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 IN OPPOSITION

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QUESTION PRESENTED

A collective bargaining agreement between UPS and petitioner's union specifies the circumstances in which employees who become unable to perform the essential functions of the job are eligible for accommodations such as modified work assignments. Petitioner became unable to perform the essential functions of her job due to a pregnancy-related lifting restriction, but was not eligible for an accommodation under UPS's pregnancy-neutral policy. She sued, claiming that UPS's adherence to that policy constituted disparate treatment under the Pregnancy Discrimination Act amendment to Title VII. The question presented is whether the Fourth Circuit correctly affirmed the grant of summary judgment to UPS on that claim.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that:

United States Parcel Service, Inc. is a publicly traded corporation and no public company owns 10% or more of its stock.

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JURISDICTION

The judgment of the court of appeals was entered on January 9, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Pregnancy Discrimination Act of 1978 amended the "Definitions" section of Title VII to add the following:

> [1] 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 [2] 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) (reproduced at Pet. App. 84a).

STATEMENT

When petitioner became pregnant, her health care providers imposed a lifting restriction that precluded her from performing an essential function of her job as a delivery driver for United Parcel Service, Inc. (UPS). Her request for an alternative work assignment was denied under UPS's pregnancy-neutral accommodations policy, which is governed by a col-

lective bargaining agreement. Petitioner sued under Section 703 of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act (PDA). *See* 42 U.S.C. § 2000e-2(a)(1). The district court granted summary judgment for UPS, ruling that petitioner had presented no evidence of discrimination. Pet. App. 57a, 62a-63a. The court of appeals affirmed, ruling that petitioner had failed to prove a prima facie case of disparate treatment. *Id.* at 29a.

1. Respondent UPS is the world's largest package delivery company. In the United States, UPS operates a large fleet of vehicles to transport packages between customer homes and offices, UPS service centers, and transfer facilities. UPS's workforce is organized by the International Brotherhood of Teamsters, and the terms of employment are governed by an extensively negotiated collective bargaining agreement, which specifies (among many other things) the circumstances under which UPS must provide accommodations—such as temporary, alternative positions—to drivers who become unable to perform the essential functions of their jobs. *See* Dist. Ct. Dkt. 60-1 at 5. Petitioner was a member of the Teamsters union and subject to the terms of the collective bargaining agreement. Pet. App. 34a.

Petitioner was employed as an "air driver," a position that involves loading packages on a vehicle, transporting them, and then unloading them for delivery to customers or a service center. Accordingly, the essential functions of the air driver position—as with all UPS driving jobs—include the ability to lift packages weighing up to seventy pounds. Pet. App. 3a, 31a-32a. Petitioner admitted that she was periodically required to lift packages weighing more than twenty or even fifty pounds. *Id*. at 31a n.2.

In July 2006, petitioner requested a leave of absence to attempt *in vitro* fertilization, which was granted by UPS's occupational health manager, Carolyn Martin. Pet. App. 5a. After petitioner became pregnant, she sought to extend her leave temporarily, with the intention of returning to work during her pregnancy. *Ibid*. Two months later, petitioner provided her supervisor with a note from her doctor, which stated that she should not lift more than twenty pounds for the first twenty weeks of her pregnancy or ten pounds thereafter. *Ibid*. Petitioner's midwife later wrote a note confirming the twenty-pound lifting restriction. *Id*. at 5a-6a.

At some point after October 2006, petitioner asked to return to work, and she and Ms. Martin discussed that request. Ms. Martin "empathized with [petitioner's] situation and would have loved to help her." Pet. App. 7a (alterations and internal quotation marks omitted). Nevertheless, she explained that UPS's collectively bargained accommodations policy did not apply to petitioner.

Although positions are typically awarded by seniority under UPS's collective bargaining agreement, certain assignments may be temporarily provided to employees as accommodations for certain limitations. *See* Dist. Ct. Dkt. 60-1 at 8. *First*, the agreement requires UPS to give temporary work assignments to employees who are unable to perform their regular jobs because of injuries sustained on the job. Pet. App. 34a. *Second*, the agreement permits light-duty work as an accommodation for an employee who has a condition or impairment that restricts performance *and* otherwise qualifies as a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq*. *Ibid*. *Third*, the agreement requires UPS to give an "inside job" to

drivers who lose their Department of Transportation (DOT) certification because of a failed medical exam, a revoked or suspended driver's license, or involvement in a motor vehicle accident. Petitioner has never contended that she qualified for an accommodation under any one of these categories.

The collective bargaining agreement neither requires nor authorizes UPS to disrupt the seniority system by giving temporary, alternative positions to employees unable to perform their normal work assignments due to *off-the-job* injuries or conditions (unless the resulting limitation amounts to a cognizable disability under the ADA). For example, a driver whose health care provider imposed a lifting limitation due to a back injury sustained off the job, and which was not an ADA-cognizable disability (*see Duncan v. Wash. Metro. Area Transit Auth.*, 240 F.3d 1110, 1114-15 (D.C. Cir. 2001) (en banc)), would not be eligible for an accommodation. Under its collectively bargained policy, UPS treats a lifting restriction resulting from pregnancy in exactly the same way. Pet. App. 4a.

Ms. Martin explained to petitioner that because her lifting restriction did not result from either an on-the-job injury or an ADA-cognizable disability, she was not eligible for an accommodation under the UPS policy. Pet. App. 6a-7a. According to Ms. Martin, she would have allowed petitioner to return to work if petitioner had provided a medical certification removing her lifting restriction. Ms. Martin also explained that, had she considered petitioner disabled within the meaning of the ADA, she would have encouraged petitioner to apply for an accommodation in accordance with UPS's policy. *Id.* at 7a.

By November 2006, petitioner's period of paid leave had expired. Pet. App. 8a. She then went on a period of unpaid leave. Petitioner gave birth on April 29, 2007, and returned to work for UPS at some point thereafter. *Ibid*.

2. Petitioner filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging discrimination on the basis of sex. Pet. App. 8a. The EEOC issued petitioner a right to sue letter in September 2008. One month later, petitioner brought a disparate treatment claim against UPS, seeking damages for sex discrimination under Title VII, as amended by the PDA. *Id*. at 8a-9a.[1]

Following extensive discovery, UPS moved for summary judgment in July 2010. Pet. App. 9a. The district court granted summary judgment for UPS on the grounds that petitioner (1) had not shown direct evidence of discrimination; (2) failed to establish a prima facie case of disparate treatment because she could not identify a similarly situated comparator who received more favorable treatment; and (3) could not show that UPS's nondiscriminatory application of a neutral policy was a mere pretext for discrimination. *Id*. at 9a-10a.

3. The Fourth Circuit affirmed. Based on a thorough review of the UPS-specific record evidence, the text and structure of the statutory provision invoked

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[1] Petitioner also brought a race discrimination claim under Title VII and a claim under the ADA. *See* Pet. App. 43a-44a. She did not pursue her race discrimination claim on appeal, and she does not challenge the court of appeals' ruling on her ADA claim in her petition for a writ of certiorari. *See* Pet. App. 9a n.5. Nor does she challenge the district court's refusal to allow her to add a disparate impact claim, which the court of appeals held was not an abuse of its discretion. *Id.* at 10a n.6.

by petitioner, and the decisions of its sister circuits, the panel unanimously concluded that petitioner had raised no genuine issue of material fact calling into question the district court's grant of summary judgment to UPS. Pet. App. 17a-29a.

a. *Record Evidence*: The court of appeals carefully examined the evidentiary submissions, including the employer-specific accommodations provisions of the UPS-Teamsters collective bargaining agreement, to consider whether petitioner had established a prima facie case of disparate treatment and concluded that she had not. Pet. App. 24a-25a, 27a-29a.

At the outset, the court of appeals considered and rejected petitioner's argument that UPS's policy of providing work accommodations to some employees and not others constituted direct evidence of discrimination. The court of appeals recognized that "an explicit policy excluding pregnant workers would violate antidiscrimination law," but determined that "no such policy exists here," because UPS had "crafted a pregnancy-blind policy." Pet. App. 18a. It therefore concluded that UPS's policy "is not direct evidence of pregnancy-based sex discrimination." *Id*. at 24a.

The court of appeals next considered whether petitioner had offered evidence sufficient to make out a prima facie case of disparate treatment under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which requires a claimant to show "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action" and (4) *either* "that similarly-situated employees outside the protected class received more favorable treatment" *or* that the "allegedly adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination" Pet. App. 25a-

26a & n.17 (alteration and internal quotation marks omitted).

The court of appeals accepted that petitioner had satisfied the first three elements and explained that the dispute centered on the final element. Pet. App. 26a-27a. As to that inquiry, petitioner and UPS "sharply disagree[d] about who constitute[d] an appropriate 'comparator.'" *Id.* at 27a. While petitioner sought to compare herself to employees accommodated under the ADA, drivers who had lost their DOT certification, and employees injured on the job, UPS compared petitioner to those employees subject to a lifting restriction caused by an off-the-job injury or condition. *Ibid.*

The court of appeals reiterated that UPS's accommodations policy was "neutral" and "pregnancy-blind," and ruled that petitioner could "no more successfully" indirectly attack that policy "than she could directly." Pet. App. 27a. The court of appeals further explained why a pregnant worker with a temporary lifting restriction is not similar to employees entitled to accommodations with respect to an "ability or inability to work." *Ibid.* Specifically, the court reasoned that petitioner is dissimilar to an employee disabled under the ADA because, unlike the ADA-disabled employee, petitioner's lifting restriction was only temporary and not otherwise "a significant restriction on her ability to perform major life activities." *Ibid.* The court also determined that petitioner is dissimilar to an employee who lost his or her DOT certification because petitioner was not legally precluded from driving a UPS vehicle and because petitioner had a lifting restriction. Finally, the court explained that petitioner differs from an employee injured on the job because petitioner's inabil-

ity to perform the essential functions of the job did not arise from an on-the-job injury. *Id*. at 27a-28a.

b. *Statutory text and structure*: The court of appeals held that Section 703 of Title VII, as amended by the PDA, does not require "employers to grant pregnant employees a 'most favored nation' status with others based on their ability to work, regardless of whether such status was available to the universe—male and female—of nonpregnant employees." Pet. App. 19a. This conclusion was based on the text and structure of the PDA amendment. *Id.* at 20a-21a.

The court of appeals rejected petitioner's contention that the second clause of the PDA should be read broadly to require different—indeed preferential—treatment for pregnant workers. Pet. App. 20a-21a. The court explained that "the second clause does not stand alone; it follows the first clause." *Id*. at 20a. The court concluded that the second clause's "placement in the definitional section of Title VII, and grounding within the confines of sex discrimination under § 703, make clear that [the PDA] does not create a distinct and independent cause of action." *Id*. at 20a-21a.

Moreover, the court of appeals explained how petitioner's reading of the second clause would lead to "anomalous consequences," *e.g.*, "pregnancy would be treated more favorably than any other basis, including non-pregnancy-related sex discrimination, covered by Title VII." Pet. App. 21a. To illustrate this point, the court compared petitioner to an employee who injured his back picking up a child, and to an employee who sustained an injury arising from her off-the-job work as a volunteer firefighter. The court explained that, if it were to accept petitioner's

interpretation of the PDA, only petitioner—but not either of the other employees injured off the job—would be eligible to receive an accommodation. *Id*. at 22a. The court concluded that "[s]uch an interpretation does not accord with Congress's intent in enacting the PDA" and "would thus imbue the PDA with a preferential treatment mandate that Congress neither intended nor enacted." *Id*. at 22a-23a.

c. *Analogous Decisions*: The court of appeals found further confirmation for its ruling in opinions from its sister circuits regarding the proper construction of the PDA. Pet. App. 21a. Specifically, the courts of appeals that have considered the issue have unanimously reasoned that adopting petitioner's interpretation of the PDA would "transform an antidiscrimination statute into a requirement to provide accommodation to pregnant employees, perhaps even at the expense of other, nonpregnant employees." Pet. App. 21a-22a (citing *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312-13 (11th Cir. 1999); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 207-08 (5th Cir. 1998); and *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994)). Although the court noted that it "disagree[d] with [the] analysis" of the sole authority put forward by petitioner, *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996), it was also "unpersuaded" that the case actually "effect[ed] the watershed change" that petitioner "ascribed to it." Pet. App. 23a.

ARGUMENT

When petitioner requested an accommodation for her pregnancy-related lifting restriction, UPS treated petitioner in exactly the same way it treats *all* employees—regardless of pregnancy—who are unable to perform essential functions of the job as a result of an off-the-job injury or condition. UPS's accommodations policy, as set forth in a detailed and extensively negotiated collective bargaining agreement, provides for temporary, alternative work assignments only in the case of drivers who suffer an on-the-job injury, have an ADA-covered disability, or lose their DOT certification. Petitioner fell into none of these categories; thus the accommodation she requested would have required UPS to give her preferential treatment in contravention of the collective bargaining agreement. The court of appeals concluded that UPS's adherence to its pregnancy-neutral accommodations policy did not constitute "disparate treatment" under Title VII as amended by the Pregnancy Discrimination Act. That decision is correct, and does not conflict with any decision of this Court or of any other court of appeals. It does not warrant further review.

I. THE DECISION BELOW IS CORRECT

The Fourth Circuit correctly determined that UPS was entitled to summary judgment on petitioner's sex discrimination claim. The application of UPS's pregnancy-blind accommodations policy to petitioner does not constitute "disparate treatment" prohibited by Title VII as amended by the PDA. The contrary view advanced by petitioner and her *amici* cannot be reconciled with the statute's text, structure, or purpose.

1. Title VII prohibits discrimination in employment "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court grappled with whether employers could legally exclude conditions related to pregnancy from a comprehensive sickness benefits plan that covered other off-the-job sicknesses. It ruled that the prohibition against sex discrimination did not extend to discrimination on the basis of pregnancy.

In direct response to *Gilbert*, Congress enacted the PDA to clarify that sex discrimination includes discrimination on the basis of pregnancy. *See Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 277 (1987). Congress therefore did not intend to provide an independent cause of action for pregnant workers and instead placed the entirety of the PDA into the "Definitions" section of Title VII. *See* 42 U.S.C. § 2000e(k).

Petitioner and her *amici* assert that the PDA's second clause removes the baseline requirement that differential treatment occur "because of or on the basis of pregnancy" to qualify as sex discrimination. Even if a neutral policy is not enacted or implemented "because of" pregnancy or "on the basis of" pregnancy, they reason, it may still violate the PDA if the effect is to deny some pregnant women benefits that are available to at least one person similar in her "ability or inability to work." Petitioner and *amici* insist that this must be the case even if pregnant women are treated the same as others "similar in their ability or inability to work." Pet. 10-16; Amicus Br. 4-11.

This construction violates the "cardinal rule" that "a statute is to be read as a whole." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Both peti-

tioner and her *amici* read "the second clause" in isolation, but the PDA is in fact a single sentence. The semicolon does not permit this Court to divorce the first half of the sentence from the second half; both halves must be considered *together*. As this Court explained, the "meaning of the first [half]" of the PDA is in no way "limited by the specific language in the second [half]." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 n.14 (1983). Rather, the first clause makes clear that pregnancy-based discrimination constitutes sex discrimination and the second clause merely "explains the application of the general principle to women employees." *Ibid*.

Indeed, it is "well established" that Congress intended this construction to overturn both the reasoning and outcome of *Gilbert*. *Guerra*, 479 U.S. at 284. "By adding pregnancy to the definition of sex discrimination prohibited by Title VII, the first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert*." *Ibid.* Similarly, the second clause "was intended to overrule the holding in *Gilbert*." *Id.* at 285. In other words, it is not enough that petitioner show that she did not receive an accommodation available to *any* other employee, regardless of the reason. Instead, petitioner must show that pregnancy was singled out for exclusion (as it was in *Gilbert*).

Furthermore, both clauses were placed in the "Definitions" section of Title VII, which "merely elucidates the meaning of certain statutory terms"—*i.e.*, "because of" or "on the basis of" sex—and "proscribes no conduct." *Carr v. United States*, 130 S. Ct. 2229, 2237 n.6 (2010). Read as a whole, the PDA merely prohibits employers from using *pregnancy* as a criterion on which to grant or deny benefits. Plainly, the

law does not prevent employers from using *other* criteria to determine whether employees are entitled to an accommodation, such as (for example) whether or not the limitation for which the employee seeks accommodation was itself employment-related. Because UPS's accommodations policy does not distinguish between employees "because of" or "on the basis of" pregnancy, it does not run afoul of the PDA.

Finally, petitioner ignores Section 703(h) of Title VII, which provides that:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different . . . conditions [] or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because . . . of sex[.]

42 U.S.C. § 2000e-2(h). "The unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977) (alterations and internal quotation marks omitted). Petitioner does not dispute that the UPS-Teamsters collective bargaining agreement is seniority-based. Accordingly, petitioner cannot challenge its application because she failed to prove that the agreement in general, or the accommodations policy in particular, was adopted with any discriminatory intent.

2. As this Court has recognized, "the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles." *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1085

n.14 (1983) (plurality opinion). Those principles require a level playing field; they do not mandate preferential treatment for any member of a protected group. *See Guerra*, 479 U.S. at 287.

The Senate Report on the PDA states that the Act "defines sex discrimination, as proscribed in the existing statute, to include these physiological occurrences [pregnancy and related medical conditions] peculiar to women; *it does not change the application of title VII to sex discrimination in any other way*." S. Rep. No. 95-331, at 3-4 (1977) (emphasis added). Likewise, the House Report states that "[p]regnancy-based distinctions will be subject to the *same scrutiny on the same terms as other acts of sex discrimination* proscribed in the existing statute." H.R. Rep. No. 95-948, at 4 (1978) (emphasis added).

It is clear that Congress did not require employers to equate pregnancy with on-the-job conditions, as petitioner would have it. Indeed, the legislative history is rife with examples specifically allowing employers to treat pregnant employees the same as employees injured off the job. In a floor statement intended to "dispel" a "few myths surrounding the bill," then-Senator Biden, one of the co-sponsors of the PDA, explained that the Act "simply requires" that "disability due to pregnancy must be treated the same as any other non-work-related disability." 123 Cong. Rec. 29640, 29660 (1977). Senator Culver confirmed this point when he explained that the PDA requires employers "to treat pregnancy-related disabilities the same as any other nonwork related disability[.]" *Id*. at 29663. *See also* 124 Cong. Rec. 21434, 21436 (1978) (remarks of Rep. Sarasin) (PDA "would not require extending coverage beyond job-related disability").

As this Court has previously observed, "the legislative history is *devoid* of any discussion of preferential treatment of pregnancy, beyond acknowledgments of the existence of state statutes providing for such preferential treatment." *Guerra*, 479 U.S. at 286 (emphasis added) (footnote omitted). Indeed, there is only one direct reference in the legislative history to preferential treatment, in which Senator Brooke "emphasize[d] most strongly that [the PDA] in no way provides special disability benefits for working women." 123 Cong. Rec. at 29664. The legislative history thus makes clear that, in amending Title VII, Congress did not "inten[d] . . . to require preferential treatment" of pregnant workers. *Guerra*, 479 U.S. at 287.

3. Requiring UPS to accommodate petitioner's pregnancy-based limitation, even though similarly situated employees would not be similarly accommodated, would treat pregnancy more favorably than *any* other basis covered by Title VII. *Cf. Hardison*, 432 U.S. at 79-80 (employer need not adapt to employee's worship schedule where doing so would conflict with a neutral policy). Indeed, the interpretation of the PDA now advanced by petitioner and her *amici* would require employers to provide benefits to pregnant workers even over *disabled* workers—as long as those benefits were provided to others "similar in their ability or inability to work." *Cf. Raytheon Co. v. Hernandez*, 540 U.S. 44, 54-55 (2003) (a neutral no-rehire policy is a nondiscriminatory reason sufficient to defeat a prima facie case of disability discrimination).

In fact, petitioner's position cannot be reconciled with this Court's decision in *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009), which explained that the PDA does not bestow most favored nation status to preg-

nant workers above all others. In that case, a pregnant employee brought a PDA suit to challenge her employer's pension plan, which gave less retirement credit for pregnancy than for medical leave. The employer argued that its pension plan came within the exemption for bona fide seniority systems. *Id.* at 707-08. Although the plaintiff pointed to the PDA's second clause to explain why the exemption should not apply, this Court rejected that argument, reasoning that the plaintiff's reading of the PDA "would result in the odd scenario that pregnancy discrimination, alone among all categories of discrimination (race, color, religion, other sex-based claims, and national origin), would receive dispensation from the general application of [this exemption]." *Id.* at 709 n.3.

Moreover, petitioner's construction would allow courts to override the terms of collective bargaining agreements, contravening the legions of federal court decisions to hold that such agreements are ordinarily controlling. *See*, *e.g.*, *Hardison*, 432 U.S. at 80-82; *Eckles v. Conrail*, 94 F.3d 1041, 1047-48 (7th Cir. 1996) (collecting cases); *cf. US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (Congress did not intend for an employer to override its seniority-based system to accommodate a qualified individual with a disability). Petitioner's contention that the accommodations policy adopted as part of the UPS-Teamsters collective bargaining agreement is unlawful cannot be reconciled with this Court's decisions holding that, "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Hardison*, 432 U.S. at 82; 42 U.S.C. § 2000e-2(h).

Contrary to petitioner's contention (Pet. 8), it is neither "modest" nor "slight" for a court to set aside a

collective bargaining agreement—especially where, as here, no unfair labor practice is alleged. Indeed, petitioner is essentially asking to jump the line in the seniority system, which would "undermine [other] employees' expectations of consistent, uniform treatment—expectations upon which the seniority system's benefits depend." *Barnett*, 535 U.S. at 404. Tellingly, the collective bargaining agreement is never mentioned in the Argument section of either petitioner's or *amici's* brief.

II. THERE IS NO CONFLICT OF DECISION WARRANTING THIS COURT'S REVIEW

In accordance with the Fourth Circuit, every court of appeals to have considered the question has concluded that the application of a facially neutral policy providing benefits to certain types of employees but not others does not constitute "disparate treatment" prohibited by Title VII, even when that policy is applied to individuals with pregnancy-related restrictions. Contrary to petitioner's submission, there is no conflict in the circuits that merits this Court's attention.

A. The Courts Of Appeals Unanimously Recognize That A Pregnancy-Blind Accommodations Policy Does Not Constitute Disparate Treatment.

Petitioner contends that there is "longstanding disagreement in the circuits" regarding "whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are 'similar in their ability or inability to work.'" Pet. i, 16 (capitalization altered). Not so.

All of the courts of appeals that have addressed this issue agree that a plaintiff may prove sex discrimination by either direct or circumstantial evidence and that there are several heuristics that courts may use in evaluating circumstantial evidence. And all circuits agree that the application of a pregnancy-blind policy—such as the collective bargaining agreement at issue here—does not constitute "disparate treatment" prohibited by Title VII. The courts of appeals therefore hold that the application of such policies, standing alone, does not prove sex discrimination on the basis of pregnancy.

1. In accordance with this Court's precedents, the circuits unanimously agree that courts must apply standard Title VII analysis to pregnancy discrimination claims. *See*, *e.g.*, *Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 993-94 (8th Cir. 2011); *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008); *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 420-21 (1st Cir. 1996). Indeed, no circuit has ever agreed with petitioner's position that the PDA requires employers to bestow a most favored nation status on pregnant employees.

A plaintiff may choose to make out a prima facie case of pregnancy discrimination through either direct evidence or indirect evidence using the burden-shifting framework of *McDonnell Douglas* and its progeny. The fourth element under that framework, and the only one in dispute here, is whether the decision or action occurred under circumstances giving rise to an inference of discrimination based on membership in a protected class. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

One way a plaintiff can establish the fourth element of the prima facie case is to prove that she was

treated less favorably than similarly situated employees who were not in her protected class. But that is not the only way. The circuits are in agreement that a plaintiff may use non-comparison circumstantial evidence to raise a reasonable inference of intentional discrimination. *See*, *e.g.*, *Chapter 7 Tr. v. Gate Gourmet, Inc.*, 683 F.3d 1249, 1255 (11th Cir. 2012); *Timmons v. GMC*, 469 F.3d 1122, 1126 (7th Cir. 2006); *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1195 n.7 (10th Cir. 2000).

Under the *McDonnell Douglas* framework, a plaintiff cannot prove discrimination through indirect evidence solely by making out a prima facie case. Rather, once a plaintiff makes out a prima facie case, the defendant may articulate a legitimate nondiscriminatory reason for its actions. If the defendant does so, whether the employee properly made out a prima facie case "is no longer relevant." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). It is then up to the plaintiff to show that the articulated reason is merely a pretext for discrimination. *See Burdine*, 450 U.S. at 254-56. Here, the district court ruled that even if petitioner had stated a prima facie case, her claim failed at the pretext stage. The court of appeals did not disturb that determination.

2. The courts of appeals are unanimous in recognizing that pregnancy-blind policies of the type at issue here, standing alone, are insufficient to prove discrimination, either directly or indirectly. As noted, the Fourth Circuit held that a policy of providing accommodations to some employees (such as those disabled under the ADA or those injured on the job) but not others (such as those injured off the job) is insufficient evidence of pregnancy discrimination. Pet. App. 24a-25a, 27a-29a. Other circuits agree.

a. *Fifth Circuit*: In *Urbano v. Continental Airlines*, 138 F.3d 204 (5th Cir. 1998), an employee challenged her employer's policy of granting light-duty assignments only to workers who suffered occupational injuries. A unanimous panel of the Fifth Circuit affirmed the grant of summary judgment to the employer, reasoning that "the PDA does not impose an affirmative obligation on employers to grant preferential treatment to pregnant women." *Id*. at 208. Because the employer treated the pregnant employee "the same as it treat[ed] any other worker who suffered an injury off duty," the Fifth Circuit explained that (1) the plaintiff did not make out a prima facie case and (2) there was "no probative evidence that [the policy] was a pretext for discrimination against pregnant women." *Ibid*. This Court denied the petition for certiorari. 525 U.S. 1000 (1998).

b. *Sixth Circuit*: In *Reeves v. Swift Transportation Co*., 446 F.3d 637 (6th Cir. 2006), an employee brought suit against her former employer, which had terminated her pursuant to a pregnancy-blind policy denying light-duty work to employees who were not injured on the job and who otherwise could not perform the essential functions of the job. A unanimous panel of the Sixth Circuit affirmed the grant of summary judgment to the employer, reasoning that the policy did not constitute either direct or indirect evidence of discrimination because it was "pregnancy-blind" and the PDA "merely requires employers to 'ignore' employee pregnancies." *Id*. at 640-42. The Sixth Circuit concluded there was no evidence that the employer adopted its policy as a pretext for pregnancy discrimination. *Id*. at 642. It also expressly "accept[ed]" the "reasoning of the Fifth and Eleventh circuits rejecting claims materially identical to [the employee's]." *Ibid.*

c. *Seventh Circuit*: In *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011), an employee challenged her employer's modified work policy which provided accommodations only to qualified individuals with an ADA-cognizable disability or to those employees who sustained work-related injuries. A unanimous panel of the Seventh Circuit affirmed the grant of summary judgment to the employer, reasoning that the policy did not constitute direct evidence of discrimination because it was "pregnancy-blind," which "is all the PDA requires." *Id*. at 548-49. The Seventh Circuit also determined that the employee had not established a prima facie case of disparate impact under *McDonnell Douglas* because she had not shown that a similarly situated, nonpregnant employee was treated more favorably. *Id*. at 551-52.

d. *Eleventh Circuit*: In *Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1039 (11th Cir. 1999), an employee challenged her employer's modified work policy providing light-duty work to employees who suffered from work-related injuries. A unanimous panel of the Eleventh Circuit affirmed the grant of summary judgment to the employer, reasoning that the employee had not offered direct or circumstantial evidence of discrimination. *Id*. at 1312-13. The Eleventh Circuit cited the Fifth Circuit's decision in *Urbano* and concluded that the employer "was under no obligation to extend [the] accommodation to pregnant employees" because the "PDA does not require that employers give preferential treatment to pregnant employees." *Id*. at 1312. The Eleventh Circuit also held that the "correct comparison is between [the pregnant employee] and other employees who suffer non-occupational disabilities, not between [the pregnant employee] and employees who were injured on

the job" because the PDA requires employers to "ignore an employee's pregnancy and treat her as well as it would have if she were not pregnant." *Id*. at 1313 (internal quotation marks omitted).

e. *Third and Eighth Circuits*: Although the Third and Eighth Circuits have not squarely considered and decided the issue, their rulings indicate that they would join the other circuits in holding that the application of a pregnancy-blind policy is not sufficient proof of pregnancy discrimination. These circuits agree that it is not unlawful under the PDA to take an adverse employment action against a pregnant employee if the employer would have taken that action against an employee who suffered from a "different temporary disability," reasoning that the "PDA is a shield against discrimination, not a sword in the hands of a pregnant employee." *In re Carnegie Ctr. Assocs*., 129 F.3d 290, 297 (3d Cir. 1997) (holding that employee on maternity leave could be treated in same manner as any other temporarily disabled employee not at work); *Adams v. Nolan*, 962 F.2d 791, 794-95 (8th Cir. 1992) (treating a policy which "purports to apply to anyone with a 'non-work-related injury or illness'" as "a facially nondiscriminatory policy"); *cf. Walker v. Fred Nesbit Distrib. Co*., 156 F. App'x 880, 884 (8th Cir. 2005) (per curiam).

B. The Assertedly Conflicting Decisions Involve An Immaterial Aspect Of The Analytical Framework.

Petitioner does not dispute that the courts of appeals are in substantial agreement regarding the application of the PDA to situations like this one, nor does she seriously argue that this case would have been decided differently had it been brought in a different circuit. Instead, petitioner strives mightily to

manufacture a conflict between the decision below and the Sixth Circuit's decision in *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996), as well as dicta from the Tenth Circuit's decision in *Horizon/CMS Healthcare Corp*. Pet. 17-19.

The circuit "split" contrived by petitioner merely reflects varying modes of reasoning that lead to the same result, *viz.*, that the application of a neutral accommodations policy to all workers, pregnant or not, does not constitute "disparate treatment" prohibited by Title VII. To the extent the Sixth Circuit diverges from others, the divergence is limited to a single—and ultimately inconsequential—aspect of the multifactor *McDonnell Douglas* test. In fact, the Sixth Circuit in *Reeves* limited its previous decision in *Ensley-Gaines* to its facts. The purported "split" is thus not a basis for certiorari review. *See* Sup. Ct. R. 10; *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties").

Ensley-Gaines will not bear the weight petitioner places on it. In that case, an employee alleged that her employer had discriminated against her while she was pregnant. Specifically, the employee complained that her employer gave her "light-duty status in name only because she was not permitted to sit while working, and after standing for the four hours allowed by her pregnancy restriction, she was sent home." 100 F.3d at 1223. The employee identified a number of nonpregnant, temporarily disabled employees who were allegedly treated more favorably than she was, including one employee with an off-the-job injury who was permitted to sit part of the time and three employees with on-the-job injuries who regularly received full-time work. *Ibid*.

The Sixth Circuit explained that the employee could establish a prima facie case of discrimination under Title VII through "the test established by the Supreme Court in *McDonnell Douglas*." 100 F.3d at 1224. "At the center" of the appeal, the court stated, was the fourth prong of the *McDonnell Douglas* framework, *i.e.*, the district court had determined that persons with on-the-job injuries were not "similarly situated" to the employee. *Ibid*. The Sixth Circuit concluded that the employee was similarly situated to persons with occupational injuries, and that because those persons were afforded better treatment, the employee had established a prima facie case of discrimination. *Id*. at 1226.

The conclusion that the employee had established a prima facie case did not end the analysis in *Ensley-Gaines*, however. The court next considered whether the employer had articulated legitimate, nondiscriminatory reasons for its actions, and whether the employee had offered contrary evidence to show that those reasons were pretextual. 100 F.3d at 1227. Although the employer stated that the employee was not allowed to sit on a stool for safety and efficiency reasons, the court determined that the employee had met her burden in evincing pretext, because she provided evidence that "other individuals were permitted to use stools and use of the stool did not pose any safety risks." *Ibid*. It was this evidence—and not evidence about any pregnancy-blind policy—that led the court to conclude that summary judgment was inappropriate. *Ibid*.

The Sixth Circuit's subsequent decision in *Reeves* confirms that *Ensley-Gaines* must be read narrowly. *Reeves* holds, in conformance with all the other circuit-level authority cited above, that the application of pregnancy-blind policies similar to the one at issue

in this case "cannot be viewed" as direct evidence of discrimination or evidence of pretext "because the Act merely requires employers to 'ignore' employee pregnancies." 446 F.3d at 641. *Reeves* distinguished *Ensley-Gaines* as a case which "primarily dealt with whether a prima facie case had been established under the Pregnancy Discrimination Act." *Id*. at 641 n.1. The reasoning of *Ensley-Gaines*, the court concluded, did "not control [the *Reeves*] case at the pretext stage of the *McDonnell Douglas* analysis. The facts that prompted [the court] in *Ensley-Gaines* to find a genuine issue of material fact at the pretext phase ha[d] no parallel in [*Reeves*]." *Ibid*. *Reeves* thus confirms that the reasoning of *Ensley-Gaines* is limited to a *singular* aspect of the *McDonnell Douglas* framework—and does not stand for the sweeping proposition that pregnancy-blind policies are sufficient evidence of discrimination in and of themselves.

Petitioner's reliance on *Horizon/CMS Healthcare Corp.*, which also concerned a pregnancy-blind policy, has even less basis. Pet. 18-19. Contrary to petitioner's suggestion, the Tenth Circuit applied the *same* Title VII analysis as the Fourth Circuit did here, holding that "[c]laims brought under the PDA are analyzed in the same way as other Title VII claims of disparate treatment." 220 F.3d at 1191, 1195 n.7. The Tenth Circuit recognized that the PDA—like other Title VII disparate treatment claims—requires a finding of intentional discrimination. And it concluded that a policy distinction between on-the-job injuries and off-the-job conditions was a legitimate nondiscriminatory reason for denying a light-duty accommodation to pregnant employees "[b]ecause nothing in the PDA requires an employer to give preferential treatment to pregnant employees." *Id*. at 1195 n.7. Ultimately, the Court

reversed the grant of summary judgment based on the specific evidence of pretext in that case that is not present in *this* case. *Id*. at 1200-12.[2]

Indeed, this case would have been decided the same way in the Sixth or Tenth Circuits. Neither *Ensley-Gaines* nor *Horizon/CMS Healthcare Corp*. establishes that pregnancy-blind policies of the type at issue here are evidence of discrimination. *Ensley-Gaines* establishes at most that an employee may state a prima facie case of sex discrimination by proffering evidence that she was treated less favorably than another temporarily disabled employee. But the prima facie case ultimately "drops out of the picture" once the defendant proffers a nondiscriminatory reason for its actions. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). *Reeves* and *Horizon/CMS Healthcare Corp*. show that the application

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[2] Although petitioner argues that this Court owes deference to the EEOC's position in *Horizon/CMS Healthcare Corp* (Pet. 10 n.3), she conveniently ignores that the EEOC specifically "waived off" the argument that "any distinction between non-work-related conditions and work-related conditions, in a modified duty policy, is per se unlawful." EEOC Br. in Resp. to Pet. for Reh'g En Banc, *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (No. 98-2328), *available at* http://www.eeoc.gov/eeoc/litigation/briefs/horizon.txt (last visited June 6, 2013). Indeed, the *actual* position advanced by the EEOC is consistent with its guidance that "an employer that creates light duty positions for its employees with occupational injuries does not have to create such positions as a reasonable accommodation for employees with disabilities who have not been injured on the job." Press Release, EEOC, EEOC Issues Guidance Clarifying Relationship Between Workers' Compensation Laws and Disability Statute (Sept. 4, 1996), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-4-96.cfm (last visited June 6, 2013).

of a pregnancy-blind policy constitutes a nondiscriminatory reason for an employer's actions, and the decision to treat employees with on-the-job injuries better than those with off-the-job injuries—including pregnant women—is ultimately insufficient to evince discrimination at the pretext stage.

As in *Reeves*, petitioner's claim failed at the pretext stage. UPS proffered a nondiscriminatory reason for its actions: It contended that it would not permit petitioner to return to work with the lifting restriction because she could not perform the lifting required of drivers and its neutral policy did not permit an accommodation. *See* Pet. App. 7a. Petitioner cannot genuinely dispute that delivery drivers must be capable of performing heavy lifting (*id*. at 3a, 31a-33a), and courts have held in unison that the application of a neutral policy is a legitimate, nondiscriminatory reason to deny an accommodation. *Cf. Raytheon*, 540 U.S. at 51-52 ("[A] neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA"). In any event, defendant's burden to proffer a nondiscriminatory reason for its actions "is one of production, not persuasion; it can involve no credibility assessment." *Reeves v. Sanderson*, 530 U.S. 133, 142 (2000) (internal quotation marks omitted). "Accordingly, the *McDonnell Douglas* framework—with its presumptions and burdens—disappear[s], and the sole remaining issue [is] discrimination *vel non*." *Id*. at 142-43 (internal quotation marks and citations omitted).

Petitioner complains that the "[d]enial of workplace accommodations to pregnant workers [where] other employees receive them is a particularly common fact pattern" (Pet. 7), but that is not the fact pattern of this case. Rather, the fact pattern here is much closer to that in *Reeves*. Just like in *Reeves*,

there was no credible evidence that UPS's policy was unevenly enforced. And just like in *Reeves*, the district court determined that UPS was entitled to summary judgment because petitioner proffered no plausible evidence to cast doubt on UPS's reasons for denying the accommodation. Pet. App. 62a-63a. Any divergence in the case law thus relates to one ultimately inconsequential aspect of the *McDonnell Douglas* test. This is reason alone to deny the petition. *Cf. Gamache v. California*, 131 S. Ct. 591, 593 (2010) (statement of Sotomayor, J., respecting the denial of the petition for writ of certiorari) (denying certiorari where resolution of an aspect of case would not have altered the ultimate decision).

Petitioner and her *amici* recognize that they have convinced no appellate judges to adopt their views; indeed, *amici* go so far as to contend that all of the circuits are "mistaken." Amicus Br. 11. Rather than rely on law, both petitioner and her *amici* cite several academic commentaries advocating that, for policy reasons, pregnant workers should receive preferential treatment. That is an argument better directed to Congress, not the Judiciary. Indeed, although several States have adopted pregnancy statutes that could require accommodations in circumstances similar to those of this case (*see, e.g.*, Cal. Gov't Code § 12945(a)(3); Conn. Gen. Stat. § 46a-60(a)(7); *cf.* La. Rev. Stat. Ann. § 23:342(4)), the federal Congress has considered but rejected analogous legislation. *See*, *e.g.*, Pregnant Workers Fairness Act, S. 3565, 112th Cong. (2012) (not enacted); Pregnant Workers Fairness Act, H.R. 5647, 112th Cong. (2012) (not enacted).

As to the legal question actually presented to and decided by the courts below in this case, the courts of appeals are entirely consistent in construing the

PDA that Congress has enacted. Petitioner's disparate treatment claim would not have survived a motion for summary judgment in any circuit. Thus, there is no need for this Court's review.

III. THIS CASE IS A POOR VEHICLE

1. In light of the recent amendments to the ADA (*see* Amicus Br. 11-14), the scenario in this case may never be repeated. In 2008, the Americans with Disabilities Act Amendment Act (the ADAAA) and its implementing regulations modified the definition of disability to include disabilities of limited duration. *See* 42 U.S.C.A. § 12101; 29 C.F.R. § 1630.2(i) & (j). Because Congress did not make the ADAAA retroactive, the court of appeals explained that it would not consider how the ADAAA's amendments affected petitioner's claims. Pet. App. 11a n.7. *Amici* contend that a person with a temporary lifting restriction is now disabled under the ADA (thus widening the gap between ADA disabled employees and pregnant employees (Amicus Br. 13)), but that might be true for a pregnant worker with a similar lifting restriction. *See*, *e.g.*, EEOC, *Facts About Pregnancy Discrimination*, *available at* http://www.eeoc.gov/facts/fs-preg.html (last visited June 6, 2013). In cases where the new amendments apply, courts will have to determine the validity of this argument—which was not presented at all in this pre-ADAAA case. Given the recent and dramatic expansion of the ADA, the Court should wait to see if the situation presented here ever repeats itself.

2. Petitioner essentially asks this Court to second-guess what she perceives to be erroneous factual findings on the summary judgment record. Indeed, petitioner challenges everything from the district court's finding that she was not similarly situated to her proposed comparators (Pet. 9-10) to its finding that drivers who lost their DOT certification

were not entitled to light work but only an "inside job"—which involves lifting (*id.* at 4). The Fourth Circuit left these findings untouched. Further review is unwarranted. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

3. The remainder of petitioner's and her *amici's* arguments evince their plan to use certiorari review as a backdoor attempt to add a disparate impact claim to petitioner's complaint, even though the courts below rejected her belated attempt to plead such a claim. *See* n.1, *supra*.

Amici state that UPS's decision to "accommodate[] multiple categories of employees, while refusing to accommodate pregnant women, establishes a formal policy of discrimination." Amicus Br. 8. This is nonsense. The policy is clearly pregnancy-blind: It does not *exempt* pregnant women altogether but accommodates them as long as they are injured on the job; lose their DOT certification; or suffer from an ADA qualifying disability.

If accepted, this theory would work a wholesale expansion of discrimination law. In a disparate treatment case like this one, "liability depends on whether the protected trait . . . actually motivated the employer's decision . . . and had a determinative influence on the outcome." *Reeves*, 530 U.S. at 141 (internal quotation marks and citations omitted). *Amici* ignore that bedrock principle to seek a ruling that an employer who accommodates one category of employees pursuant to a collective bargaining agreement must extend the same accommodation to pregnant employees—regardless of its motivation in crafting that agreement with the union. So, for example, *amici* would ask this Court to conclude that a policy providing accommodations only to those who

have lost a limb is discriminatory—even in the absence of any evidence of animus toward pregnant women. Notwithstanding *amici's* assertions, it is not a "formal policy of discrimination" for an employer to decline the same accommodation to a pregnant woman who has not lost a limb. Indeed, an employer would provide *preferential* treatment—not equal treatment—if it granted the accommodation in violation of the agreement.

Petitioner and her *amici* badly misread *International Union v. Johnson Controls*, 499 U.S. 187 (1991), and *Guerra*, for the proposition that an employer's motivation in enacting a facially neutral policy is irrelevant. *See* Pet. 11, 15-16; Amicus Br. 9-12. *Johnson Controls* involved a facially discriminatory policy in which an employer excluded fertile female employees from certain jobs because of its purported concern for the health of potential fetuses. *See* 499 U.S. at 199. This Court merely held that a nondiscriminatory purpose cannot save a *facially discriminatory* policy. *Id*. at 199-200. That case is therefore inapposite because UPS's policy is *facially neutral*. Nor does *Guerra* hold that an employer's motive is irrelevant; indeed, that case did not involve disparate treatment at all, but considered merely whether the PDA preempted state laws that appeared to provide preferential treatment to women. *Guerra*, 479 U.S. at 284-90.

In a last-ditch attempt to convince the Court that this case is cert-worthy, petitioner and *amici* switch tactics and argue that, at the very least, the Fourth Circuit should have compared petitioner to those injured on the job, those with ADA cognizable injuries, and those who lost their DOT certification. Pet. 15-16; Amicus Br. 9-10. But this is wrong, too. As this Court has recognized, the prima facie case requires

"*evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion*." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) (alterations and internal quotation marks omitted). In other words, "there must be at least a logical connection between each element of the prima facie case and the illegal discrimination." *Id.* at 311-12 (holding that certain comparator evidence was "not a proper element of the *McDonnell Douglas* prima facie case" because it "lack[ed] probative value"). Here, there is no logical connection between the application of UPS's neutral policy and the alleged sex discrimination because the policy does not raise any inference whatsoever that UPS has animus directed specifically at pregnant workers. It would thus be nonsensical to compare petitioner to anyone other than those in her position, *i.e.*, those with off-the-job injuries or conditions. Because petitioner was treated exactly the same as other employees who had non-disabling restrictions as a result of off-the-job injuries or conditions, she cannot make out a prima facie case of disparate treatment.

While petitioner contends that this Court cannot allow pregnancy-blind rules to "insulate" an employer from liability (Pet. 8), she misses that such rules are simply not actionable in a disparate treatment case. Indeed, only in a disparate *impact* case may a plaintiff attempt to demonstrate that a neutral rule has a greater effect on persons protected under Title VII than on a majority group. In contrast, "[p]roof of a discriminatory motive is critical" in a disparate treatment case. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (internal quotation marks omitted). By focusing on the effect of the policy—instead of the *intent* of UPS—petitioner and her *amici* attempt to resurrect a claim that the district court denied on procedural grounds. *See* Pet. App. 9a-10a &

n.6. This is reason alone to deny the petition. *See*, *e.g.*, *Calhoun v. United States*, 133 S. Ct. 1136, 1137 (2013) (statement of Sotomayor, J., respecting the denial of the petition for writ of certiorari) (petitions should be denied where petitioner presents forfeited arguments).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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June 10, 2013