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IN THE SUPREME COURT OF THE UNITED STATES

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PEGGY YOUNG, :

Petitioner : No. 12-1226

v. :

UNITED PARCEL SERVICE, INC. :

- - - - - x

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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1 P R O C E E D I N G S

2 (10:05 a.m.)

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

6 Mr. Bagenstos.

7 ORAL ARGUMENT OF SAMUEL BAGENSTOS

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

19 JUSTICE SCALIA: Most favored nations
20 treatment.

21 MR. BAGENSTOS: So --

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

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

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

8 JUSTICE SCALIA: Why not?

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

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

20 JUSTICE BREYER: But suppose you have a --

21 CHIEF JUSTICE ROBERTS: Justice Breyer.

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

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

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

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

24 MR. BAGENSTOS: And so --

25 JUSTICE BREYER: -- then do you have to give

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

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

8 JUSTICE BREYER: Yes.

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

11 JUSTICE BREYER: Exactly.

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

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

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

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

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

4 MR. BAGENSTOS: So --

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

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

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

19 JUSTICE SOTOMAYOR: Could that take --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 JUSTICE SCALIA: Does the record show that?

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

23 JUSTICE SCALIA: I understand.

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

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

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

14 MR. BAGENSTOS: And I hope so, yes.

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

17 (Laughter.)

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

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

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

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

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

23 JUSTICE SCALIA: That's right.

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

1 so those are the words that I'm --

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

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

10 MR. BAGENSTOS: Yes.

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

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

22 JUSTICE SCALIA: I'm so relieved.

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

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

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

13 If I might reserve the balance of my time.

14 CHIEF JUSTICE ROBERTS: Certainly.

15 MR. BAGENSTOS: Thank you.

16 CHIEF JUSTICE ROBERTS: General Verrilli.

17 ORAL ARGUMENT OF GENERAL DONALD B. VERRILLI, JR.

18 FOR THE UNITED STATES, AS AMICUS CURIAE

19 SUPPORTING THE PETITIONER

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

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

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

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

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

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

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

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

9 JUSTICE SCALIA: Oh.

10 GENERAL VERRILLI: But the government has
11 interests --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 And to get back to the point --

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

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

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

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

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

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

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

9 JUSTICE KENNEDY: But nothing less.

10 GENERAL VERRILLI: Correct. That's correct.

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

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

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

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

1 full-time status, then, of course --

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

7 CHIEF JUSTICE ROBERTS: Briefly.

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

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

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, General.

24 Ms. Halligan.

25 ORAL ARGUMENT OF CAITLIN J. HALLIGAN

1 ON BEHALF OF THE RESPONDENT

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

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

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

17 MS. HALLIGAN: Yes.

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

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

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

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

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

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

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

1 case where you have a policy that facially discriminates
2 against pregnancy, you will nonetheless conclude that
3 there's not sex discrimination because there will be
4 women who are pregnant in the disfavored group, but
5 there will also be women.

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

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

1 would have to read "the same as any other person." It
2 does not.

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

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

1 the employer makes his case, the employee gets to come
2 back and say, no, that is a pretext, in just the way we
3 do with every other discrimination case.

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

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

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

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

25 JUSTICE GINSBURG: Then you are saying

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

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

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

22 JUSTICE KAGAN: Ms. Halligan, what is wrong
23 with my middle ground? It's not that Mr. Bagenstos and
24 the General's ground, because it allows the employer to
25 come back and say: I have a legitimate policy based on

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

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

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

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

1 clear that that is an absolute line. It said so in
2 Raytheon. Congress tracked that distinction in the 1991
3 Civil Rights Act, and Justice Stevens in his dissent in
4 Gilbert itself which this Court said it was codifying
5 when it enacted the pregnancy discrimination --

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

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

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

15 MS. HALLIGAN: Right.

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

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

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

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

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

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

24 MS. HALLIGAN: To be clear, Your Honor, the
25 reason the second clause is there is to avoid a case in

1 which a court uses the same reasoning and reaches a
2 different result. This Court also attached special
3 significance to the second clause in Johnson Controls.
4 It said that the second clause provides a BFOQ for
5 pregnancy specifically, and so it does that work as
6 well.

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

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

1 MS. HALLIGAN: It does.

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

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

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

22 MS. HALLIGAN: Pardon?

23 JUSTICE BREYER: Why not? Because, of
24 course, the employer will always have a facially neutral
25 policy. It just turns out that this facially neutral

1 policy happens to hit the pregnant women and four other
2 people.

3 MS. HALLIGAN: If --

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

8 MS. HALLIGAN: Two answers, Your Honor.

9 JUSTICE BREYER: Yes.

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

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

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

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

1 MS. HALLIGAN: Yes.

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

4 MS. HALLIGAN: Yes.

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

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

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

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

17 MS. HALLIGAN: And that would be acceptable.

18 And what a -- what a plaintiff who believed that
19 nonetheless there was intentional discrimination afoot,
20 what they would do is they would, under McDonnell
21 Douglas, they would, first of all, attempt to make a
22 prime facia case by showing that other employees who
23 were similarly situated were being treated differently.
24 The comparators that the Petitioner points to here are
25 not valid because they're not similarly situated. The

1 bottom line --

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

12 MS. HALLIGAN: Well, the first --

13 JUSTICE GINSBURG: -- that meaning.

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

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

22 The comparators here were not at all
23 congruous. The first set of comparators were
24 individuals who were accommodated under the ADA. The
25 government realizes that they're not similar --

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

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

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

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

23 MS. HALLIGAN: It said two things. It said
24 it's illegitimate in the first clause and it said you
25 cannot, when you are trying to ascertain if there's sex

1 discrimination, with a pregnancy policy, break it down
2 into women and men because you won't get the result
3 Congress wants. Congress says when it's facially
4 discriminatory on the basis of pregnancy, that's sex
5 discrimination.

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

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

13 MS. HALLIGAN: Yes.

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

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

18 JUSTICE KAGAN: I'm sorry --

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

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

25 MS. HALLIGAN: No. The policy in Gilbert

1 singled out pregnancy for this favor.

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

5 MS. HALLIGAN: The Court --

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

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

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

18 MS. HALLIGAN: It's holding and --

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

21 MS. HALLIGAN: Yes.

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

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

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

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

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

18 MS. HALLIGAN: Yes.

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

24 MS. HALLIGAN: And I --

25 JUSTICE GINSBURG: And if that's the case in

1 fact, then you lose, don't you?

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

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

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

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

18 MS. HALLIGAN: No, but we have to look at
19 the uncontroverted evidence. There's uncontroverted
20 testimony in the record, and I would point you to
21 Ms. Martin and Mr. Brian's testimony that there were
22 many employees who sustained off-the-job injuries, and
23 the district court held specifically that no light duty
24 was given to any employees, male or female, with any
25 medical conditions not related to work, pregnancy

1 included, at page 56A. It also --

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

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

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

19 MS. HALLIGAN: The district court held that
20 UPS's policy is that employees who are unable to perform
21 the essential functions of their job would be required
22 to take leave if their inability stemmed from something
23 off the job. And in a business that involves moving
24 70-pound packages around all day long, it is certainly
25 the case that, as the uncontroverted testimony

1 established, there were many employees who sustained an
2 off-the-job injury that prevented them from doing that
3 job.

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

9 JUSTICE KENNEDY: Traffic certificates.

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

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

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

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

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

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

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

24 JUSTICE ALITO: Is there really a dispute
25 about this?

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

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

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

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

19 MS. HALLIGAN: There are individuals who
20 lose their DOT certification and pursuant to the
21 collective bargaining agreement, they are accommodated
22 for some period of time. But those jobs, the
23 individuals who lose their DOT certification, are not
24 light-duty jobs. Those are heavy-lifting jobs, as the
25 District Court squarely held. The District Court at

1 page 36A and 59A said, "Inside jobs are not light-duty
2 jobs and the individuals who lose their license can
3 perform any number of demanding physical tasks," which
4 Ms. Young could not perform. So they're not comparable
5 in that regard either.

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

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

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

25 MS. HALLIGAN: '79 guidelines, the '79

1 guidelines simply mimic the language of the statute. In
2 2012 the EEOC, in its strategic plan, said that it was
3 looking at addressing the very issue that it opined on
4 in the 2014 guidance as emerging. If the 1979
5 guidelines stood for what Petitioner suggests, there
6 would have been no need to treat it as emerging. It
7 would have been settled 30 years ago.

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

20 JUSTICE KAGAN: Well, Ms. Halligan, for the
21 democratic process to work as it should, the PDA has to
22 be given a fair reading. And what we know about the PDA
23 is that it was supposed to be about removing stereotypes
24 of pregnant women as marginal workers. It was supposed
25 to be about ensuring that they wouldn't be unfairly

1 excluded from the workplace. And what you are saying is
2 that there's a policy that accommodates some workers,
3 but puts all pregnant women on one side of the line.

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

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

13 The states that --

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

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

22 JUSTICE GINSBURG: What category of
23 employees?

24 MS. HALLIGAN: The policy that's at issue
25 here, Justice Ginsburg, distinguishes on-the-job versus

1 off-the-job injuries. That's a distinction that's
2 echoed in state and in federal law. That's a far cry
3 from a policy that singles out pregnant women. There
4 are nine states that --

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

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

17 I see my time is up, Your Honor.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Bagenstos, you have four minutes
20 remaining.

21 REBUTTAL ARGUMENT OF SAMUEL BAGENSTOS

22 ON BEHALF OF THE PETITIONER

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

25 So I'd like to begin, if I could, with the

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

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

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

22 The second point I'd like to make is about
23 what the two clauses do, and I think this is very
24 important. So the first clause of the PDA, as this
25 Court has said in Newport News and Cal Fed, overturns

1 the reasoning in General Electric v. Gilbert. So what
2 the first clause says is where Gilbert said, look,
3 discrimination based on pregnancy isn't sex
4 discrimination because there are pregnant women and
5 non-pregnant persons, that's wrong instead because a
6 pregnancy is because of sex definitionally. That's not
7 what the second clause does, that's what the first
8 clause does.

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

18 It said if you have an off-the-job injury or
19 accident, defined as an off-the-job illness or accident
20 defined as an accidental injury, then you get disability
21 benefits. It just so happens pregnancy isn't an illness
22 and pregnancy isn't an accident in the sense of an
23 accidental injury. And what Congress -- we know
24 Congress was trying to do, because Congress said it and
25 this Court has said it, is to overturn the holding

1 there.

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

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

12 MR. BAGENSTOS: Well, I think, Justice
13 Sotomayor, the first clause says you don't worry about
14 whether they're the same sex or not. You don't look at
15 --

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

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

25 The second clause goes further, as this

1 Court's explained, and overturns the holding, overturns
2 the holding upholding the General Electric policy. And
3 so -- and I think under -- under UPS's rule it wouldn't
4 do that.

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

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

19 Justice Alito's opinion for the Third
20 Circuit in the Fraternal Order of Police of Newark case
21 articulates the same rule. We know that as well because
22 the purpose of this statute is to say to employers, as
23 Justice Kagan said, you have to treat pregnant workers
24 as just as valued employees as anybody else, and if you
25 think it's valuable to keep these employees on the job

1 who are injured on the job because they keep valuable
2 work -- valuable knowledge within the company, do that
3 for pregnant women.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 The case is submitted.

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

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