IN THE SUPREME COURT OF THE UNITED STATES

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PEGGY YOUNG, :

Petitioner : No. 12-1226

v. :

UNITED PARCEL SERVICE, INC. :

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Washington, D.C.

Wednesday, December 3, 2014

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

SAMUEL R. BAGENSTOS, ESQ., Ann Arbor, Mich.; on behalf of Petitioner.

DONALD B. VERRILLI, JR., ESQ., Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

CAITLIN J. HALLIGAN, ESQ., New York, N.Y.; on behalf of Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 12-1226, Young v. United Parcel Service.

Mr. Bagenstos.

ORAL ARGUMENT OF SAMUEL BAGENSTOS

ON BEHALF OF THE PETITIONER

MR. BAGENSTOS: Thank you, Mr. Chief Justice, and may it please the Court:

If Peggy Young had sought an accommodation for a 20-pound lifting restriction that resulted from any number of conditions, whether acquired on or off the job, the summary judgment record reflects that UPS would have granted that accommodation. But because Peggy Young's 20-pound lifting restriction resulted from her pregnancy and not from one of those conditions, UPS rejected her request. That, we submit, is a violation of the second clause of the PDA which, if it means anything, must mean that when an employee seeks an accommodation or benefit due to her pregnancy, that she is entitled to the same accommodation that her employer would have given her.

JUSTICE KENNEDY: Well, what you make it sound as if the only condition that was not accommodated

was a lifting restriction because of pregnancy, and I -- I did not understand that to be the case. I mean, that's the way you start. You want -- you want me to say it's only pregnancy, unless I've -- I've missed something.

MR. BAGENSTOS: Well, I -- so I think on the summary judgment record here, Your Honor, that the three very broad classes of -- of limitations that UPS accommodates do -- at least there's a genuine issue of material fact that they cover the waterfront of everything but pregnancy. But our position is that those three broad classes by themselves, even if there are some conditions out there, that they don't cover create --

JUSTICE SOTOMAYOR: I'm sorry. I'm confused.

JUSTICE KENNEDY: Well, I mean, I think that's a necessary starting point for your case. It seems to me that you started out by really giving a misimpression.

MR. BAGENSTOS: Well, I -- Your Honor, I would submit that that's not right. I would submit that in -- on this summary judgment record, UPS had -- UPS acknowledges that they provide accommodations to people with on-the-job injuries, but also the summary -- but

also the summary judgment record shows that UPS provides accommodations to drivers with off-the-job injuries that result in DOT disqualification, and UPS has not been able to point to a single driver who has a lifting restriction similar to my client, Peggy Young's, who didn't get accommodated who was not pregnant. So -- so I think --

JUSTICE GINSBURG: Mr. Bagenstos, what would your case be if -- let's accept, for argument's sake, that there's a category people who are injured off duty who do not get light work assignments. So you -- you pointed to three large categories that do, but let's suppose one category doesn't.

MR. BAGENSTOS: Yes. So in that case, our position would be, as the plain text of the statute demands, that the employer would be required to treat the pregnant plaintiff the same as those classes of employees who get accommodations --

JUSTICE SCALIA: Most favored nations treatment.

MR. BAGENSTOS: So --

JUSTICE SCALIA: It doesn't have to be read that way. It -- it could be read that way, and it could -- it could also mean that if you give it to employees generally, you have to give it to pregnant

employees, although there may be special -- special classes. I think one of the briefs had an example about, you know, if -- if you have your -- your senior employees driven to work when -- when -- when they are unable to drive themselves, you have to do the same for pregnant women. Would you say that that's the case?

MR. BAGENSTOS: No, we would not say that.

JUSTICE SCALIA: Why not?

MR. BAGENSTOS: We would -- we would not say that because our position is that the statutory text requires that employers provide workers who are disabled by pregnancy the same treatment they would receive if they themselves had a similar -- had a condition with a similar effect on the ability to work, but that had a different source.

So what the statute prohibits is discrimination based on the source of the workplace limitation, not based on seniority, not based on position within the company.

JUSTICE BREYER: But suppose you have a --

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: Suppose -- I mean, we have a brief, as you've seen it, from the truck drivers, and -- and they say they don't give many of these benefits to anybody. And suppose they do, though, give

a benefit to a truck driver who has driven over a particularly difficult mountain pass, you know, where -- and gotten himself in some danger. Now, the -- the -- the harm or the disability is lifting precisely the same. It's just that the source was different. You see, this came from taking a -- some truck that -- doing something special with it, and, again, it's a kind of most favored nation problem. I don't know that source gets you out of it. Is -- is -- what do you say about that?

MR. BAGENSTOS: So I -- I think as to that, the -- the important point is that -- that is an example of what may be an idiosyncratic decision by an employer to provide an accommodation to a particular employee. I think, as Justice Scalia --

JUSTICE BREYER: Well, I don't know that it's idiosyncratic, you see, because I don't know all the workplaces, and I can imagine that employers have all kinds of different rules for different kinds of jobs. And -- and is -- are you saying as long as there is one job in respect to which, let's say, they give them benefits of $1,000 a week when you're hurt on this job but not on others --

MR. BAGENSTOS: And so --

JUSTICE BREYER: -- then do you have to give

them to all pregnant women who hold different jobs? Now, I think the answer to that must be no, but the problem for that and for you is how do you distinguish your situation from that?

MR. BAGENSTOS: Right. And I -- and I think actually what Justice Scalia's question to me a minute ago --

JUSTICE BREYER: Yes.

MR. BAGENSTOS: -- actually contains the seeds of the answer to that.

JUSTICE BREYER: Exactly.

MR. BAGENSTOS: So -- so it seems to me I might agree that an employer that provides a particularly good deal to a single nonpregnant employee doesn't set a --

JUSTICE BREYER: Not a single. There's a class of people.

MR. BAGENSTOS: For a small -- right. So -- so -- but when you have an employer that provides to a large class, to -- to its employees generally, to many of its employees, this accommodated work treatment --

JUSTICE BREYER: I see -- I see that that -- now, it sounds -- the other question I have, and it's the only other one, is it did seem to me there is a way, given your theory it's a quite easy way for you to win,

and that would be to bring a disparate impact claim, and that's what I thought disparate impact claims were about.

MR. BAGENSTOS: So --

JUSTICE BREYER: But you didn't bring the disparate claim and, therefore, what am I to do because I don't know that you want to twist the disparate, you know, intent claim out of shape when you have such a beautiful vehicle to bring a claim of the kind you just articulated.

MR. BAGENSTOS: Well, I think the vehicle to bring the claim of the kind that I articulated is the second clause of the PDA. The second clause of the PDA says that, "Women affected by pregnancy, childbirth, or related conditions shall be treated the same as other persons not so affected but similar in their ability or inability to work."

JUSTICE ALITO: Well, you read that as a --

JUSTICE KAGAN : Could that take --

JUSTICE ALITO: You read that as an accommodation provision basically, and maybe -- maybe it is. But let me ask you this question, which goes to the -- the issue of -- of whether the types of accommodations that you would say are required have to meet some reasonableness standard.

Let's say there are two categories of employees who have lifting restrictions in their job descriptions. One consists of people who work alone and they lift all the time. A driver who is driving a truck by herself and has to lift heavy packages all the time would fall into that category. The second category would consist of people who lift more occasionally, and they do it in a place where there will always be lots of other employees in the same class available to do the lifting.

Now, if an accommodation is provided to the workers in the second category, would you say that one must also be provided to workers in the first?

MR. BAGENSTOS: No, I don't think so.

So our point is precisely that a driver who is pregnant and who has a limitation related to her pregnancy is entitled to the same accommodation her employer would have given her if she had sought it for a different medical condition with the same effect on the ability to work.

JUSTICE ALITO: But why -- why doesn't that fit -- why doesn't that second class fit within your reading of the statutory text?

MR. BAGENSTOS: Well, so because, in our -- in our view, the statutory text, by saying -- by drawing

this distinction between employees affected by pregnancy, childbirth, and related medical conditions and not so affected, saying employers can't draw that distinction, excuse me, and saying instead they look only at the ability to work, what it does is it prohibits discrimination based on the source of the disabling condition. It doesn't prohibit discrimination based on different job classifications.

If you have a driver -- if an employer says no driver who drives alone is going to get an accommodation whether for an on-the-job injury, a DOT disqualifying injury, or pregnancy, that's fine because it's the same treatment. Because, Justice Alito, we do not read this statute as an independent, reasonable accommodation --

JUSTICE KAGAN: But why then -- I guess I'm not quite understanding why you can -- get the source classifications into a different category from all other classifications. So explain that to me.

MR. BAGENSTOS: Well, so, I mean, I think it -- it goes to the statutory text. So, I mean, the statutory text says, "Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same," et cetera, "as other persons not so affected but similar in their ability to work."

What that -- what that text is saying is -- to an employer, don't consider whether this person is affected by pregnancy or not so affected. That's not the basis on which you can compare this employee to other employees. Instead, compare this employee based on ability to work.

And remember, this statutory text was adopted in response to General Electric v. Gilbert which upheld an employer policy that distinguished based on the source of the disabling condition, treated some kinds of disabling conditions differently from pregnancy-related disabling conditions.

JUSTICE ALITO: I think you're reading -- you have admitted that other persons can't really be read literally. Other -- you have to read things into it. And you would read into it people in the same job classification. But if you can do that, then why can't you also read into it people whose injuries, whose disabilities have the same source?

MR. BAGENSTOS: Because once you do that, then the second clause of the PDA doesn't occupy any space and then -- and Congress should have stopped with the first clause. Congress was doing something with the second clause. It was trying to overturn the Gilbert situation, where you had an employer that adopted a

policy that, as a formal matter, treated pregnant people the same way it treated nonpregnant people. If you were pregnant, but the reason that you weren't able to work was an off-the-job illness or injury, the General Electric policy in Gilbert would have given you disability benefits. And what this Court said in the Gilbert case was that's not discrimination; it -- it simply doesn't include coverage for pregnancy, but pregnant women aren't fenced off.

What this statutory text does is it says: No, employers have to treat pregnancy-related conditions as favorably as they treat nonpregnancy-related conditions. And that's in fact how this Court has read the statute since it's very first PDA case. In Newport News, what this Court said was that the Act makes clear that it's discriminatory to treat pregnancy-related conditions less favorably than other medical conditions. And here UPS, with the three very large classes of employees that it provides accommodations to who are not pregnant, is treating pregnancy-related conditions less favorably than other medical conditions.

JUSTICE SCALIA: So you do assert it's a -- it's a most favored nation provision. You -- you have to give the benefits that you give to any other class of employees, right?

MR. BAGENSTOS: To any other class of employees, I think that's right.

JUSTICE SCALIA: How long -- it doesn't matter whether that class is enormous or small, right?

MR. BAGENSTOS: Well, I -- so I think this is -- this is text that obviously requires some degree of interpretation. I think Your Honor articulated one way of thinking about it, which is providing it -- providing this accommodation or benefit to employees generally. And certainly, when an employer provides accommodations or benefits to such large classes of employees who are not pregnant, who are similar in the ability to work --

JUSTICE SCALIA: Does -- does the record show what you have asserted here, that the classes that are given special treatment is almost everybody?

MR. BAGENSTOS: Well, I think that we have --

JUSTICE SCALIA: Does the record show that?

MR. BAGENSTOS: I think -- I think the record is sufficient to show that. Remember, summary judgment was granted against us.

JUSTICE SCALIA: I understand.

MR. BAGENSTOS: Yes. So I think the record is sufficient to show that in the following sense: So,

number one, obviously, there's all the on-the-job injuries, which -- which UPS acknowledges they provide accommodations for. Number two, DOT-disqualifying conditions that UPS provides accommodated work for; we have presented examples in the record of individuals who have off-the-job injuries, who are similar in their ability to work as Peggy Young, who have been given accommodated work, and UPS hasn't pointed to in its briefing here any driver with a similar lifting restriction to Peggy Young who was not pregnant who didn't get the accommodation.

JUSTICE BREYER: You can win your case with that argument, perhaps.

MR. BAGENSTOS: And I hope so, yes.

JUSTICE BREYER: Yes, assume that. But that isn't going to help me, which I'm rather selfish about.

(Laughter.)

JUSTICE BREYER: Because my -- my job here is to write what this statute means for a lot of cases. And writing the words, what it means is if you give a lot of benefits to a lot of employees, but not to the pregnant women and you don't give it to some employees and not to the pregnant women, and the employer says, look, pregnant women are like the few we don't give it to, not to the lot we do give it to, employer, you lose.

But by the time I've written that into the U.S. Code, nobody knows what I'm talking about. Do you understand? I -- I need to know how to interpret the words such that they would do, in your view, what you want them to do, which is just what I said.

MR. BAGENSTOS: Yes. And so -- and I think the important point is if an employer provides accommodations as a matter of policy to a class of employees who are not pregnant, who are similar in their ability or inability to work to the pregnant plaintiff and does not provide the same accommodation or benefit to the pregnant plaintiff, it is violating the plain text of the statute, which says that women affected by pregnancy --

JUSTICE SCALIA: Most favored nation. So you're coming down to most favored nation. And that makes sense and that's easy for my colleague to describe. He can write that down in his opinion.

JUSTICE BREYER: But unfortunately, it takes out of what you just said the fact that you give them to a lot of employees. Because you could have a most favored nation that was two employees --

JUSTICE SCALIA: That's right.

JUSTICE BREYER: -- including those who've only worked there for 4 years. A huge seniority. So --

so those are the words that I'm --

MR. BAGENSTOS: I understand. And -- and I understand. And that's why I think this may be an easier case than the one --

JUSTICE SOTOMAYOR: Basically what you're saying, if I understand it, is it's okay to differentiate on the basis of anything but source, which means whether it's work or non-work-related. That -- that's your --

MR. BAGENSTOS: Yes.

JUSTICE SOTOMAYOR: You're reading out of the legislative history the fact that Congress repeatedly said, we're not forcing employers to give benefits for non-work-related injuries, but we're going to write it so they have to anyway.

MR. BAGENSTOS: So I -- so I don't think there's any statement in the legislative history that says we're not forcing employers to give benefits for non-work-related injuries. What -- there are three statements in the legislative history that -- that Respondent draws a negative inference from.

JUSTICE SCALIA: I'm so relieved.

MR. BAGENSTOS: That Respondent draws a negative inference from to say, obviously, Congress didn't mean to do that.

But to return to Justice Scalia's response there, I mean, the point is the text contains no such limitation. And on-the-job/off-the-job distinctions were certainly known to Congress at the time it adopted this -- it adopted this statute. In fact, General Electric v. Gilbert involved a policy that contained an on-the-job/off-the-job distinction, although the flip side of the one in this case.

If Congress meant to say that employers have an exception from the general "shall be treated the same" requirement for an on-the-job/off-the-job distinction, it could have said so.

If I might reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Certainly.

MR. BAGENSTOS: Thank you.

CHIEF JUSTICE ROBERTS: General Verrilli.

ORAL ARGUMENT OF GENERAL DONALD B. VERRILLI, JR.

FOR THE UNITED STATES, AS AMICUS CURIAE

SUPPORTING THE PETITIONER

GENERAL VERRILLI: Mr. Chief Justice, and may it please the Court:

The point of the Pregnancy Discrimination Act is to reduce the number of women who are driven from the workforce or forced to go months without an income as a result of becoming pregnant. The second clause of

the PDA advances that interest in a narrow but important way. I say the second clause is narrow because it is not a freestanding accommodation requirement like the religious provision of Title VII or like the ADA. And I say it is narrow because there's only one thing that an employer can't do when it affords benefits or accommodations. It can't draw distinctions that treat pregnancy-related medical conditions worse than other conditions with comparable effects on ability to work.

JUSTICE GINSBURG: That wasn't the position that the government took in the U.S. Postal Service policy. We are told that the government defended a policy that is, for all intents and purposes, the same as United Parcel Service. And more than that, some briefs called Petitioner's position frivolous, contrived. That was the government's position. So will you explain how the government -- I suppose to this day, because the Postal Service still retains, as far as we know, the exclusion of pregnant women.

GENERAL VERRILLI: Of course, Justice Ginsburg. It is correct that the Department of Justice defended the Postal Service practices against charges like those that Ms. Young makes in this case. That's correct. We acknowledge that in footnote 2 of our brief to this Court.

Since then, however, the EEOC has issued guidance, and that's a very significant fact. Congress has charged the EEOC with authority to interpret this statute and with an authority to enforce it.

JUSTICE SCALIA: I thought we felt that we don't give deference to the EEOC.

GENERAL VERRILLI: You don't give Chevron deference to the EEOC.

JUSTICE SCALIA: Oh.

GENERAL VERRILLI: But the government has interests --

JUSTICE SCALIA: Oh, come one. So we give what -- what do you call the other kind of deference? I mean, gee, you give that to me even when -- even when I'm in dissent. I mean, that just means, you know, treat it for what it's worth.

GENERAL VERRILLI: The EEOC sets the enforcement policy for the Federal sector with respect to this issue. That's a significant fact. We took it into consideration in deciding what the position of the United States should be.

JUSTICE KENNEDY: Would your position here be the same if the 2014 guideline had not been adopted?

GENERAL VERRILLI: We didn't take that position before the 2014 guideline had been adopted,

Justice Kennedy. And I just don't know how to answer that question because we took the position in light of the guidance it adopted in 2014, which we do consider to be significant and we do have to weigh our interest as enforcer of the law as well as employer. We did so on a considered basis and we came to the judgment that we thought was the correct judgment about the meaning of the statute.

JUSTICE SCALIA: But we don't give you any more deference than we give the EEOC, though, right?

GENERAL VERRILLI: Well, with respect to this, I do think that the Court's got to decide what the best reading of the statute is, that's right.

JUSTICE SCALIA: What the best reading is, regardless of what you think.

GENERAL VERRILLI: That's correct. And if I could turn to that, I think -- and I hopefully in doing so will answer your question, Justice Alito, and also yours, Justice Kagan. Here's why we think the statutory text -- and if -- maybe it would help if I restated what I think the rule is and then explain where the textual basis comes from.

We think the one thing an employer can't do as a result of the second clause is draw distinctions that treat pregnancy-related medical conditions worse

than other conditions with comparable effects on ability to work. It's that single thing. And so seniority, full-time work, different job classifications, all of those things would be permissible distinctions for an employer to make to differentiate among who gets benefits.

Now, as for the textual basis, I'm looking at the -- at the statute here, which is -- we've got it at page 12 and 13 of our brief and it's also in the last page of the appendix to the petition. It says that -- what it says is that among the class of people who are comparable in their ability to work," in other words, similar in their ability or inability to work, as the statute says, women with a pregnancy-related medical condition, in other words, women affected by pregnancy, childbirth, or related medical condition, as the statute says, can't be treated worse on the basis of their condition -- that's what we think "treated the same" means in the statute -- than other workers with non-pregnancy-related medical conditions that impose comparable limitations. Those are other persons not so affected.

JUSTICE KENNEDY: Would you give me your interpolation again? You -- you altered the phrase and the words you added were?

GENERAL VERRILLI: "On the basis of their condition." And the reason we think that that's the sensible and best reading of the statutory text is because this is focused on the condition and not the person.

JUSTICE BREYER: Well, but you start -- you've got -- at the very beginning, you listed three things that you said were reasonable distinctions. Because the word I'd like you to focus on is "other workers" and the problem is which other workers? Because it is easy to construct hypothetical cases where the work -- the employer treats some other workers the same as the statute and doesn't others. And which distinctions are reasonable and which ones are not, and how do we tell?

GENERAL VERRILLI: I'd like to make two points in response, Justice Breyer. The first about the nature of the Title VII claim and the second about the nature of this kind of an antidiscrimination provision.

With respect to the first, I think it's helpful to differentiate between a direct claim of discrimination, disparate treatment, versus a claim proven through the McDonnell Douglas framework. Now, we think in order to prove a direct claim without going through the McDonnell Douglas burden-shifting analysis,

what you've got to show is that an employer offers an accommodation to a significant class of employees and that that accommodation fails the test I described earlier. It's got to be a significant class.

Now, we think that's this case. We think that's going to be most cases. But in the kinds of examples that Your Honor identified, the one guy driving across the mountain, for example, I think you'd have two issues there: First, when it's one person, you're not going to be able to make a direct case. You go through McDonnell Douglas and the employer may well have an explanation for that accommodation that would take it outside the source of the disability limitation and mean there's no liability.

And then with respect to that example there's a second point to be made, I think, which is that that person who has to drive the particularly dangerous route, for example, may just well be in a different job category and, therefore, not similar in ability or --

CHIEF JUSTICE ROBERTS: I would have thought it's those types of cases that present the starkest example of discrimination on the basis of pregnancy, the idiosyncratic one. Oh, well, he's doing this, yes, but he's doing that and then the pregnant woman comes in and

says, ah, you know, that's not the same thing. I thought maybe it's the -- the sort of the isolated examples that would be particularly glaring in their discriminatory treatment.

GENERAL VERRILLI: Well, Mr. Chief Justice, I guess what I would say about that is that you could certainly bring a McDonnell Douglas claim against an individual idiosyncratic difference, but then if the employer can show that the accommodation was granted to one not on the basis of a criterion that this sentence in the PDA would forbid, then the employer's -- then the -- then the accommodation is fine, there's no violation.

And to get back to the point --

JUSTICE BREYER: That's the -- that's -- I used the idiosyncratic example, not because I'm interested in it, because I think it illustrates something that isn't idiosyncratic. And what I use it to illustrate is the fact that, as here, employers will have classes of people and the classes may be based on all kinds of different things. But this is a case where there are classes and some get the benefits equivalent to the pregnancy and some don't.

And how are we supposed to tell which are the criteria that are consistent with the statute and

which are not? That's what I found as the difficult question in the case. And that's why I ask it using the idiosyncratic, simply to illustrate what I think is the problem.

GENERAL VERRILLI: Yes, of course. Let me get to the second point I wanted to make in response to your question, and then I'll try, after I do that, to give you a very specific response to what you just asked me.

The second point is, you know, it is true that some classes are going to be in and some classes are going to be out, but that's how discrimination law operates. If an employer is discriminating against women in promotions, the fact that an employer is also discriminating against overweight men in promotions doesn't make the discrimination against women any less actionable because it just reflects the choice Congress made about whom to protect and whom not to protect. And here, the choice Congress made on whom to protect and whom not to protect is the choice to protect women who have conditions -- pregnancy-related medical conditions. That's the congressional judgment here. They didn't choose to protect everybody who gets injured off the job. They chose to protect those with pregnancy-related medical conditions.

JUSTICE KENNEDY: Suppose the employer has the rule, we will, if you have a disability acquired outside of employment, give you benefits for one month, and it applies that same policy to the -- to the pregnant woman. Is that a violation of the statute?

GENERAL VERRILLI: No. I think the pregnant woman would be entitled to the one month, but nothing more than the -- than the Court gives to anybody else.

JUSTICE KENNEDY: But nothing less.

GENERAL VERRILLI: Correct. That's correct.

JUSTICE KENNEDY: Why isn't that discrimination on the basis of --

GENERAL VERRILLI: Well, because the statute requires that people be treated the same, and so she would be. The pregnant employee would be treated the same under those circumstances. It doesn't require any --

CHIEF JUSTICE ROBERTS: But not if there is a separate category of people who are entitled to benefits for more than one month.

GENERAL VERRILLI: Well, the question would be whether those benefits -- whether the distinction -- whether the disentitlement of the pregnant employee was based on the source of her condition, namely, pregnancy. If it's based on something else like seniority or

full-time status, then, of course --

JUSTICE SOTOMAYOR: Would you please answer my question, which was: Do you mean "source" means on the job and off the job? Is that what this case revolves around? Because I don't know what "source" means otherwise.

CHIEF JUSTICE ROBERTS: Briefly.

GENERAL VERRILLI: Yes, Mr. Chief Justice, briefly.

So I think that on the job versus off the job, that distinction goes to -- inevitably goes to the source of the impairment. And, of course, pregnancy will never qualify under that standard. But this case is not just about on the job versus off the job. It's about on the job versus off the job plus the DOT certification category, which can include people who lose their DOT certification and can't drive as a result of physical conditions other than pregnancy that prevent them from doing the job they have to do, which could include lifting. And the DOT manual, which the Petitioner cites at pages 6 and 7, says exactly that.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, General.

Ms. Halligan.

ORAL ARGUMENT OF CAITLIN J. HALLIGAN

ON BEHALF OF THE RESPONDENT

MS. HALLIGAN: Mr. Chief Justice, and may it please the Court:

Justice Breyer, you are exactly correct. Had Petitioner believed that the policy that UPS applied, which was to provide accommodations to employees who are injured on the job but not to provide accommodations to any employees who sustained a condition incurred off the job, she could have brought a disparate impact claim. We believe she would not have succeeded, but she could have and she did not. She attempted to bring one late in the day. It was dismissed by the district court because it had not been exhausted.

JUSTICE KAGAN: Well, Ms. Halligan, could we talk about the claim that she did bring?

MS. HALLIGAN: Yes.

JUSTICE KAGAN: So your reading of the statute basically makes everything after the semicolon completely superfluous. And I think you would agree with that, wouldn't you?

MS. HALLIGAN: Absolutely not, Your Honor. The reading that we propose is very straightforward. What Congress said in the second clause, the key words are "the same as other persons." What "other" means is

simply distinct from whatever is mentioned first. So employers have to treat pregnant employees the same as some distinct group of nonpregnant employees that are similar in their ability or inability to work and that's exactly what UPS's policy is.

JUSTICE KAGAN: But that is what the first provision does. When it says pregnancy is the same as sex, when we say because of sex, we also say because of pregnancy, all of that would be taken care of by that clause.

MS. HALLIGAN: This Court explained in Newport News, as well as in CalFed, that the function of the second clause is to explain how Title VII principles apply to pregnancy. And the reason that they had to do that was in order to repudiate the logic --

JUSTICE KAGAN: So -- so you are saying it's not doing anything new; it's only explaining the old stuff. And okay. Tell me why that's necessary?

MS. HALLIGAN: I'm not -- I'm not saying that, Your Honor. What I'm saying is that in a pregnancy discrimination case, instead of comparing women with men as you would in a typical sex discrimination case, because what the first clause does is bolt pregnancy on to sex discrimination. And so if you compare women and men in a pregnancy discrimination

case where you have a policy that facially discriminates against pregnancy, you will nonetheless conclude that there's not sex discrimination because there will be women who are pregnant in the disfavored group, but there will also be women who are not pregnant in the favored group, along with men

JUSTICE KAGAN: I think, again, that that is not necessary, because all that the inquiry would be is were you discriminated against because you were pregnant? Yes, I was. No, I wasn't. You don't need any of this other stuff about what the comparator class is. And, in fact, you are creating a kind of double redundancy. It's everything past the semicolon is redundant, but then, moreover, the key words here, which is "other persons not so affected but similar in their ability or inability to work," that becomes redundant even within the redundancy.

MS. HALLIGAN: I think, to respond to the last point first and then to the first. What Petitioner's interpretation and the government's interpretation would do would actually be to rewrite those words in one of two ways. Initially, Petitioner seemed to be suggesting that if a plaintiff could identify any other single employee who was accommodated that the pregnant employee would be entitled to the same

accommodation. What that would mean is the statute would have to read "the same as any other person." It does not.

Now Petitioner and the government are both suggesting that the only restriction that this bars is a restriction based on source. Any other restriction, rank, seniority status, outside legal obligations, are acceptable. But it doesn't contain any of those words either, not "source," not --

JUSTICE KAGAN: That seems the -- that is the question that this language raises, right? Which is why source? But why not a seniority limitation or something like that? Could I give you an alternative way to understand what the statute is doing? Which is that -- what we ought to be thinking about is McDonnell Douglas. In other words, this -- this provides the comparator. It says an employee can find a class of people who are being given an accommodation notwithstanding that those people are similarly situated with respect to work. An employee points to that class. And then in a typical McDonnell Douglas fashion, the employer comes back and says: No, there is a good reason why I'm treating that class differently that has nothing to do with pregnancy. It has something to do with I always treat more senior employees differently or

something like that. And at that point, if the -- if the employer makes his case, the employee gets to come back and say, no, that is a pretext, in just the way we do with every other discrimination case.

And that's what this is all about. It's identifying the comparator that the employee has to identify in the first instance in order to shift the burden to the government to come back with a reason.

MS. HALLIGAN: I think the second clause is highly relevant to the question of comparators, but not in the way that you are suggesting. What the second clause does, as this Court has laid out in Newport News and in CalFed, is to explain when you are making those comparisons that you don't look at women and men, which is what you might do, as this Court did in Gilbert, because it's sex discrimination that you are actually classifying --

JUSTICE GINSBURG: That's the first clause. But, I mean, instead of talking in the abstract, can you give me any example of a case that a plaintiff would lose under the first clause that puts pregnancy together with sex.

MS. HALLIGAN: I'm not sure that you could, but that wasn't the function of the second clause. And Petitioner --

JUSTICE GINSBURG: Then you are saying second clause adds nothing even though Congress said "and." There is one clause because of sex, includes pregnancy, "and" something in addition. But you are saying it's not really in addition.

MS. HALLIGAN: I think that grammatical connector is very important in understanding how the two clauses relate, for the following reason: Petitioner's construction would read the first clause out of the statute entirely. The words in the first clause are "because of." And this Court has consistently understood those words across protected traits to require that discrimination -- in an intentional discrimination case, that you have discrimination that is actually motivated by the protected trait.

If the second clause does the work Petitioner suggests, even if you could find the word "source" in that where it's not in the text, it would mean that you don't need to show that the protected trait, pregnancy, actually motivated the adverse treatment. So his construction would read that out of the statute entirely.

JUSTICE KAGAN: Ms. Halligan, what is wrong with my middle ground? It's not that Mr. Bagenstos and the General's ground, because it allows the employer to

come back and say: I have a legitimate policy based on seniority, or even I have a legitimate policy based on the source of the injury. But it does put that as a question whenever an employee is able to point to a similar -- to a class of people who are granted the disability accommodation who aren't pregnant.

MS. HALLIGAN: I just don't think it has any anchor in the words of the statute itself. The words are --

JUSTICE KAGAN: Quite the opposite. It basically gives a function for what -- the key words of the statute are "other persons not so affected but similar in their ability and inability to work." What is that doing? What it does is it points to the comparator that sets off the McDonnell Douglas test, that forces the employer to come back and give a reason for why it is that this ought not to be taken as discrimination against pregnancy.

MS. HALLIGAN: I think that this Court's been clear that the function of the second clause is to repudiate that logic which equates -- when you look at women and men and you have a pregnancy -- a cause -- a policy that discriminates on the basis of pregnancy, you say that is not sex discrimination. What that would also do is to collapse the distinction between disparate

treatment and disparate intent. This Court has been clear that that is an absolute line. It said so in Raytheon. Congress tracked that distinction in the 1991 Civil Rights Act, and Justice Stevens in his dissent in Gilbert itself which this Court said it was codifying when it enacted the pregnancy discrimination --

JUSTICE ALITO: What if the language after the semicolon were not there? Would the language before the semicolon have effectively overruled Gilbert?

MS. HALLIGAN: It would have overruled Gilbert by bolting pregnancy on, but Congress was --

JUSTICE ALITO: Would it have produced a different result in Gilbert? Suppose the employer has a policy of providing certain benefits for employees who have an injury or a disease but not pregnancy.

MS. HALLIGAN: Right.

JUSTICE ALITO: If you didn't have the language after the semicolon, would the language before the semicolon have required the employer to treat pregnant women the same as those who have an illness or an injury?

MS. HALLIGAN: I'm not sure that it would have. And I'm also not sure that it would have precluded the Court from using the same logic that was at play in Gilbert itself, and that's why those words

are there.

JUSTICE ALITO: Isn't that the reason for the language after the semicolon? Because you have to go further in order to produce a different result than Gilbert. And if that's correct, could you explain what you think the language after the semicolon means.

MS. HALLIGAN: I think the language after the semicolon instructs that when you look at a policy that facially discriminates on the basis of pregnancy, what you would typically do in a sex discrimination case is to look at how women and men are treated. And if they are treated differently, you would conclude that there is sex discrimination. What this clause instructs is that when you look at a policy that discriminates on the basis of pregnancy, rather than looking at women and men which would lead you to the conclusion that there is no sex discrimination -- because all the non-pregnant women --

JUSTICE GINSBURG: That's what the first clause does. It says pregnancy and sex, period.

You have already said that you don't think that the second clause does any practical work. That is, you can't conceive of a case where a plaintiff would loose under clause one and win under clause two.

MS. HALLIGAN: To be clear, Your Honor, the

reason the second clause is there is to avoid a case in which a court uses the same reasoning and reaches a different result. This Court also attached special significance to the second clause in Johnson Controls. It said that the second clause provides a BFOQ for pregnancy specifically, and so it does that work as well.

What Petitioner suggests is that the second clause somehow permits any distinction except on-the-job versus off-the-job. That's a distinction that is longstanding and hasn't --

JUSTICE BREYER: But you don't know where the -- I would like just to go back on this very point to what Justice Kagan said. Now, the McDonnell Douglas test, I think, should come in somewhere. That is the -- the woman shows that, I'm pregnant, I couldn't lift, I wasn't paid anything, and other people who had comparable inabilities were paid. And so we get to, was I qualified like they are? And now a distinction is being made. The employer says, no, you are not because you didn't drive over the mountain pass. Or, no, you are not because you got it off the job. And then we have to decide is that a pretext? Is it legitimate? And where they are giving it to everybody else and there are very few, it doesn't sound too legitimate. But that

test must come in.

MS. HALLIGAN: It does.

JUSTICE BREYER: And so -- and so how does it and does it matter if we put it under the first so-called whatever, you know, intentional as opposed to disparate impact? Will we muck up the law were we to say it goes in that part rather than the other part or both parts?

MS. HALLIGAN: Well, I -- I think if I can, this Court has been clear that McDonnell Douglas provides a mechanism for providing indirect evidence of disparate treatment of intentional discrimination. So it's distinct, I think, from a disparate impact case where, as here, you have a facially neutral policy, a policy that says on-the-job gets accommodation when they can't perform the essential functions of their job, anyone with an injury or condition that's sustained off the job doesn't. When you have a facially neutral policy like that, you can bring a disparate impact claim. Peggy Young could have done that.

JUSTICE BREYER: But why not if it goes under disparate treatment?

MS. HALLIGAN: Pardon?

JUSTICE BREYER: Why not? Because, of course, the employer will always have a facially neutral

policy. It just turns out that this facially neutral policy happens to hit the pregnant women and four other people.

MS. HALLIGAN: If --

JUSTICE BREYER: And I mean, that -- that's the kind of thing that we're trying to stop in this statute. So -- so why not bring it in there, in the disparate treatment part as you say?

MS. HALLIGAN: Two answers, Your Honor.

JUSTICE BREYER: Yes.

MS. HALLIGAN: First of all, I think that distinction between a disparate impact claim where you're looking adverse effects on a certain class of employees, but you have a facially neutral policy has been quite -- as distinct from a policy that discriminates on its face, either directly or indirectly --

JUSTICE KAGAN: Well, Ms. Halligan, suppose this --

MS. HALLIGAN: -- that's well established.

JUSTICE KAGAN: Suppose this, and it's exactly what Justice Breyer is talking about. Suppose you had a policy that said we're going to provide accommodations to -- for anybody with a -- a nonoccupational sickness and -- and accident. Very

similar to Gilbert --

MS. HALLIGAN: Yes.

JUSTICE KAGAN: -- but without all the other facts of Gilbert. We're just -- it's a facial policy.

MS. HALLIGAN: Yes.

JUSTICE KAGAN: We're going to provide accommodations, but, of course, pregnancy is not a nonoccupational sickness and accident, so as a result of this facially neutral policy, pregnant women will not get accommodations.

Now, as I understand what you are saying, it's -- that's perfectly fine.

MS. HALLIGAN: If -- if a policy distinguishes between occupational injuries and nonoccupational --

JUSTICE KAGAN: Yes, this is nonoccupational sickness and accident.

MS. HALLIGAN: And that would be acceptable. And what a -- what a plaintiff who believed that nonetheless there was intentional discrimination afoot, what they would do is they would, under McDonnell Douglas, they would, first of all, attempt to make a prime facia case by showing that other employees who were similarly situated were being treated differently. The comparators that the Petitioner points to here are

not valid because they're not similarly situated. The bottom line --

JUSTICE GINSBURG: You are departing -- you are departing radically from what the Fourth Circuit view in this -- I mean, the Fourth Circuit did say, right up front, that this clause standing alone is unambiguous; if a group of employees get the benefit, if other employees get the benefit, so must pregnant women. But the Fourth Circuit said, yes, that's what it says just standing alone, but because it would lead to untoward results, preferential treatment, we're not going to give it --

MS. HALLIGAN: Well, the first --

JUSTICE GINSBURG: -- that meaning.

MS. HALLIGAN: The Fourth Circuit realized that the two clauses have to be read together, and in fact to read the second clause, as Petitioner suggests, just -- just reads the first clause out of existence.

Justice Kagan, to go back to your question, what an employee could do in that circumstance is to say, the policy doesn't treat similarly situated employees the same as me. It treats me worse.

The comparators here were not at all congruous. The first set of comparators were individuals who were accommodated under the ADA. The

government realizes that they're not similar --

JUSTICE KAGAN: But that's where we disagree because -- because what this tells you is it tells you what the comparators are. The comparators are any class you can come up with who is -- is -- has the same disability and isn't pregnant, and then the employer can come back and say, no, we had a good reason to -- to treat that class of employees differently.

And if you -- if you buy that with respect to the Gilbert distinction, I don't understand why you wouldn't buy it with respect to any other classification.

MS. HALLIGAN: Because all the second clause is telling you, and -- and Congress was clear and this Court was clear that the -- that the PDA, both clauses, in its entirety, were not intended to in any way depart from traditional Title VII principles. It was simply to correct the fact that pregnancy could be sex discrimination. So all --

JUSTICE KAGAN: But we absolutely know that what Gilbert was -- said was that kind of policy was legitimate and that Congress came back and said, no, that kind of policy is illegitimate, right?

MS. HALLIGAN: It said two things. It said it's illegitimate in the first clause and it said you

cannot, when you are trying to ascertain if there's sex discrimination, with a pregnancy policy, break it down into women and men because you won't get the result Congress wants. Congress says when it's facially discriminatory on the basis of pregnancy, that's sex discrimination.

So the comparators do have to be different; you are correct. It's pregnant employees and nonpregnant employees. And -- and --

JUSTICE KAGAN: But as I understand the answer to my question, and tell me if I'm wrong, is you're saying with respect to a facially neutral policy as to nonoccupational sickness and health --

MS. HALLIGAN: Yes.

JUSTICE KAGAN: -- that you think that that is illegal under the PDA.

MS. HALLIGAN: No. It's legal under the PDA. A policy that --

JUSTICE KAGAN: I'm sorry --

MS. HALLIGAN: -- that distinguishes between occupational and nonoccupational injuries and is evenly applied is absolutely permissible under the PDA.

JUSTICE KAGAN: Even if it's -- it's exactly the policy that's in Gilbert, and you're saying that's fine?

MS. HALLIGAN: No. The policy in Gilbert singled out pregnancy for this favor.

JUSTICE KAGAN: It didn't. There were lots of other things except for pregnancy that got excluded in Gilbert.

MS. HALLIGAN: The Court --

JUSTICE KAGAN: If -- if a man had a vasectomy, it got excluded in Gilbert. If somebody got into a bar fight, it got excluded under the policy in Gilbert. If a person had cosmetic surgery, it got excluded under the policy in Gilbert. Gilbert was about much more than singling out.

MS. HALLIGAN: This Court and Congress clearly described the policy in Gilbert as singling out pregnancy and that's why Congress enacted the PDA, because --

JUSTICE GINSBURG: But it -- it enacted it to overturn Gilbert, everybody --

MS. HALLIGAN: It's holding and --

JUSTICE GINSBURG: -- and not just some abstract theory, but the result --

MS. HALLIGAN: Yes.

JUSTICE GINSBURG: -- in Gilbert. And as Justice Kagan pointed out, Gilbert was a case where you could point to a lot of other people who were not

getting this benefit.

MS. HALLIGAN: One of -- the result that Petitioner and the government suggests, which is instead to say that you can have any distinction you want and it's permissible under the PDA except on the job versus off the job is -- is far more contorted. That's a distinction that sounds in worker's compensation law.

JUSTICE GINSBURG: Is it -- is it true essentially -- I mean, you said that -- that Young's position is most favored nation. Well, yours is least favored nation, right?

MS. HALLIGAN: It's -- it's not least favored nation. The question is, is there another distinct group of employees who are treated the same as the Petitioner, and here there are. And this is where --

JUSTICE GINSBURG: This -- this case went off on summary judgment --

MS. HALLIGAN: Yes.

JUSTICE GINSBURG: -- so the facts -- Mr. Bagenstos has told us that there is not in this record a single instance of anyone who needed a lifting dispensation who didn't get it except for pregnant people.

MS. HALLIGAN: And I --

JUSTICE GINSBURG: And if that's the case in fact, then you lose, don't you?

MS. HALLIGAN: Well, I would like to address that because I think that's a real mischaracterization of the record in a couple of ways. First of all, the district court held, squarely, that the effort by plaintiff to characterize this policy as no light duty for pregnancy was wrong. What the district court said -- this is at page 59A -- is that the actual policy was on-the-job ADA accommodations and DOT.

JUSTICE GINSBURG: But do we know in fact -- this is an allegation that in fact no one who wanted a dispensation didn't get it except pregnant women.

MS. HALLIGAN: That is also contradicted, Your Honor.

JUSTICE GINSBURG: But we have -- we're on the summary judgment stage, so we don't know what the facts are.

MS. HALLIGAN: No, but we have to look at the uncontroverted evidence. There's uncontroverted testimony in the record, and I would point you to Ms. Martin and Mr. Brian's testimony that there were many employees who sustained off-the-job injuries, and the district court held specifically that no light duty was given to any employees, male or female, with any

medical conditions not related to work, pregnancy included, at page 56A. It also --

JUSTICE GINSBURG: Can you give an example then? Is there an employee who asked for a dispensation because of a medical condition that restricted her ability to lift, to any single employee employed -- who was -- said, sorry, you don't get it because your injury was off duty?

MS. HALLIGAN: There's not a name provided in the record because one was not elicited by the Petitioner whose burden it was in building a prima facie case. But the record evidence is undisputed that there were many employees who sustained off-the-job injuries and it's unsurprising. UPS is in the business of delivering packages.

JUSTICE GINSBURG: They -- they suffered off-the-job injuries, but we don't know if they asked for a dispensation because the off-the-job injury would require that they limit the weight that they could bear.

MS. HALLIGAN: The district court held that UPS's policy is that employees who are unable to perform the essential functions of their job would be required to take leave if their inability stemmed from something off the job. And in a business that involves moving 70-pound packages around all day long, it is certainly

the case that, as the uncontroverted testimony established, there were many employees who sustained an off-the-job injury that prevented them from doing that job.

JUSTICE SCALIA: I assume that you disagree with the Petitioner -- the Petitioner's proposition that when you take these three classes, namely, off the job -- I'm sorry, on-the-job injuries, ADA injuries, and the -- what was the third one?

JUSTICE KENNEDY: Traffic certificates.

JUSTICE SCALIA: Yes, yes, getting disapproved as drivers by DOT. There's almost nothing left. That's -- that's what --

MS. HALLIGAN: We absolutely disagree with that and there is nothing in the record which suggests that. It is completely without citation or support and it's completely controverted by the testimony that there were many employees who did sustain an off-the-job injury.

So there were three narrow exceptions absolutely, the three that you identified, but every employee, as the District Court held, that sustained an off-the-job injury pulled their back, turned their knee, whatever it is, couldn't come in to work, were not accommodated with the kind of light duty that Ms. Young

was.

JUSTICE BREYER: So why shouldn't there be a trial on that or further proceedings? If it turns out that they're right that there were four people who weren't pregnant, and that's all, who didn't get the benefits, that's pretty strong evidence that the employer is discriminating. If there were 400,000 people who got the thing off the job and there were only, like, 19 people on the job who got the benefit, well, then you have a better case. So why don't we have to look at the facts?

MS. HALLIGAN: First of all, Your Honor, that would be relevant to a disparate impact claim which the Petitioner did not bring.

Secondly, there was extensive discovery in this case. There was a summary judgment granted with uncontroverted evidence that establishes exactly the opposite of what you are suggesting, so there is no need to do that.

This is a very straightforward case and but for the effort by the Petitioner to bring the record back into play at this late date, none of this -- none of this would be something that you would ever consider at this point.

JUSTICE ALITO: Is there really a dispute

about this?

Maybe Petitioner's counsel could address it in rebuttal, but is there really a dispute that if a UPS driver fell off his all-terrain vehicle during -- on the weekend and was unable to lift that that person would not be given light duty? Is there really a --

MS. HALLIGAN: There's no dispute at all and the District Court made a square finding exactly to that effect at page 56A and page 35A. I would also direct you in our red brief to page 5 where we set forth Ms. Martin's testimony that she never authorized an accommodation for anyone who was injured off the job, so that's there as well.

I'd like to turn briefly, if I can, to the question of the EEOC guidance that the solicitor general --

JUSTICE SOTOMAYOR: I -- I -- but there are individuals who are injured off the job who lose their DOT licenses?

MS. HALLIGAN: There are individuals who lose their DOT certification and pursuant to the collective bargaining agreement, they are accommodated for some period of time. But those jobs, the individuals who lose their DOT certification, are not light-duty jobs. Those are heavy-lifting jobs, as the

District Court squarely held. The District Court at page 36A and 59A said, "Inside jobs are not light-duty jobs and the individuals who lose their license can perform any number of demanding physical tasks," which Ms. Young could not perform. So they're not comparable in that regard either.

With respect to the EEOC guidance, the guidance which was issued two weeks after this Court granted certiorari is 180-degree change from the position that the government has consistently taken and that the postal service, which UPS fairly looked to in trying to ascertain what appropriate conduct was under federal antidiscrimination laws, the policy that it still has in place today.

In addition, the process in issuing that guidance was incredibly rushed. It was not until 2012, as one of the amicus briefs point out, that the EEOC even identified the question of pregnancy accommodations as an emerging or developing issue. There was no notice and comment. The three --

JUSTICE GINSBURG: The original -- the original guideline, as I understand EEOC, what they did in 2014, they said, we were terse the first time around. All we're doing in 2014 is explaining that what the original -- what was -- it was '79, the original --

MS. HALLIGAN: '79 guidelines, the '79 guidelines simply mimic the language of the statute. In 2012 the EEOC, in its strategic plan, said that it was looking at addressing the very issue that it opined on in the 2014 guidance as emerging. If the 1979 guidelines stood for what Petitioner suggests, there would have been no need to treat it as emerging. It would have been settled 30 years ago.

Finally, I want to point out that this is an area where the democratic process is working as it should and as this Court instructed it should in Cal Fed. In Cal Fed, this Court looked at the question of whether or not state statutes which provided preferential treatment to pregnant employees, the statute there provided extra leave and reinstatement rights to pregnant employees, was preempted by the PDA. The Court said the PDA sets a floor. That floor is that you can't single out pregnancy for adverse treatment. States can go beyond that as additional and new challenges are identified.

JUSTICE KAGAN: Well, Ms. Halligan, for the democratic process to work as it should, the PDA has to be given a fair reading. And what we know about the PDA is that it was supposed to be about removing stereotypes of pregnant women as marginal workers. It was supposed

to be about ensuring that they wouldn't be unfairly excluded from the workplace. And what you are saying is that there's a policy that accommodates some workers, but puts all pregnant women on one side of the line.

And what you are further saying is that the employer doesn't even have to justify that policy ala McDonnell Douglas. That seems to me a reading of the statute, the PDA, that ignores two-thirds of the text.

MS. HALLIGAN: I'm not saying that the employer isn't subject to a suit under McDonnell Douglas. I'm saying that there are no valid comparators here. That's -- that's all -- all that we're saying in that regard.

The states that --

JUSTICE GINSBURG: So essentially it says any group that doesn't get the benefit, a group that is non-pregnant, then pregnant people are -- any group at all?

MS. HALLIGAN: If you had a policy, I'm not sure what one would look like, that singled out pregnant employees plus one other employee, my guess is that you'd find --

JUSTICE GINSBURG: What category of employees?

MS. HALLIGAN: The policy that's at issue

here, Justice Ginsburg, distinguishes on-the-job versus off-the-job injuries. That's a distinction that's echoed in state and in federal law. That's a far cry from a policy that singles out pregnant women. There are nine states that --

JUSTICE GINSBURG: Singling out is in the first -- is what the first --

MS. HALLIGAN: Or targeting or otherwise primarily disadvantaging. That distinction tracks what workers' comp requires, which is payment for employees who are injured on the job, and many employers, including the U.S. Postal Service, have found it advantageous to provide light-duty accommodations so their employees can be at work while they are rehabilitating and provide some productive work for the company. That distinction is as legitimate as you could get.

I see my time is up, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Bagenstos, you have four minutes remaining.

REBUTTAL ARGUMENT OF SAMUEL BAGENSTOS

ON BEHALF OF THE PETITIONER

MR. BAGENSTOS: Thank you, Mr. Chief Justice.

So I'd like to begin, if I could, with the facts, because Justice Alito did ask, and, yes, we certainly do disagree with UPS's -- UPS's assertion here. This case was on summary judgment and UPS does point correctly to some very general statements in the record by UPS managers that they never authorized these accommodations. However, we point to specific examples in the record of people with off-the-job injuries or illnesses who were DOT decertified who were given accommodations, and not just accommodations that remove them from driving but also remove them from heavy lifting. That's a factual dispute that has to go to trial.

JUSTICE ALITO: You really think that you could prove at trial that if somebody is injured in a recreational activity over the weekend that they get light duty but a pregnant women does not maybe?

MR. BAGENSTOS: So if someone is injured over the weekend in a way that leads them to be DOT decertified, yes, and in fact, the UPS manager so testified about his sports injury. We cite that in our opening brief. So yes, we think so.

The second point I'd like to make is about what the two clauses do, and I think this is very important. So the first clause of the PDA, as this

Court has said in Newport News and Cal Fed, overturns the reasoning in General Electric v. Gilbert. So what the first clause says is where Gilbert said, look, discrimination based on pregnancy isn't sex discrimination because there are pregnant women and non-pregnant persons, that's wrong instead because a pregnancy is because of sex definitionally. That's not what the second clause does, that's what the first clause does.

The second clause, as this Court said again in Newport News and Cal Fed, goes further and overrules the holding. And I think Justice Kagan was exactly correct in describing the facts of Gilbert, that the Gilbert holding would not be overturned by -- under UPS's reading here because the Gilbert policy, the one thing we know that Congress meant to say was illegal, the Gilbert policy itself acted, drew lines in pregnancy-neutral ways.

It said if you have an off-the-job injury or accident, defined as an off-the-job illness or accident defined as an accidental injury, then you get disability benefits. It just so happens pregnancy isn't an illness and pregnancy isn't an accident in the sense of an accidental injury. And what Congress -- we know Congress was trying to do, because Congress said it and

this Court has said it, is to overturn the holding there.

But UPS's rule simply reprices the rule at issue in Gilbert. If I might return to the point Justice Breyer's made a couple of times at various points in the argument--

JUSTICE SOTOMAYOR: Actually I think the reverse. The second sentence is what does that. The second sentence says you don't worry about whether it's between sexes. You worry about whether the same class of people, people who are injured off-duty, are being treated differently when they have the same ability to work.

MR. BAGENSTOS: Well, I think, Justice Sotomayor, the first clause says you don't worry about whether they're the same sex or not. You don't look at --

JUSTICE SOTOMAYOR: No, you do have to worry about it because it still has to be sex discrimination.

MR. BAGENSTOS: Well, no. But the first clause definitionally defines pregnancy discrimination as sex discrimination. It says if you're discriminating because of pregnancy, that is because of sex. And that's the -- that's overturning the Gilbert reasoning coming from Geduldig that pregnancy discrimination isn't

sex discrimination.

The second clause goes further, as this Court's explained, and overturns the holding, overturns the holding upholding the General Electric policy. And so -- and I think under -- under UPS's rule it wouldn't do that.

On Justice Breyer's question, basically how do we deal with a world where there's an employer that treats two different groups of people who are non-pregnant differently? Does "shall be treated the same" mean shall be treated the same as those who get the better deal or those who get the worst deal; right?

And I think Justice Ginsburg and Justice Kagan I think articulated this well, that their position really would give least favored nation status to pregnant workers and we know that that can't be something that Congress intended. We know that in part because of what General Verrilli said, that that's not how anti-discrimination law works, the fact that someone else was discriminated against doesn't mean I lose.

Justice Alito's opinion for the Third Circuit in the Fraternal Order of Police of Newark case articulates the same rule. We know that as well because the purpose of this statute is to say to employers, as Justice Kagan said, you have to treat pregnant workers

as just as valued employees as anybody else, and if you think it's valuable to keep these employees on the job who are injured on the job because they keep valuable work -- valuable knowledge within the company, do that for pregnant women.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:07 a.m., the case in the above-entitled matter was submitted.)

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