1630.2(i)(1)(i).

Those amendments may have the effect of diminishing the importance of the erroneous interpretations of Title VII adopted by several courts of appeals for

two reasons. First, although pregnancy in and of itself will not qualify as a disability, the amended ADA may require employers to accommodate pregnant women who are substantially limited in a major life activity as a result of a pregnancy-related impairment. If so, such women would not need to rely on the protection afforded by Title VII; their right to an accommodation would not depend on their employer's offering a similar accommodation to nonpregnant employees with similar impairments. Second, as amended by the ADAAA, the ADA requires employers to accommodate at least some employees with *temporary* restrictions on their ability to lift or stand even when the limitations arise from non-work-related causes. The courts of appeals thus will have to consider whether employees covered by the amended ADA provide a suitable comparator at the fourth stage of a Title VII prima facie case even under the flawed reasoning employed in the Fourth, Fifth, Seventh, and Eleventh Circuits. In light of the possibility that the courts of appeals will expand the coverage of the PDA or that the ill effect on pregnant women in the workforce of their current erroneous view will diminish in light of the availability of relief under the amended ADA, this Court's review of the question presented is not warranted at this time.

Finally, as noted at p. 8, *supra*, the EEOC is currently considering the adoption of new enforcement guidance on pregnancy discrimination that would address a range of issues related to pregnancy under the PDA and the ADA. The publication of such guidance should clarify the Commission's interpretation of those statutes with respect to policies like the one at

issue in this case, thus diminishing the need for this Court's review of the question presented at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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