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 EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF RESPONDENT IN SUPPORT OF AFFIRMANCE

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 200
WASHINGTON, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com
Counsel for Amicus

QUESTION PRESENTED

Whether respondent United Parcel Service violated the Pregnancy Discrimination Act amendment to Title VII of the Civil Rights Act of 1964 when it treated petitioner the same as employees with similar restrictions resulting from off-the-job injuries or conditions.

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Legislative History

Rules, Regulations and Orders

Other Authorities

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

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For over thirty years, Eagle

[1] *Amicus* Eagle Forum files this brief with the consent of all parties; The petitioner and respondent have lodged their blanket consent with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

Forum has consistently defended federalism and supported States' autonomy from federal intrusion in areas – such as employment law – that are of traditional state and local concern. In addition, Eagle Forum has longstanding interest in adherence to the Constitution as written. In connection with that, Eagle Forum's founder, Phyllis Schlafly, was a leader in the movement to oppose ratification by the states of the proposed Equal Rights Amendment, H.J. RES. 208, 86 Stat. 1523 (1972) ("ERA"), in the 1970s and 1980s. The history of that effort has a direct bearing on the issues that this litigation attempts to import into federal anti-discrimination law. For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues raised here.

STATEMENT OF THE CASE

Respondent Peggy Young ("Young") has sued her former employer, United Parcel Service ("UPS"), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e to 2000e-17, as amended by the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. §2000e(k), for failing to allow her to take "light-duty work" when her doctor advised her not to lift packages over 20 pounds during her pregnancy. The district court granted summary judgment to UPS, and the Fourth Circuit affirmed.

Factual Background

Amicus Eagle Forum adopts UPS's statement of the facts. UPS Br. at 1-7. In summary, Young's job with UPS involved driving a truck and picking up and delivering packages, which the parties agree required lifting up to 70 pounds. *Id.* at 2. In 2006, Young requested and was granted leave to undergo

in vitro fertilization, and after she became pregnant was instructed by her doctor not to lift more than 20 pounds for the duration of her pregnancy. *Id.*

At the time that Young sought light-duty work, UPS accommodated three types of alternate work arrangements for drivers like Young: (1) light-duty work, known as temporary work assignments, for workers injured on the job; (2) accommodation under the Americans with Disabilities Act, 42 U.S.C. §§12101-12213 ("ADA"); and (3) "inside" work assignments for drivers who lose their Department of Transportation ("DOT") certification for any reason, such as loss of a driver's license or involvement in an accident. UPS Br. at 2-3.[2]

Significantly, the first category was generally limited to 30 days to allow the driver to recuperate, although that could be extended – usually no more than up to two weeks – if a doctor stated that the driver would be able to return to regular work in that timeframe. *Id.* at 3. For the second category (ADA accommodation), UPS adopted the relief on a case-by-case basis. The third category ("inside" work) involved lifting packages over 20 pounds. *Id.* UPS never approved light-duty work for drivers injured off the job, unless the injury triggered the ADA's legal requirements for accommodation. *Id.* at 5.

---

[2] In addition, for drivers unlike Young who worked in states that required such accommodation as a matter of state law, UPS's collective bargaining agreement allowed light-duty work for pregnancy-related restrictions on lifting, when certified by a physician and in compliance with applicable laws. *Id.* at 4.

Thus, although some pregnant UPS drivers continued their full duties throughout pregnancy, Young had to take a leave of absence. *Id.* at 7. Although she therefore lost her UPS medical coverage, she was fully insured through her husband's plan. *Id.* at 7 & n.3.[3] Prospectively, UPS has adopted a new policy to allow light-duty work for pregnant employees with lifting or other physical restrictions. UPS Br. App. 1a.

Statutory Background

As relevant here, Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 prohibits discrimination "because of [an] individual's … sex." 42 U.S.C. §2000e-2(a)(1). To show discrimination *because of* a protected status, this Court has read Title VII to allow proving the intent to discriminate by comparing an employer's actions regarding the plaintiff to its actions regarding similarly situated employees of a different status (*e.g.,* comparing treatment of women versus men). *See, e.g., TWA v. Hardison,* 432 U.S. 63, 71-72 (1977); *Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 705 n.5 (1978); *Hazelwood Sch. Dist. v. U.S.,* 433 U.S. 299, 308 (1977). As enacted, Title VII did not extend to the states, but the 1972 amendments

[3] If Young had lacked access to alternate coverage through her husband, she could have extended her UPS coverage. *See Geissal v. Moore Med. Corp.,* 524 U.S. 74, 76 (1998) (discussing portability of insurance upon leaving employment).

extended it to states,[4] which this Court upheld as a valid abrogation of Eleventh Amendment immunity in *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976).

As relevant here, Title VII's type of "because of" discrimination means intentional discrimination, which means "more than intent as volition or intent as aware of consequences. It implies that the decisionmaker ... selected or reaffirmed a course of action at least in part *'because of,'* not merely *'in spite of'* its adverse effects upon an identifiable group." *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979) (emphasis added). Reasoning that discrimination because of *pregnancy* is not the same as discrimination because of *sex,* this Court allowed a company insurance plan to exclude pregnancy from coverage in *General Electric Co. v. Gilbert,* 429 U.S. 125, 136 (1976) (*citing Geduldig v. Aiello,* 417 U.S. 484, 487-89 (1974)).

Congress responded to *Gilbert* by enacting the PDA, Pub. L. No. 95-555, 92 Stat. 2076 (Oct. 31, 1978) ("PDA"). As applicable here, PDA amended Title VII's definitions section to add new §701(k), the relevant part of which provides as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related

---

[4] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §2, 86 Stat. 103 (Mar. 24, 1972).

> 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). The committee reports indicate that PDA "does not change the application of title VII to sex discrimination in any other way" than to "defin[e] sex discrimination, as proscribed in the existing statute to include" "pregnancy, childbirth, and related medical conditions," S. REP. NO. 95-331, at 3-4 (July 6, 1978); *accord* H.R. REP. NO. 95-948, at 4-5 (Mar. 13, 1978).

Like the statute itself, the legislative history does not expressly indicate whether §701(k)'s "ability or inability to work" criterion is cumulative with the existing framework under §703(a)(1) or instead supplants that framework as the new, sole criterion for pregnancy-related discrimination:

> By defining sex discrimination to include discrimination against pregnant women, the bill rejects the view that employers may treat pregnancy and its incidents as *sui generis,* without regard to its functional comparability to other conditions. Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not

> able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.

S. REP. NO. 95-331, at 3; *accord* H.R. REP. NO. 95-948, at 4-5. At the time that Congress acted, "almost half of the States presently interpret[ed] their own fair employment practices laws to prohibit sex discrimination based on pregnancy and childbirth." H.R. REP. NO. 95-948, at 3; *accord* S. REP. NO. 95-331, at 3 ("25 States presently interpret[ed] their own fair employment practices laws to prohibit sex discrimination based on pregnancy and childbirth").

SUMMARY OF ARGUMENT

In the parties' dispute over whether §701(k)'s second sentence supplements (UPS) or supplants (Young) the pre-existing Title VII framework for analyzing sex-based discrimination in the context of pregnancy and related conditions, UPS provides the better plain-language reading of Title VII. Consistent with §701(k)'s text, the first sentence puts pregnancy-based discrimination within the ambit of sex-based discrimination, *and* the second sentence directs an *additional* criterion. Contrary to Young's arguments, an "ability or inability to work" criterion is not mere surplusage if it fails to eradicate distinctions between coverage for on-the-job injuries and off-the-job injuries and conditions. Under UPS's reading, the criterion would prohibit, for example, employer distinctions between types of injuries or conditions (*e.g.,* physical versus mental) or treatments (*e.g.,* medication versus bandaging, casts, or dressing of the injured area). Moreover, UPS's

limited reading of PDA's intervention is consistent with the legislative history that disclaims any intent other than to reverse *Gilbert*. Finally, several canons of statutory construction support UPS's reading.

Insofar as states already had entered the field of both sex-based discrimination and pregnancy-based sex discrimination, this Court should not presume that Congress intended to overturn state laws by eliminating the concept of similarly-situated comparators in pregnancy-discrimination cases. In the same way, the canon against reading statutes to repeal prior statutes by implication also supports UPS's narrow reading. In addition, Young has no claim to an implied private right of action under §701(k), but must instead proceed under §703(a)(1), which includes the concept of similarly-situated comparators. Finally, although UPS itself is not a state entity entitled to sovereign immunity, Young's broad reading would – as explained below – exceed the power of Congress as applied to states. As such, the canon of constitutional avoidance argues for the UPS reading as a way to avoid an unconstitutional statute as applied to states.

Although Congress enacted Title VII under both the Commerce Clause and, as to states, Section 5 of the Fourteenth Amendment, Congress can abrogate states' sovereign immunity only under Section 5. For Congress to do so, there must be a violation of Equal Protection taking place. Unlike prior decisions that have upheld abrogating states' sovereign immunity to address *sex discrimination,* the PDA reading pressed by Young and her *amici* seeks preferential treatment (not non-discrimination) based on the

state of being pregnant (not based on sex). Because pregnancy discrimination is reviewed under the rational-basis test – not elevated scrutiny – under this Court's equal-protection cases, that distinction makes it more difficult to justify federal intrusion. As such the proposed congressional action is not sufficiently congruent or proportional to the supposed violation of the Equal Protection Clause that – under the PDA reading pressed by Young – Congress would be trying to eradicate. Nor can Young rely on the broad protections of the ERA, which (of course) was not ratified. Finally, this Court should disregard the *post hoc* guidance issued by the Equal Employment Opportunity Commission ("EEOC") because the guidance is inconsistent not only with PDA and the Constitution, but also with prior executive-branch interpretations of PDA. This Court is faced, then, with two possible solutions: (1) adopt UPS's narrow reading, consistent with the legislative history, or (2) find that PDA is unconstitutional as applied to states or that Congress did not intend PDA to apply to state employers.

Amicus Eagle Forum also responds to the policy arguments made by Young and her *amici*. In sum, the preferential treatment that they press would be ill-advised public policy, and is not something that Congress ever enacted. As with many well-meaning efforts at social engineering, Young's reading of PDA would harm not only the intended beneficiaries but also coworkers (who must support the beneficiaries) and economic competitors (who are disadvantaged by the bestowing of preferential treatment on others).

Finally, the suggestion that Young's reading of PDA is the pro-life reading is unsupported. If this Court adopts it, the legal approach pressed by Young would be used by the abortion industry to press for abortion on demand and public funding of abortion under the same equal-protection theories.

ARGUMENT

I. THIS COURT SHOULD ADOPT UPS'S READING OF PDA

The parties offer rival possible interpretations of §701(k)'s first two sentences. As explained in this section, UPS's reading better aligns with not only Title VII's plain language but also the relevant canons of statutory construction. For that reason, the Court should reject Young's interpretation.

A. UPS's Reading of PDA Is the Better "Plain-Language" Reading

This Court should adopt UPS's argument that §701(k)'s criteria are cumulative with Title VII's other criteria, including the use of similarly-situated comparators to establish discrimination. At the same time, this Court must reject Young's argument that §701(k)'s criteria supplant the pre-PDA criteria for Title VII actions, which would entitle pregnant employees to the most-favorable accommodation that employers offer to any employee, regardless of other circumstances. There is no evidence that Congress intended PDA to create that form of entitlement.

In *Hardison,* this Court recognized that "[t]he emphasis of both the language and the legislative history of the statute [*i.e.,* §703(a)(1)] is on eliminating discrimination in employment" and that "similarly situated employees are not to be treated

differently solely because they differ with respect to race, color, religion, sex, or national origin." 432 U.S. at 71-72; *see also Manhart,* 435 U.S. at 705 n.5 (using similarly situated comparator to analyze Title VII claim); *Hazelwood,* 433 U.S. at 308 (same). By adding §701(k) into this framework, PDA simply added "because of pregnancy" into the definition of "because of sex" and supplemented the *existing* Title VII criteria with §701(k)'s new second-sentence criterion about the "ability or inability to work." That need not – and grammatically *does not* – remove the pre-existing criterion that required a comparison of similarly situated employees. It merely *adds* §701(k)'s criterion to disregard the physical state that *causes* the inability to work (*e.g.,* a pulled muscle, blood pressure, pregnancy),[5] without *removing* §703(a)(1)'s criterion that comparators be similarly situated. Were it otherwise, absurd results would follow:

> If [a company's Chief Executive Officer] receives company-provided transportation as an accommodation for a back injury, then so too must the pregnant mailroom clerk, merely because they have the same physical capability to work.

[5] As indicated, UPS's reading does not rob §701(k)'s of all meaning; that criterion would prohibit distinctions between types of injuries or conditions and the types of treatments that the employee uses during their light-duty work.

UPS Br. at 45. Quite simply, nothing in either the statute or the legislative history explicitly instructs how to address multiple potential comparators.[6]

For her part, Young reads §701(k)'s second sentence to include the following emphasized additions: "***notwithstanding any other provision of law,*** women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes … as ***any*** other persons not so affected but similar ***only*** in their ability or inability to work." But even with the luxury of those added terms, her reading still does not resolve the issue presented here: what to do if more than one class of potential comparator exists? To be sure, Young would prefer comparators with the more generous benefits, but nothing in "other persons" or even "any other persons" compels that. She could just as consistently with that language get the person with the less-generous benefits.

Repeatedly and tautologically, Young's brief assumes that §701(k) mandates that pregnant employees receive the highest-level accommodation available to any other employee. *See, e.g.,* Young Br. at 20-21, 26, 29-30, 48-49. She then cites with approval excerpts from this Court's decisions that appear to support her outcome, but only if one first assumes her reading of §701(k). *Id.* at 20, 26. That form of circular reasoning proves nothing. Quite the

---

[6] As explained in Section I.B, *infra,* the canons of statutory construction would not allow removing the well-understood Title VII criteria on the slender reed of PDA's revisions.

contrary, this Court's past PDA decisions do not expressly resolve this case.

B. Canons of Statutory Construction Support UPS's Reading of PDA

In this section, *amicus* Eagle Forum outlines four canons of statutory construction that undermine Young's reading of PDA and support UPS's reading. In her defense, Young offers primarily the canon against interpreting statutory text as mere surplusage. Young Br. at 23 (*citing Fifth Third Bancorp v. Dudenhoeffer,* 134 S.Ct. 2459, 2468-69 (2014) and *Clark v. Rameker,* 134 S.Ct. 2242, 2248-49 (2014)).[7] As indicated in Section I.A, *supra,* UPS's reading of PDA does not render §701(k)'s second sentence surplus. Accordingly, Young's defense is no defense.

1. The Presumption against Preemption Supports UPS's Reading of PDA

As the enacting Congress recognized, the states already were regulating pregnancy-discrimination in employment when Congress enacted PDA. *See* S. REP. NO. 95-331, at 3 (quoted *supra*); H.R. REP. NO. 95-948, at 3 (quoted *supra*); *see also DeCanas v. Bica,* 424 U.S. 351, 357-58 (1976) (states have occupied the general field of employment). In such fields

---

[7] The canon against surplusage cuts both ways. If Congress had omitted §701(k)'s first sentence entirely and dropped its second sentence into an appropriate part of Title VII, Young's arguments would not change. In other words, §701(k)'s first sentence is surplusage as Young reads PDA.

traditionally occupied by state and local government, courts apply a presumption *against* preemption under which they will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947) (emphasis added). Moreover, even where Congress plainly intended *some* preemption, the presumption against preemption applies to determining the *scope* of that preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Federal courts "rely on the presumption because respect for the States as independent sovereigns in our federal system leads [federal courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine,* 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted). The "presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.; Santa Fe Elevator,* 331 U.S. at 230. The field here is plainly one of traditional state activity.

Under the circumstances, the presumption would prevent this Court's entertaining that interpretation to preempt state law if a non-preemptive or less-preemptive interpretation was also viable:

> When the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.

Altria Group, Inc. v. Good, 555 U.S. 70, 77 (2008) (interior quotation omitted). Thus, while neither Eagle Forum nor UPS would concede that Young's interpretation *is* viable, that is not the test. The

burden is on Young to demonstrate that UPS's less-preemptive interpretation *is not* viable.[8]

2. The Canon against Repeals by Implication Supports UPS's Reading of PDA

As explained in Section I.A, *supra,* the entire pre-PDA process for enforcing Title VII's right to be free from employment discrimination required the use of similarly situated comparators to demonstrate discrimination. *Hardison,* 432 U.S. at 71-72. Given that the legislative history states emphatically that PDA "does not change the application of title VII to sex discrimination in any other way" than to "defin[e] sex discrimination, as proscribed in the existing statute to include" "pregnancy, childbirth, and related medical conditions," S. REP. NO. 95-331, at 3-4, Young's reading cannot survive the canon against repeals by implication.

As this Court has recognized, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007) (interior quotations omitted, alteration in original). Of course, that is the same skeptical, clear-and-manifest-intent standard used in the presumption

---

[8] This Court already has held that PDA does not preempt state laws that are *more generous* than PDA, *California Fed'l Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 287-88 (1987), but that says nothing about state laws that were *less generous,* which PDA would supersede under the Supremacy Clause.

against preemption, which accepts plausible non-preemption readings over preemptive ones. *Altria Group,* 555 U.S. at 77. Similarly, "absent an expression of legislative will, [courts] are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision," such as *Hardison* and this Court's other pre-PDA Title VII decisions. *See Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 128 (1985). For these reasons, this Court should be reluctant to assume that Congress intended *sub silentio* to jettison the whole Title VII framework for comparing similarly situated employees when a viable alternate reading not only preserves that framework but also gives §701(k)'s second sentence meaning.

3. Young's Reading of PDA Impermissibly Relies on an Implied Private Right of Action, which this Court Has Rejected

Young's argument for enforcing §701(k)'s second sentence – separate and apart from a Title VII action under §703(a) – represents an impermissible attempt to revive this Court's former implied-right-of-action doctrine. As such, this Court should reject claims that Young can enforce §701(k)'s second sentence outside of the well-established process for enforcing Title VII under §703(a)(1).

In *Cannon v. University of Chicago,* 441 U.S. 677, 689 (1979), this Court rejected its prior practice of reading implied rights of action into statutes. Just as this Court decided in connection with another facet of the Civil Rights Act of 1964, it is too late in the day to argue for new implied rights of action:

"Having sworn off the habit of venturing beyond Congress's intent, we will not accept [the] invitation to have one last drink." *Alexander v. Sandoval,* 532 U.S. 275, 287 (2001) (declining to expand Title VI's existing implied right of action for statutory violations to include an action for regulatory violations); *cf.* Pet. App. 20a-21a (PDA's "shall be treated the same" language "does not create a distinct and independent cause of action"). For that reason, Title VII plaintiffs cannot enforce §701(k)'s second sentence outside of §703(a)(1).

4. The Canon of Constitutional Avoidance Supports UPS's Reading of PDA

As shown in Section II, *infra,* Young's reading of PDA would violate the Constitution by exceeding the power of Congress with respect to state governments. Under the circumstances, the canon of constitutional avoidance argues for rejecting Young's statutory reading to avoid the serious constitutional questions raised by Young's reading of PDA.

The canon of constitutional avoidance interprets statutes "to *avoid* the decision of constitutional questions" by "choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Suarez Martinez,* 543 U.S. 371, 381 (2005) (emphasis in original), Here, the canon argues for rejecting Young's reading of PDA because that reading would exceed the powers of Congress.

II. YOUNG'S READING OF PDA VIOLATES THE CONSTITUTION

This Court should reject Young's reading of PDA because that reading would exceed the power of Congress under Article I and Section 5 of the Fourteenth Amendment, at least as applied to state-government employers. Although this action involves a *private* employer – and one that unquestionably is involved in interstate commerce – the canon of constitutional avoidance counsels against reading Title VII in a way that would be unconstitutional as applied to state employers.

By way of background, Congress can violate the Constitution by enacting not only "laws for the accomplishment of objects not entrusted to the government" but also those "which are prohibited by the constitution." *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 423 (1819); *see also U.S. v. Comstock,* 560 U.S. 126, 135 (2010) ("a federal statute, in addition to *being authorized* by Art. I, § 8, must also '*not [be] prohibited*' by the Constitution") (*quoting McCulloch,* 17 U.S. (4 Wheat.) at 421) (alterations in *Comstock,* emphasis added). As explained in this Section, Young's reading of PDA would exceed the power granted to Congress under both Article I and Section 5 of the Fourteenth Amendment.

Congress has two powers that *potentially* might authorize anti-discrimination provisions like PDA or Title VII: Section 5 of the Fourteenth Amendment

and the Commerce Clause.[9] *Bitzer,* 427 U.S. at 453 n.9 (Congress relied on §5 to extend Title VII to states in the 1972 amendments); *id.* at 458 ("Congressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause … and in § 5 of the Fourteenth Amendment") (Brennan, J., concurring in judgment); *cf. Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 726-27 (2003) (Congress relied on those two powers for the Family and Medical Leave Act). Neither of the two relevant powers supports applying Young's reading of PDA against states.

Although the 1978 PDA amendment likely could be justified as to UPS under the Commerce Clause, that Clause did not empower Congress to waive states' sovereign immunity for PDA's extension of Title VII to pregnancy-related discrimination. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank,* 527 U.S. 627, 635-36 (1999) ("Congress may not abrogate state sovereign immunity pursuant to its Article I powers"). As explained in this Section, the Fourteenth Amendment did not authorize Congress to extend PDA – as interpreted by Young – to the states, and EEOC's contrary interpretation cannot change that analysis. Instead, Young and the "urgings of feminist scholars" among her *amici*, *Troupe v. May Dep't Stores Co.,* 20 F.3d 734, 738 (7th Cir. 1994), are trying to raise the ERA, a fight that they lost more than thirty years ago.

---

[9] The Spending Clause can support anti-discrimination laws like Title VI, but applies only to recipients of federal funds.

A. Congress Lacks the Authority under the Fourteenth Amendment to Impose Young's Reading of PDA

While "[t]here is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under [Section 5] of the Fourteenth Amendment," *Bitzer,* 427 U.S. at 453 n.9, there is an open question whether PDA – as read by Young and her *amici* – furthered any valid federal interest under Section 5.[10]

When Congress seeks to enforce the guarantees of the Fourteenth Amendment through Section 5, this Court has the ultimate obligation to determine whether Congress has overreached: "The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the

---

[10] Under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), Young had the opportunity to prove UPS's requisite discriminatory intent *indirectly*. To do so, however, she needed to make out a *prima facie* case of discrimination, including a showing of UPS's differentially treating similarly situated comparators, the same showing that Young cannot make under a direct proof. As UPS explains, "PDA was enacted to overturn *Gilbert,* not *McDonnell Douglas."* UPS Br. at 56. If Young had made her showing, UPS could have shown that its rationales were not pretextual, providing an opportunity to rebut the social-science data cited by Young and her *amici.* By failing to make a *prima facie* case, Young denied UPS its rebuttal, and this Court should disregard data that have not survived evidentiary scrutiny. Especially in politicized fields, social-science data often are biased. *See, e.g., Lofton v. Sec'y of Dept. of Children & Family Serv.,* 358 F.3d 804, 825 (11th Cir. 2004).

province of the Judicial Branch." *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 81 (2000); *accord Hibbs,* 538 U.S. at 744 ("Congress does not have authority to define the substantive content of the Equal Protection Clause; it may only shape the remedies warranted by the violations of that guarantee") (Kennedy, J., dissenting). Although such legislation may be prophylactic in prohibiting or requiring conduct that the Fourteenth Amendment does not prohibit or require, "Section 5 legislation reaching beyond the scope of [the Fourteenth Amendment's] actual guarantees must be an appropriate remedy for identified constitutional violations, not an attempt to substantively redefine the States' legal obligations." *Hibbs,* 538 U.S. at 728 (interior quotations omitted). In deciding these issues, this Court "distinguish[es] appropriate prophylactic legislation from substantive redefinition of the Fourteenth Amendment right at issue" by requiring the legislation to "exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* (interior quotations and citations omitted). Young's reading of PDA cannot survive that analysis.

To determine whether Congress constitutionally imposed the Family and Medical Leave Act on the states, this Court "inquire[d] whether Congress had evidence of a pattern of constitutional violations." *Hibbs,* 538 U.S. at 729. In doing so, the *Hibbs* majority relied on this Court's elevated standard of review for claims of sex-based discrimination, *id.* at 730, which enabled the Court to see discrimination in the states' purported "rel[iance] on invalid gender

stereotypes in the employment context." *Id.* Under the Equal Protection Clause, however, *this case* is not a sex-discrimination case.[11]

Accordingly, what distinguishes this case from *Hibbs* (which upheld prophylactic legislation under Section 5) and instead groups it with cases like *Kimel* (which held such legislation invalid) is the level of scrutiny that the Equal Protection Clause affords to the protected class. *See Hibbs,* 538 U.S. at 735. Significantly, this case would involve the rational-basis level of scrutiny for pregnancy-related discrimination, *Geduldig v. Aiello,* 417 U.S. 484, 496-97 n.20 (1974), if indeed it were a pregnancy-discrimination case. Viewed as such for purposes of the Equal Protection Clause, it is clear that neither Young nor Congress provided any evidence of discrimination against pregnant women vis-à-vis others with off-the-job conditions that limit their ability to work.[12] Instead, as Young seeks to apply it,

---

[11] Whereas *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 228 (1995), overruled – for race discrimination – the suggestion in *Metro Broadcasting, Inc. v. F.C.C.,* 497 U.S. 547, 565-66 (1990), that "benign" classifications warrant less scrutiny, this Court should clarify that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual ... class." *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 152-53 (1994) (*citing Metro Broadcasting,* 497 U.S. at 602 (O'Connor, J., dissenting)) (Kennedy, J., concurring).

[12] In fact, this case involves discrimination against those with lifting restrictions, not pregnancy, which also would implicate the rational-basis test.

PDA would be a "preferential treatment mandate," Pet. App. 23a, not an anti-discrimination remedy:

> The inability to adduce evidence of alleged discrimination, coupled with the inescapable fact that the federal scheme is not a remedy but a benefit program, demonstrate the lack of the requisite link between any problem Congress has identified and the program it mandated.

Hibbs, 538 U.S. at 745 (Kennedy, J., dissenting). For that reason, this Court should reject Young's reading of PDA, unless employers would lack any rational basis for treating all off-the-job injuries and medical conditions alike.

Although a court reviewing the UPS policy under the rational-basis test would not be limited to issues raised by the parties, *Nordlinger v. Hahn,* 505 U.S. 1, 11-12 (1992); *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973), UPS here has provided ample rational for treating on-the-job injuries more generously that off-the-job injuries and conditions: "workforce continuity and … assist[ance with] returning to their regular jobs as quickly as possible." UPS Br. at 54. Under the circumstances, there is no basis for Congress to impose Young's view of PDA on the states, and thus a significant reason for this Court to reject Young's reading under the canon of constitutional avoidance. *See* Section I.B.4, *supra.*

B. The United States Did Not Ratify the ERA, but Young's Reading of PDA Presupposes She Has Rights that Only the ERA Might Have Granted

The ERA provided the only possible basis for the federal authority that would allow Congress to enact the law that Young and her *amici* seek to enforce. But the states did not ratify the ERA, and "[f]ew principles of statutory construction are more compelling than the proposition that [a legislative body] does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," *INS v. Cardoza-Fonseca,* 480 U.S. 421, 442-43 (1987) (citation omitted). Accordingly, the federal government lacks the authority to require what Young and her *amici* seek to enforce.

If the states had ratified it, the ERA would have supplemented federal anti-discrimination authority both substantively and procedurally. Substantively, the ERA would have provided that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." ERA §1. Just as importantly here, the ERA also would have mirrored the Fourteenth Amendment's Section 5 with the proviso that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." ERA §2. Of course, there is no telling how the Court would have read the

amendment into its constitutional jurisprudence because the states did not ratify the ERA.[13]

An influential law review article on the proposed ERA purported to cover all the amendment's possible consequences, including its impact on the area of pregnancy leave. *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 YALE L.J. 871, 929-32 (1971). As this article showed, however, even the ERA might not have helped: "pregnancy was only a small part of the larger problem of temporary disabilities which could not constitutionally be dealt with separately," *id.* at 932, which suggests the same issue that UPS raises: leave (and thus light-duty accommodations) are part of a larger employment issue, thus requiring a larger fix. In the absence of that fix, the article suggests that an employer would be able to rely on the same types of distinctions that UPS makes (*i.e.,* off-duty injuries and conditions versus on-the-job injuries).

Amicus Eagle Forum respectfully submits that the reading that Young and her *amici* press *might* (or might not) have been viable under the ERA, but the states' failure to ratify the ERA dooms that reading under the Fourteenth Amendment that the states did ratify.

---

[13] *Nat'l Org. for Women, Inc. v. Idaho,* 459 U.S. 809 (1982) (dismissing ERA-related ratification question as moot when the extended ratification period expired on June 30, 1982).

C. EEOC's Post-*Certiorari* Guidance Does Not Warrant this Court's Deference

This Court should deny deference to the EEOC's *post hoc* guidance because the guidelines: (1) are inconsistent with the federal power under the Constitution, *see* Section II, *supra;* (2) do not align with the statute's text or history, *see* Sections I.A, I.B.2, *supra;* and (3) reflect an inconsistent federal position on the legal point at issue here. *See* UPS Br. at 15-20. While reasonable EEOC guidelines are entitled to deference under *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944), *see* U.S. *Amicus* Br. at 26, the guidelines here are not reasonable.

Consistency of interpretation can increase deference, *Skidmore* 323 U.S. at 140, and any inconsistency can decrease or nullify it. *Id.; Morton v. Ruiz,* 415 U.S. 199, 237 (1974). On the other hand, consistency alone cannot make an arbitrary position rational. *Judulang v. Holder,* 132 S.Ct. 476, 488 (2011) ("[a]rbitrary agency action becomes no less so by simple dint of repetition"). Thus, whatever deference Young claims for EEOC's present position, the primary issue is whether that position is consistent with Title VII and federal authority. For the reasons explained in this brief, EEOC's position is untenable.

III. ALTHOUGH YOUNG AND HER *AMICI* RELY ON POLICY ARGUMENTS – NOT LEGAL ARGUMENTS – TO SUPPORT THEIR READING OF PDA, THAT READING WOULD BE BAD POLICY

As UPS explains, Young and her *amici* rely on policy arguments about what the law *should be,* not

legal arguments about what the law *is*. UPS Br. at 12-25. Indeed, as *amicus* Eagle Forum explains, their view of what the law should be is not even something that the law constitutionally *could be*. *See* Section II, *supra*. In any event, because Young and her *amici* have raised policy issues about not only her position on PDA but also the dubious claim that Young's position is the pro-life position with respect to abortion, they should not go without rebuttal.

A. Young's Reading of PDA Would Harm American Families

The reading of PDA put forward by Young and her *amici* would harm American families, which is not the result that Congress intended in 1978. Quite simply, the accommodation Young requested is not good policy, which is why Congress did not require it.

In enacting PDA, Congress never intended: (1) to eliminate stereotypes of husband-breadwinner, wife-homemaker families; (2) to have women return to work immediately after giving birth to the exclusion of caring for their newborns; (3) to have pregnant women work as package-delivering truck drivers; or (4) to privilege the status of female truck drivers over either male truck drivers or the women married to male truck drivers. While the eradication of typical – or even stereotypical – families was the goal of the feminist movement, Congress generally has taken the more moderate path advocated by UPS here.

By contrast, Young demands that UPS provide her with light duty for *nine months* when typical on-the-job light duty lasts *a month,* UPS Br. at 55; J.A. 254, 569, so that she continues to draw her high pay while forcing her predominantly male coworkers –

who support their own spouses and children – to do the heavy lifting. It insults pregnancy to characterize this situation as pregnancy discrimination. As explained in Section II.A, *supra,* Young's demand for preferential treatment lacks a rational relationship to any legitimate anti-discrimination purpose that Congress may have had in 1978. Moreover, as explained in Sections II.A-II.B, *supra,* her demands exceed the constitutional powers of Congress given the failure of the ERA.

At all times relevant to this action, Young herself was married to a man whose job provided medical insurance. Nonetheless, much of the advocacy and data submitted to this Court press the concerns of single women who work and want to have children. *See, e.g.,* U.S. Amicus Br. at 23-24. If PDA did allow women like Young and similarly situated single women to impose their pregnancies on coworkers, PDA might provide enough of a cushion for Young, but it would leave similarly situated single women short, once their children were born. Facilitating single motherhood out of strained sense of equality does not do the women or the children a significant or long-lasting favor:

> Throughout human history, a single woman with a small child has not been a viable economic unit. Not being a viable economic unit, neither have the single woman and child been a legitimate social unit. In small numbers, they must be a net drain on the community's resources. In large numbers, they must destroy the community's capacity to sustain itself. *Mirabile dictu,* communities

> everywhere have augmented the economic penalties of single parenthood with severe social stigma.

Charles Murray, *The Coming White Underclass,* WALL ST. J., Oct. 29, 1993, *reprinted in Welfare Reform: Hearings Before the Subcommittee on Social Security & Family Policy of the Senate Committee on Finance,* 103rd Cong. 179, 181 (1994). The charitable purpose that some legislators may have had in PDA would be misplaced if PDA encouraged a single woman to bear children whom she cannot support.

The women's-rights group *amici* make an explicit the appeal to "this Court's longstanding commitment to gender equality," Women's Right Org. Br. at 3, an appeal that is implicit in all of the briefs supporting Young. The concept of "equality," however, is not the traditional sense of uninhibited opportunity or non-discrimination inherent in our legal tradition. Instead, this form of "gender equality" or "gender equity" means women as a group should earn as much as men and have equal representation in any desirable jobs, even (as here) when they cannot perform all the functions and duties of the job. While on the Ninth Circuit, Justice Kennedy addressed the strand of this theory that calls for comparable-worth payments to females in lower-paying jobs, based on their comparison with higher-paying jobs in which men predominate. "Neither law nor logic deems the free market system a suspect enterprise," and "Title VII does not obligate [an employer] to eliminate an economic inequality that it did not create." *Am. Fed'n of State, County & Muni. Employees, AFL-CIO v. Washington,* 770 F.2d 1401, 1407 (9th Cir. 1985)

(Kennedy, J.). Young's case, in short, is based "upon an economic theory which a large part of the country does not entertain." *Lochner v. New York,* 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). "The Fourteenth Amendment does not enact" feminist theory, *id.,* and this Court should reject Young's reading of PDA as such.

Although congressional social engineering often proves disastrous for even the intended beneficiaries, Charles Murray, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984), the judiciary is even less suited for that task. *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 766 (2007) (Thomas, J., concurring). For that reason, even if helping pregnant truck drivers seems noble or enlightened, the Nation will be better off if this Court stays its hand to allow the private sector and state governments to act in this arena, as UPS already has. This Court should reject the call to act out of equity in a field that this Court lacks not only the expertise but also the resources to manage.

B. Young's Reading of PDA Would Undermine Pro-Life Policies and Laws

As problematic as Young's PDA positions are as a matter of social policy, the position of her pro-life *amici* are even worse. *See Amicus* Br. of 23 Pro-Life Organizations at 20. Based on three brief statements in the legislative debates to the effect that PDA would provide women flexibility to carry their pregnancies to term, these *amici* throw their support behind an expansion of the concept of pregnancy-related discrimination that would greatly increase the abortion industry's ability to argue for abortion

on demand and public subsidization of those abortions. The brief has three principal flaws.

First, the brief subscribes to the incorrect view that preventing the economic coercion of abortions was "the very problem that Congress sought to solve." *Id.* at 10. While the few legislators who mentioned this facet included Rep. Hawkins and Sen. Williams, the floor statements of even bill managers do not bind Congress to a position unsupported in the bill. Even when made by bills' sponsors, floor statements lack controlling effect and – when (as here) inconsistent with the statutory language – do not even provide evidence of congressional intent. *Brock v. Pierce County,* 476 U.S. 253, 262-63 (1986). Moreover, to the extent that PDA's legislative history actually addressed abortion, it concerned the extent to which employers could decline to include abortion coverage as a health-insurance benefit. H.R. REP. NO. 95-1786, at 3-4 (Oct. 13, 1978) (Conference Report).

Second, aside from those hyperbolic claims in seeking the votes of pro-life legislators, no evidence exists, then or now, that PDA either was intended to discourage abortions or, in fact, did reduce abortions. Nor do *amici* cite any evidence to support their claim. Contrary to this unsupported claim, the interpretation that Young and her *amici* press would promote abortion by adopting legal arguments that true equality requires relieving women from the burdens of pregnancy and childcare, which likely would include not only unrestricted abortion on demand, but also requirements for public funding and mandating abortion coverage in health care

plans. *Burwell v. Hobby Lobby Stores, Inc.,* 134 S.Ct. 2751, 2787-89 (2014) (Ginsburg, J., dissenting). If abortion becomes a gender-equity issue – rather than one of privacy or liberty – the abortion industry obviously would press that right. Finally, inclusion of abortion among the pregnancy-related medical conditions protected by PDA would dwarf the few instances, if any, where PDA leave or benefits enabled a woman to bring a child to term that she otherwise would have aborted.

Third, although Young herself was married when the underlying facts unfolded, the position pressed by Young and her *amici* also extends to single working mothers. For both married women like Young and especially for single mothers, neither this Court nor this Nation have ever recognized a "fundamental right to bear children while also participating fully and equally in the workforce." *Amicus* Br. of 23 Pro-Life Organizations at 23 (*citing* 123 Cong. Rec. 29,658 (1977) (statement of Sen. Williams) and *Guerra,* 479 U.S. at 288-89) (interior quotations and alternation omitted). Senator Williams – as quoted in Guerra – should not be construed to mean that women can "have it all" through some "fundamental right" to avoid the inevitable tradeoffs between work and family life. Life is a series of tradeoffs, and "you can have it all" does not mean "having it all given to you." While this Court should not have restated Sen. Williams' floor-

speech hyperbole,[14] *Guerra,* 479 U.S. at 288-89, that restatement on the "entire thrust" behind PDA did not create any such right. If it existed, that supposed right would be a right to be supported by others or by the government. While our Constitution may forbid the government from *interfering in the exercise* of such freedoms, the Constitution offers no such privileges outright.

CONCLUSION

This Court should affirm the Fourth Circuit.

October 31, 2014

Respectfully submitted,

LAWRENCE J. JOSEPH
1250 Connecticut Av. NW
Suite 200
Washington, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com

Counsel for Amicus

[14] PDA's thrust was to end pregnancy-based discrimination for women who – unlike Young – are able to perform their jobs as well as required of similarly situated coworkers.