No. 12-1226

IN THE

Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION; SERVICE EMPLOYEES INTERNATIONAL UNION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; AND AMERICAN FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICI CURIAE

This brief is submitted with the consent of the parties on behalf of the National Education Association (NEA), the Service Employees International Union (SEIU), the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME), the United Food and Commercial Workers International Union, AFL-CIO (UFCW), and the American Federation of Teachers, AFL-CIO (AFT) as *amici curiae* in support of the Petitioner, Peggy Young.[1]

NEA is a nationwide employee organization with nearly three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. NEA has a strong interest in ensuring that its members—approximately 64% of whom are women—receive the full protections of the Pregnancy Discrimination Act (PDA). NEA and its members are also deeply committed to the notion that all persons, regardless of gender, must have equal opportunity for employment, promotion, compensation, and leadership in all activities and, further, that federal laws such as the PDA are essential to securing those opportunities.

SEIU is a labor organization that represents over two million men and women working in health care, property services, and public services throughout the United States. As SEIU's Mission Statement provides,

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[1] Letters of consent from all parties are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

the union is committed to bringing "economic and social justice to those most exploited in our community — especially to women and workers of color." Fifty-six percent of SEIU's members are women, and many of them work in so-called "pink collar" professions such as home care, nursing, and child care. These women workers, who are often underpaid and whose jobs are physically demanding, are in particular need of the protection promised in the PDA so that they can continue to work to provide for their families during pregnancy.

AFSCME is a labor organization representing 1.6 million working men and women who provide vital public services around the nation. AFSCME represents members in hundreds of different occupations, including nurses, child-care providers, corrections officers, EMTs, sanitation workers, and more. Women make up 58% of AFSCME's membership. AFSCME advocates for fairness in the workplace for working women both at the bargaining table and in the halls of government. AFSCME has a long history of promoting gender equality and supporting the employment rights of pregnant workers aimed at achieving prosperity and opportunity for all of America's working families.

UFCW is a labor organization of 1.3 million members representing workers across the United States in the retail food, non-food retail, poultry, meatpacking, food processing, healthcare, and chemical industries. UFCW members confront persistent challenges across the industries in which they are employed that operate to reduce their standard of living, including employment discrimination. UFCW organizes and represents workers and fights to strengthen labor, civil, and human rights for all workers. Most of UFCW's

membership are women, and most of those women are of childbearing age. A robust PDA is key to protecting these workers from pregnancy discrimination in employment.

AFT represents 1.5 million members who are employed across the nation and overseas in K-12 and higher education, public employment, and healthcare. Over 60% of its members are women. AFT has a strong interest in supporting civil rights issues, such as gender and pregnancy discrimination, and regularly participates in litigation fighting bias in the workplace. More than 36 years ago, AFT actively supported the passage of the PDA because the prohibition of pregnancy-related discrimination is essential to the ultimate fair and equal treatment of women in the workplace.

Amici believe that their role as labor organizations that represent millions of working women nationwide gives them a unique perspective on the seniority and collective-bargaining issues raised by the Respondent, United Parcel Service (UPS), and that their views on these issues will greatly assist the Court in resolving this case correctly.

INTRODUCTION AND SUMMARY

As labor organizations that represent millions of working women throughout the country, *Amici* believe that the Pregnancy Discrimination Act (PDA) — including its requirement that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons . . . similar in their ability or inability to work," 42 U.S.C. § 2000e(k) — is essential to the empowerment of those workers and to

the improvement of workplace culture and practices for all women.

Amici submit this brief in support of the Petitioner, Peggy Young, to address the seniority and collective-bargaining issues first raised by the Respondent, United Parcel Service (UPS), in its brief in opposition to *certiorari*. In particular, UPS contends that its collective-bargaining agreement excuses it from the PDA's substantive obligation to treat pregnant workers the same as other workers who are similar in their ability or inability to work, and that Title VII's provision exempting certain seniority systems from antidiscrimination scrutiny applies to Young's PDA challenge. These contentions are without merit.

First, UPS's claim that collective-bargaining agreements are "controlling" over the PDA's substantive protections is baseless. Quite to the contrary, an employee's protections under the federal civil rights laws, including those secured by the PDA, are not forfeited or supplanted simply because the employees of that employer have exercised their rights to form and join a union for purposes of collective bargaining. In fact, it can easily be the case that the benefits a union negotiates for one group of workers must also be extended to women affected by pregnancy, childbirth, or related medical conditions since, by operation of the PDA's plain terms, those workers must be treated the same as other workers who are similar in their ability or inability to work.

Next, this Court should reject UPS's claim that it was privileged under Title VII's seniority provisions to deny Young's request for light duty on the same terms as other employees who are similar in their ability to

work. As a threshold matter, this argument was not properly presented because UPS did not raise it before the district court or court of appeals below. And, the argument must fail in any event, for the simple reason that Title VII's protections for certain bona fide seniority systems do not apply to policies that are based on factors *other* than just an employee's length of service — such as the ones that give rise to Young's claim here. At the end of day, even if UPS assigned some light duty work on the basis of seniority, it still maintained significant non-seniority-based exceptions to that policy that, on their face, failed to treat pregnant women the same as others who were similar in their ability or inability to work. Nothing in Title VII's protections for bona fide seniority systems can be read to save such a practice.

ARGUMENT

Throughout its brief in opposition to *certiorari*, UPS makes the argument — which it will presumably maintain in its merits brief — that its collective-bargaining agreement with the union representing its employees excuses it from the substantive obligation under the Pregnancy Discrimination Act (PDA) to treat pregnant workers the same as other workers who are "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). The thrust of UPS's argument on this score is that a ruling in Young's favor on her PDA claim would necessarily violate the collective-bargaining agreement and deprive other UPS workers of their bargained-for rights and benefits under that agreement. *See* Opp. Cert. at 4 (arguing that the "collective bargaining agreement neither requires nor authorizes" allowing pregnant employees to have temporary, light-

duty positions on the same terms as other employees who are similarly limited in their ability to work); *id.* at 10 ("[T]he accommodation [Young] requested would have required UPS to give her preferential treatment in contravention of the collective bargaining agreement."); *id.* at 16 ("[Young]'s construction [of the PDA] would allow courts to override the terms of collective bargaining agreements . . . ."); *id.* ("[S]uch agreements are ordinarily controlling."); *id.* at 16-17 (arguing that a ruling in Young's favor would require "a court to set aside a collective bargaining agreement"). Stated differently, UPS effectively contends that Young would, by virtue of her pregnancy, only be entitled to be treated the same as other workers "similar in their ability or inability to work" if UPS and the union representing its employees had explicitly agreed to provide such protection in collective bargaining.

UPS's argument is wrong in every particular. It betrays a fundamental misunderstanding of the interaction between collective bargaining and federal employment and antidiscrimination laws. It also misconstrues both the scope of Title VII's provisions relating to bona fide seniority systems and the essential thrust of Young's claims in the case, which do not challenge any seniority-based feature of UPS's policies. As we will show, a fundamental premise of federal employment and antidiscrimination laws is that employees' substantive rights—including those secured by the PDA—are not supplanted or preempted by the existence of a collective-bargaining agreement. Instead, those substantive rights generally exist as a floor on top of which any rights or benefits obtained through the process of collective bargaining are added. Fur-

thermore, Title VII's seniority-related provisions are inapplicable where, as here, they are not only raised belatedly and without an adequate record, but also against a challenge involving only the aspects of an employer's light-duty policy that are not based on seniority. Indeed, UPS's arguments are particularly unjustified here, since the applicable collective-bargaining agreement may well envision precisely the kind of relief that Young seeks.

A. Collective-Bargaining Agreements Do Not Preempt or Supplant the Substantive Protections of Federal Civil Rights Laws Such as the PDA

Employees who exercise their statutory rights under federal or state law to form a union and to bargain collectively with their employer remain entitled to the substantive protections of the federal civil rights and antidiscrimination laws, which Congress enacted to protect all workers. That is because this latter set of rights derives not from the collectively bargained "system of industrial self-government," *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960), but from the "statutes governing relationships between employers and their individual employees, [which] guarantee covered employees specific substantive rights," *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 734 (1981). Thus, when unionized workers sit down to bargain with an employer, they do not start from scratch, forced to negotiate back from the employer the general public-law protections that non-unionized workers enjoy.

To be sure, many collective-bargaining agreements

incorporate or improve upon the protections already provided by federal or other laws.[2] Here, for instance, the applicable collective-bargaining agreement between UPS and the Teamsters explicitly provides that "The Parties agree to abide by the provisions of the Americans with Disabilities Act." J.A. 548. Workers and their unions choose to bargain for such provisions for a variety of reasons. As is true of the ADA provision in UPS's agreement with the Teamsters, these contractual provisions often elaborate on the law's guarantees, setting forth concrete procedures as to how an abstract standard like the ADA's "reasonable accommodation" requirement will be put into practice. *See id.*[3] Also, the grievance and arbitration systems generally contained in a collective-bargaining agreement may allow unions to achieve faster remedies for the workers they represent than are available

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[2] *See, e.g.*, *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 72-73, (1998); *2012 Commercial Building Agreement Between Local 32BJ Service Employees International Union and the Realty Advisory Board on Labor Relations* 104 ("[I]n cases of pregnancy, it shall be treated as any other disability suffered by an employee in accordance with applicable law."), *available at* http://www.seiu32bj.org/wp-content/uploads/2014/06/32BJ-Comm-Bldg-Agreement-NYC.pdf.

[3] *See also* AFSCME, *Fighting for the Rights of Employees with Disabilities: An AFSCME Guide* (recommending the negotiation of contract language that includes general compliance with the ADA, regular labor-management committee meetings on issues including accommodations of people with disabilities, and the right to union representation in the process to identify a "reasonable accommodation"), *available at* http://www.afscme.org/news/publications/for-leaders/fighting-for-the-rights-of-employees-with-disabilities-an-afscme-guide/negotiating-favorable-contract-language.

through the courts or administrative agencies.[4] Yet, even though some collective-bargaining agreements may *reference* the substantive protections of federal law, it remains a basic principle that unionized employees do not have to make concessions at the bargaining table in order to *receive* them.

That workers do not have to bargain to win the protections of federal antidiscrimination laws such as the PDA follows directly from this Court's recognition that an employer and union cannot agree in a collective-bargaining agreement to waive the substantive protections of federal civil rights laws. *See 14 Penn Plaza v. Pyett*, 556 U.S. 247, 273 (2009) ("[A] substantive waiver of federally protected civil rights will not be upheld.") (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991)); *id.* at 265 ("[F]ederal antidiscrimination rights may not be prospectively waived."). And, from this it follows even more clearly that an employer and union cannot constructively, or by implication, waive employees' substantive protections under federal civil rights laws simply by failing to explicitly *include* them in the agreement.[5] *Id. See*

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[4] *See*, *e.g.*, Am. Fed'n of Gov't Employees, *Bargaining for Health and Safety Protection* (recommending the negotiation of provisions that incorporate the protections of the Occupational Safety and Health Act so that the union may "file a grievance if they are not followed" and thereby "strengthen [the employees'] health and safety program"), *available at* https://www.afge.org/Index.cfm?page=BargainingforHealthSafetyProtection.

[5] This Court has held that certain *procedural* rights contained in federal statutes—namely, an individual's right to sue in court for claims of discrimination—may be waived by a

also Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1046 n.9 (7th Cir. 1996) (declining to hold that "provisions of collective bargaining agreements will preempt a covered entity's duty to reasonably accommodate a disabled employee under the ADA").

The PDA — including its requirement that employers treat pregnant workers the same as other workers "similar in their ability or inability to work" — is no different. Nothing in the text of the PDA remotely suggests that its substantive protections, unlike those contained in other federal civil rights statutes, are somehow uniquely amenable to either express or implied waiver in a collective-bargaining agreement. And, since the time of the PDA's introduction and passage into law, it has been the common understanding among the unions that negotiate these agreements with employers that, even though unions may negotiate for more robust protections for pregnant workers, the PDA establishes a statutory

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collective-bargaining agreement's arbitration provision. *See 14 Penn Plaza*, 556 U.S. at 274. But, such a waiver must be unambiguous and cannot have the effect of eliminating a worker's substantive rights. *See id.* at 251, 273-74 (holding that "a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the Age Discrimination in Employment Act" is enforceable only if the collective-bargaining agreement allows a worker to "effectively vindicat[e]" her "federal statutory rights in the arbitral forum") (citation and internal quotation marks omitted). These limitations on the contractual waiver of *procedural* rights serve to emphasize that *substantive* statutory antidiscrimination protections cannot be waived by a collective-bargaining agreement or other private contract.

floor of substantive rights that cannot be traded away.[6]

For example, during the House subcommittee hearings on the bill that would become the PDA, the AFL-CIO's Special Counsel, Laurence Gold, analogized the PDA to other federal statutory protections, testifying:

> Collective bargaining starts from the essential premises, where you cannot have a collective bargaining agreement for a $2 wage in this country, even if the employer is strong enough, and the union is so weak that that is the best you could get. Under the Occupational Safety and Health Act, [. . .] you cannot bargain for unsafe conditions. We believe that [the PDA] is precisely the same type of matter.

HEARING BEFORE THE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES OF THE HOUSE COMMITTEE ON EDUCATION AND LABOR ON H.R. 5055 AND 6075 (VOL. 1) 83 (April 6, 1977). And, in response to Congressman Augustus Hawkin's comment that "I don't think you can collectively bargain that which the public law prohibits you to do," Mr. Gold replied, "I have nothing to add except we are in entire agreement." *Id.*

Accordingly, UPS's contention that collective-bargaining agreements are "controlling" over the PDA's substan-

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[6] *See, e.g.*, Judith A. Scott, *Why a Union Voice Makes a Real Difference for Women Workers: Then and Now*, 21 YALE J. L. & FEMINISM 233, 235-36 (2009) (explaining that, after the passage of the PDA in 1978, the United Auto Workers and other unions helped to enforce and amplify the basic job protections of the PDA "by integrating the legislation into collective bargaining provisions, conducting internal education, and remedying violations through the contract grievance/ arbitration procedure").

tive protections, Opp. Cert. at 16, is plainly wrong. A union and employer cannot negotiate an agreement that targets or excludes pregnancy for adverse treatment. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-84 (1983). To hold otherwise would effectively return the law to this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which prompted Congress to pass the PDA in the first place.

After all, the employer's policy at issue in *Gilbert* that excluded pregnancy from disability coverage was itself the product of a collective-bargaining agreement between the employer and the union. *See Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 369-70 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976). So it is inconceivable, as well as inconsistent with the plain language of the PDA, that Congress would have reacted to the *Gilbert* decision so quickly by passing the PDA, but without disturbing *Gilbert*'s holding as to the very kinds of collectively-bargained policies at issue in that case. *See Newport News Shipbuilding*, 462 U.S. at 678 (noting that, with the passage of the PDA, "Congress . . . unambiguously expressed its disapproval of both the holding and the reasoning of . . . *Gilbert*").

It is similarly undeniable that the *omission* of any explicit reference to pregnancy rights in the agreement's discussion of particular employment policies (such as UPS's light-duty policy) does not operate as a constructive or implicit waiver of employees' rights under the PDA. Indeed, under the plain language of the PDA, the opposite can often be true. The PDA provides that "women affected by pregnancy . . . or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but

similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Thus, to the extent a union and employer negotiate employment-related rights or benefits for workers who are "similar in their ability or inability to work" to "women affected by pregnancy . . . or related medical conditions," those benefits *must*, by operation of the PDA's plain language, be accorded to pregnant women as well, even if the employer did not or would not provide them in the absence of collective bargaining.

In its recently issued enforcement guidance on the PDA, the Equal Employment Opportunity Commission (EEOC) fully endorses that proposition in language of particular relevance to this case, stating that "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (*e.g.*, a policy of providing light duty only to workers injured on the job)." EEOC, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* § I.A.5 (July 14, 2014) (*EEOC Guidance*); *see also id.* § I.C ("An employer is required under Title VII 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 employees similar in their ability or inability to work . . . .")

UPS's attempt to claim that its collective-bargaining agreement excused its refusal to grant Young's request for light duty or other accommodation is particularly unavailing here because UPS took that position *in spite of*, not because of, language in its agreement that addresses this issue. Article 16, Section 4 of the collective-bargaining agreement, entitled "Maternity and Paternity

Leave," provides that "[a] light duty request, certified in writing by a physician, shall be granted in compliance with state or federal laws, if applicable." J.A. 592. Thus, the agreement seemingly contemplates the very result Young urges here, which is that the PDA be held to mandate the provision of temporary light duty for pregnant women on the same terms as it is provided to others who are similarly limited in their ability to work. In the proceedings below, UPS made clear that its "policy and practice" was to deny light duty to pregnant workers without regard to this provision of its agreement. *See* J.A. 571("My policy and practice, and the policy and practice within the Metro D.C. District, was to treat pregnancy the same as any other off-the-job injury or medical condition."). Having embarked on that "policy and practice" in the face of contrary language in the agreement, UPS certainly cannot now claim that its actions were somehow required by the agreement.

B. This Court Should Reject UPS's Belated Assertion that Title VII's Seniority Provision Insulates it from Liability on Young's PDA Claim

UPS also contends that it was privileged under Title VII's seniority provision, § 703(h),[7] to deny Young's re-

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[7] Section 703(h) provides:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e–2(h).

quest for light duty on the same terms as other employees who were similar in their ability to work. *See* Opp. Cert. at 13; *see also id.* at 4 (arguing that granting Young's request would "disrupt the seniority system"); *id.* at 16-17 (arguing that "petitioner is essentially asking to jump the line in the seniority system"). This Court should reject that argument because it was not raised or developed below. And, based on the incomplete record that was developed, it appears this argument lacks merit in any event.

1. As an initial matter, this Court should not entertain UPS's argument under § 703(h) because it has not been properly presented or preserved. It is well established that, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). This requirement, like the more general obligation to raise issues in a timely fashion, allows those issues to be considered and resolved in the first instance by the lower courts that are "ordinarily in the best position to determine the relevant facts and adjudicate the dispute." *Puckett v. United States*, 556 U.S. 129, 134 (2009).

That rule has particular application here. UPS did not raise § 703(h) before the district court or the court of appeals. *See* Pet. Br. at 50; Pet. Cert. Reply at 6-7. As a result, the parties did not develop an adequate record for this Court to determine the basic facts or to rule on the full range of issues involved. Most critically, the record below does not even contain the provisions of the collective-bargaining agreement that

purportedly establish a seniority-based system for light-duty and inside-work assignments.[8] Moreover, if UPS had raised the application of § 703(h) in a timely fashion, Young could have developed additional evidence showing that there was no conflict between granting Young's light-duty request and the seniority system — either because no more senior worker would have been "bumped" or displaced if the assignment were made,[9] or because the assignment was consistent with the provision of the maternity policy that allows "[a] light duty request, certified in writing by a physician, [to] be granted in compliance with state or federal laws," J.A. 592. Finally, Young could have demonstrated the seniority system was not a valid defense because UPS's treatment of her was "the result of an intention to discriminate," 42 U.S.C. § 2000e–2(h), *i.e.*, an intent to provide light duty work opportunities to employees who are "similar [to pregnant women] in their ability or inability to work," but not to pregnant women, *id.* § 2000e(k). This Court should not indulge

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[8] In the proceedings before the district court, UPS made only a fleeting reference to seniority, which it supported only with a reference to Young's own deposition testimony. *See* Dist. Ct. Dkt. 60-1 at 8. This does not establish the existence of a collectively bargained seniority system, which would ordinarily need to be proven by introducing the relevant provisions of the bargaining agreement. *See generally* Fed. R. Evid. 1002.

[9] *See infra* at 21-22 and Pet Br. at 9 (noting that a UPS manager, speaking for the company pursuant to Fed. R. Civ. P. 30(b)(6), testified that drivers who had lost their certifications and received inside-work reassignments "typically d[id] not displace any incumbent employees, because '[u]sually there will be positions available that they can just slide into'") (quoting J.A. at 261).

UPS's attempt to inject these underdeveloped issues into the case at this late date.

2. If this Court excuses UPS's failure to raise the § 703(h) issue below, it should nevertheless reject UPS's argument that a bona fide seniority system insulates it against Young's PDA claim. Young's PDA claim does not challenge any seniority-based feature of UPS's policies, so neither her claim nor UPS's asserted defenses to that claim fall within § 703(h)'s exemption for seniority systems. Moreover, the available facts indicate that granting Young's request would not have violated the seniority system in any event.

"'[S]eniority systems are afforded special treatment under [§ 703(h)]' . . . , reflecting Congress's understanding that their stability is valuable in its own right." *AT & T Corp. v. Hulteen*, 556 U.S. 701, 708 (2009) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977)). These systems assure "consistent, uniform treatment" in determining such workplace rights and benefits as pensions, promotions, job assignments, and layoffs, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 404 (2002), and they are of "'overriding importance' in collective bargaining," *American Tobacco Co. v. Patterson*, 456 U.S. 63, 76 (1982) (quoting *Humphrey v. Moore*, 375 U.S. 335, 346 (1964)). To that end, § 703(h) provides certain protections against discrimination claims for this key element of the collective-bargaining process that "lies at the core of our national labor policy." *Hardison*, 432 U.S. at 79.

Nevertheless, neither Young's claim nor UPS's asserted defense to that claim falls within § 703(h)'s exemption for bona fide seniority systems. That is

because Young's PDA claim does not challenge any seniority-based feature of UPS's policies. Instead, her claim is directed at, and arises from, UPS's policies that grant temporary light-duty and inside work assignments *without regard to seniority* to other employees who were similar to Young in their ability or inability to work.

As this Court has explained, the "principal feature of any and every 'seniority system'" covered by § 703(h) is that, "[u]nlike other methods of allocating employment benefits and opportunities . . . ," it allocates benefits and opportunities "on the basis of some measure of time served in employment." *Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598, 606 (1980). And, while it is true that some seniority schemes may consider an employee's length of service "in tandem with non-'seniority' criteria," this Court has made clear that only the "'seniority' aspects of such a scheme. . . might be covered by § 703(h)," but that "does not mean that the [non-seniority factors] would also be so covered." *Id.* at 606 & n.13; *see also United States v. City of Cincinnati*, 771 F.2d 161, 168 (6th Cir. 1985) (concluding that non-seniority-based features of the employer's layoff policy were "an appendage" to an otherwise seniority-based system and, as such, are not covered by § 703(h)). Thus, even if the record made clear that seniority played a role in the assignment of light duty in some cases, that would not immunize the policies at issue here, under which light duty is granted without regard to seniority to several classes of workers who are "similar [to pregnant women] in their ability or inability to work," but not to pregnant women. 42 U.S.C. § 2000e(k). These policies do not operate on "the basis of some measure of time served in employ-

ment," *Cal. Brewers Ass'n*, 444 U.S. at 606, and they are therefore outside the scope of any limitation § 703(h) places on liability under the PDA.[10]

To illustrate the point further, imagine that an employer maintained a seniority-based bidding system for light-duty assignments, but made exceptions to that system, without regard to their seniority, for all injured employees of a particular race, sex, or religion. That employer obviously could not invoke the protections of § 703(h) in a challenge to such a discriminatory practice. *See id.* at 606 & n.13. The same is true for UPS with respect to its denial of temporary light-duty assignments to a pregnant worker here: even if it assigned *some* light-duty work based strictly on seniority, it nevertheless maintained non-seniority-based exceptions to that policy that, on their face, qualify as prohibited discrimination under Title VII be-

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[10] In its recently released guidance, the EEOC states:

> [T]he PDA explicitly provides that the presence of a seniority system does not permit an employer to treat pregnant workers differently from workers similar in their ability or inability to work. *See* 42 U.S.C. § 2000e(k) ("and nothing in section 703(h) of this title shall be interpreted to permit otherwise"). An employer may not turn down a pregnant worker's request for light duty on the basis that such positions are awarded through seniority.

EEOC *Guidance* § I.C.1.b n.103. Whether this passage fully captures the interaction between the PDA and § 703(h), *cf. Hulteen*, 556 U.S. at 709 n.3, is a question that does not need to be resolved here. Young's claim rests entirely on the features of UPS's temporary work assignment policies that are themselves discriminatory and are not based on seniority. That being the case, UPS cannot invoke the protection of § 703(h) in any event.

cause they failed to treat "women affected by pregnancy . . . or related medical conditions . . . 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 both instances, the employer is maintaining non-seniority-based exceptions that Title VII defines as discriminatory, and nothing in § 703(h) can be read to save those exceptions.

This result makes sense, not only because of the PDA's overarching goal of eradicating practices that diminish the employment opportunities of pregnant women, but also because this Court has recognized that non-seniority-based elements or exceptions to a seniority-based system tend to undermine any protections that system might otherwise deserve. In the context of employee accommodations under the Americans with Disabilities Act, this Court stated that an otherwise seniority-based system may contain sufficient "departure[s]," "exceptions," and other non-seniority-based features that it will no longer engender "employee expectations that the system will be followed." *Barnett*, 535 U.S. at 405.

That is particularly true here. The collective-bargaining agreement that covered Young provided temporary alternative work to employees "unable to perform their normal work assignments due to an on-the-job-injury." J.A. 584. UPS also provided temporary alternative work for additional categories of employees, including those with an ADA-qualifying disability, *id.* at 585-86, and those who have an injury or condition that disqualifies them from DOT certification (without regard to whether that disqualification oc-

curred because of an on-the-job injury), *id.* at 590-91. Moreover, in a provision that might well have direct application to Young's circumstance, the collective-bargaining agreement made explicit allowance under its "Maternity and Paternity Leave" policy for "[a] light duty request, certified in writing by a physician, [to] be granted in compliance with state or federal laws, if applicable." *Id.* at 592. Because an employee's eligibility under these policies does not depend on seniority, they do not implicate § 703(h). And, because UPS interpreted and applied those policies in a manner that failed to treat "women affected by pregnancy . . . or related medical conditions . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work," its actions constitute prohibited discrimination as defined by the PDA, 42 U.S.C. § 2000e(k).

As a final matter, even though the record on this issue was not adequately developed because UPS never raised § 703(h) below, the facts that are available indicate that granting equal treatment to Young by virtue of her pregnancy would not cause any interference with the seniority system in any event. Under the various policies that allowed for temporary work assignments, UPS assigned employees with on-the-job injuries and ADA-qualifying disabilities to light duty, as well as some employees to "inside jobs" that do not require heavy lifting. *See* J.A. 397-98 (driver who had a stroke and kidney disease assigned to clerk's job answering phone calls); *id.* at 446-52 (driver with ankle injury acquired outside of the workplace assigned to scan but not lift packages); *id.* at 647 (driver, who lost her driving certification due to high blood pressure, assigned to scan packages, make address corrections,

and apply address labels). Seniority was not a factor when UPS provided these temporary work assignments, and there is no indication in the record that *any* of these assignments resulted in "bumping" or displacement of other more senior employees. Indeed, UPS managers testified that an employee being moved into a light-duty job need not displace another employee because there were *available*, *open positions* that those employees could perform. *See* Pet Br. at 52; J.A. 260-61. In other words, these managers conceded that the kind of relief Young sought here could have been granted without interfering in any way with the seniority-based reliance interests of other employees.

UPS's belated efforts to invoke Title VII's protections for bona fide seniority systems fail here because they fit neither the letter nor the spirit of § 703(h). To hold otherwise would run a grave risk of entirely "swallowing up Title VII's otherwise broad prohibition[s]." *Cal. Brewers Ass'n*, 444 U.S. at 608. Moreover, given the failure of UPS to raise that issue at the appropriate state of the litigation — thereby ensuring that the issue lacks the necessary factual development —such a holding would be particularly unjustified. Accordingly, this Court should reject UPS's arguments under § 703(h).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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