

N 12-1226

Se m C'h d' d' s'æ

d

7 E

E ,

Petitioner,

v .

7ED A CE E CE, C.,

Respondent.

7 7 CE 7 A 7 7 E 7ED 7AE
C 7 7 A EA 7 7 E 7 C C 7

LIBERTIES UNION AND A BETTER BALANCE, IN SUPPORT OF PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	5
ARGUMENT	7

A.	The Hardships Suffered By Petitioner In This Case Are Shared By Many Other Pregnant Women Who Are Forced Out Of The Workplace.	16
B.	Congress Was Concerned About The Financial Hardships Suffered By Women Who Are Deprived Of Income And Benefits When Forced Out Of The Workforce During Pregnancy.	21
C.	The Concerns That Prompted Passage Of The PDA, Including Women’s Economic Inequality, Persist Today.	23
D.	Inequality Is Magnified When Women Are Pushed Out Of Jobs From Which They Were Traditionally Excluded.	29
	CONCLUSION.....	33

123 Cong. Rec. 29,641 (1977) (statement of Sen. Birch Bayh).....	11
123 Cong. Rec. 29,658 (1977) (statement of Sen. Williams).....	10
95th Cong. (1977)	31
, 95th Cong. (1977)	22
, 113th Cong. (2014).....	17, 18
, 95th Cong. (1977).....	21
111th Cong. (Sept. 28, 2010).....	21

OTHER AUTHORITIES

Alexandra Cawthorne & Melissa Alpert Center for American Progress, (Aug. 3, 2009).....	23
Ann Crittenden, (2001).....	28

Brigid Schulte,
Wash. Post, Aug. 4, 2014..... 30
Bureau of Justice Statistics, DOJ,
1987-2008 (2010) 29
Bureau of Labor Statistics,

Julie A. Kmec et al.,

,

INTEREST OF *AMICI CURIAE*¹

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the

9to5 is a national membership-based organization of women in low-wage jobs dedicated to achieving economic justice and ending discrimination. 9to5's members and constituents are directly affected by workplace discrimination, including pregnancy discrimination and poverty, among other issues. They experience first-hand the long-term negative effects of discrimination on economic well-being, and the difficulties of seeking

has advocated for the use of the Pregnancy Discrimination Act to obtain accommodations for pregnant women who are similar in their ability to

discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. Legal Aid has appeared before this Court in discrimination cases on numerous occasions both as counsel for plaintiffs,

, 536 U.S. 101 (2002);
, 535 U.S. 391 (2002); and
, 479 U.S.
272 (1987) (counsel for real party in interest), as well
as in an capacity.
, 131 S. Ct. 2541 (2011),
, 518
U.S. 515 (1996);
, 510 U.S.
17 (1993);
, 499 U.S. 187 (1991);
, 490 U.S. 228 (1989);
, 477 U.S. 57 (1986). Legal Aid has
extensive policy experience advocating for the
employment rights of pregnant women and new
parents. Legal Aid has a strong interest in ensuring
that pregnant women are granted the full protections
of the Pregnancy Discrimination Act and other anti-
discrimination laws.

The National Consumers League (NCL) is America's oldest consumer and labor organization, representing consumers and workers on workplace and marketplace issues since our founding in 1899. The issues raised in this brief are very close to NCL's mission and history. Under the direction of its first general secretary, Florence Kelley, NCL wrote and championed state minimum wage laws, got enacted the first state laws restricting child labor, and exposed scandalous working conditions for all workers, including minorities. NCL has advocated for women in the workforce since our founding. NCL

believes that vigorous enforcement of discrimination laws and other workplace employment laws is of paramount importance, especially for the millions of working women who rely on the laws to deter and remedy illegal employment discrimination.

The Southwest Women's Law Center is a legal and policy law center whose mission is to advance opportunities for girls and women in New Mexico. We collaborate with community members, organizations, attorneys, health care providers and public officials to address pregnancy fairness and accommodations for women in the workplace. We advocate for pregnant workers to ensure they are treated fairly and given accommodations when needed, and we advocate against employment practices that force pregnant workers to leave their places of employment causing them to suffer adverse economic consequences because of the loss of means to support their families.

INTRODUCTION AND SUMMARY OF ARGUMENT

adopt the Statement of the case contained in the Brief for Petitioner.

Congress enacted the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, § 1, 92 Stat. 2076, codified at 42 U.S.C. § 2000e(k), to put an end to widespread practices of discrimination against women because of pregnancy. Women were routinely forced to leave the workforce when they became pregnant, with the result that women were subject, as a class, to economic disadvantages and to exclusion from the public sphere more broadly once they became mothers.

ARGUMENT

I. RESPONDENT'S REFUSAL TO PROVIDE PETITIONER WITH THE SAME ACCOMMODATIONS THAT OTHER UPS WORKERS RECEIVE UNDERMINES THE CENTRAL PURPOSE OF THE PDA TO ENSURE THAT WOMEN ARE NO LONGER SYSTEMATICALLY EXCLUDED FROM THE WORKFORCE BECAUSE OF THEIR PREGNANCIES.

Prior to the PDA's enactment, laws and workplace policies often forced women to stop working when they became pregnant, regardless of their capacity to work. Such policies relegated women to second-class status in the workplace and to economic disadvantage over the long term. Congress enacted the PDA to enable pregnant women to participate on an equal footing in the labor force. It did so by ensuring that pregnant women would not be treated worse than other workers who are similar in their ability or inability to work. By denying pregnant workers who are temporarily unable to perform their regularly assigned duties an accommodation that is available to other workers at UPS, the policy at issue in this case pushes pregnant women out of the workforce, undermining the purpose of the PDA and perpetuating the inequality the statute meant to address.

A. Congress Enacted The PDA To Eradicate Widespread Practices Requiring Women Who Became Pregnant To Leave The Workforce.

Congress enacted the PDA to end longstanding practices by which employers forced women out of the workplace as a matter of course when they became pregnant. These practices were based on the notions that pregnancy is incompatible with work, that a pregnant woman's proper place was at home, and that pregnancy should signal the end of a woman's working life. , 123 Cong. Rec. 7,539 (1977) (statement of Sen. Williams) (PDA intended to address "the outdated notion that women are only supplemental or temporary workers-earning 'pin money' or waiting to return home to raise children full-time"). These stereotypes implicated all women and emanated from the belief that women are, "and should remain, 'the center of

pregnant teachers to take unpaid leave five months before they were due to give birth, with no guarantee of re-employment);

, 649 F.2d 1084, 1086-87 (5th Cir. 1981) (placing

, 479 U.S. at 289 (quoting 123 Cong. Rec. 29,658 (1977) (statement of Sen. Williams)) (“The entire thrust... behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”). Lawmakers recognized that “discrimination against pregnant women is one of the chief ways in which women’s careers have been impeded and women employees treated like second-class employees,” and they set out to change that state of affairs. 123 Cong. Rec. 10,582 (1977) (statement of Rep. Hawkins). They sought legislation that would permit millions of “working American women to assume their rightful place, and make a full contribution in our Nation’s economy.” 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams).

The PDA amends Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on sex (among other categories). The amended statute states:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

42 U.S.C. § 2000e(k).

pregnant,” to be treated “as marginal workers not deserving the full benefits of compensation and advancement granted to other workers.” 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams).

Congress recognized the harm to women’s equality, as well as to families, when women are pushed out of the workforce. Legislators emphasized the “unjust and severe economic [and] social ...

work, are inapt. This group, unlike women,

The financial and other harms Petitioner suffered are sadly typical of those faced by many other women who are pushed out of their jobs,

giving birth. Diana Teigland, a letter carrier for the United States Postal Service for nine years, reported being forced to use paid sick days and other leave after her doctor placed her on a heat restriction while pregnant. “As a result, I didn’t have any paid leave left when my baby was born. I was the primary breadwinner in the family, but during my maternity leave, it was all on my husband’s shoulders. Going without my salary right when I had the added expense of a new baby was very difficult for me and my family.” report, , at 10.

Women who are forced to use up their leave (Family and Medical Leave Act of 1993 (FMLA)³ leave) – including women whose employers do not provide any paid sick days – may lose their jobs altogether. While Peggy Young did not suffer this consequence, it is a predictable outgrowth of employer policies, like UPS’s, that systematically deny accommodations to workers who become pregnant. For example, Amy Crosby, who is featured in the report, described being denied accommodation of her lifting restriction by the hospital where she worked, although she reported that the hospital accommodated workers with disabilities and on-the-job injuries. “Because of my lifting restriction, the hospital placed me on 12 weeks

‘voluntarily resigned’ if I failed to return to work without restrictions the day after my 12 weeks of leave expired, in the middle of my last trimester.”
report, at 8.

Even women who qualify for disability insurance – unlike Petitioner Peggy Young – may be forced to use up those benefits before the baby arrives. Yvette Nunez, another woman whose story is documented in the report, worked at a New York City grocery store for eleven years. When she sought an accommodation to avoid endangering her high-risk pregnancy, she was fired. After being fired, her union helped her obtain disability benefits, but her 26 weeks of disability payments ran out one month before her due date, forcing her onto unpaid leave just as her household expenses were rising.
report, , at 11. When she lost her job, Nunez also lost her health insurance. She had to resort to Medicaid and other public benefits. “My family and I survived on food stamps and my savings. When I finally returned to work three months after giving birth, I had no savings left.”
report, , at 11.

Women who are forced out of the workplace when pregnant also forfeit other earned long-term benefits, including 401K contributions, short-term disability benefits, seniority, pension, social security contributions, and other benefits.

, 531 F.3d 1210 (10th Cir. 2008) (police officers were forced to exhaust accrued sick leave and were not allowed to use accrued compensatory time for their pregnancy-related leaves, affecting their eligibility for early retirement). Systemically depriving women workers of these short- and long-

term job benefits when they become pregnant contributes to women's economic inequality over the long run.

B. Congress Was Concerned About The Financial Hardships Suffered By Women Who Are Deprived Of Income And Benefits When Forced Out Of The Workforce During Pregnancy.

The economic concerns of pregnant women and their families, such as those described above, were expressly addressed by Congress when it enacted the PDA. Congress discussed the need to ensure women's "financial security, and the security of their families." 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams). Members of Congress focused on the financial vulnerability of low-income women when excluded from the workforce while pregnant.

, 95th Cong. (1977) (opening statement by Rep. Hawkins), cited in , 706 F.2d 1469, 1473 , 724 F.2d 52 (7th Cir. 1983) (stating that exclusion of pregnant workers from benefits and other workplace protections would have "a particularly severe impact on low-income workers who may be forced to go on leave without pay for childbirth or pregnancy related disabilities"). Legislators were especially concerned about the effect of "loss of income" on workers, "especially low-income women," and sought to eliminate situations in which they had to use up savings and even "go on welfare." 123 Cong. Rec. 7,539 (1977) (statement of Sen. Williams).

workers' pay and benefits, and sought to end this disadvantage.

C. The Concerns That Prompted Passage Of The PDA, Including Women's Economic Inequality, Persist Today.

Unfortunately, the concerns that prompted Congress to act in 1978 remain all too real for today's women, more of whom are now working than ever before. Half of all U.S. workers are women. Maria Shriver, Center for American Progress,

Exec. Summ. 17 (2009), http://cdn.americanprogress.org/wp-content/uploads/issues/2009/10/pdf/awn/a_womans_nation.pdf. Seventy-five percent of women will become pregnant during their working lives. Alexandra Cawthorne & Melissa Alpert

, Parenting with Dignity, Center for American Progress (Aug. 3, 2009), <http://www.americanprogress.org/issues/women/report/2009/08/03/6599/labor-pains/>.

Women's income – before, during, and after pregnancy – is critical to their families' we.009-beg, anTJ0 -1.2 TD-.Tc.662322

anitical tohouseholdrcome – d sodepd th Chat prmoney]TJ0 -1.205 TD.00002 7

2012/04/pdf/breadwinners.pdf. Nearly 64% of mothers with children under the age of six work. Bureau of Labor Statistics, U.S. Department of Labor, Economic News Release, 2 (last modified April 25, 2014), <http://www.bls.gov/news.release/pdf/famee.pdf>. And “[i]n 2010 in nearly two-thirds (63.9%) of families with children women were either breadwinners or co-breadwinners.” Glynn, , at 2.

Women’s income is especially critical to the well-being of low-income and single-mother headed families, which rely disproportionately on mothers’ earned income and have little cushion for emergencies. Stephanie Bornstein,

(2011), Ctr. For WorkLife Law <http://www.worklifelaw.org/pubs/PoorPregnantAndFired.pdf>. In families in the bottom fifth of income distribution, 70% of working wives earn as much or more than their husbands. Glynn, at 3.

In part for that reason, many women who become pregnant work long into their pregnancies. From 2006 to 2008, 81% of women who became pregnant while employed continued to work until one month or less before the birth of their first child, up from 34% in the period from 1961 to 1965. Lydia Laughlin,

Household Economic Studies, Special Studies, Current Population Reports, U.S. Census Bureau 7, table 3 (Oct. 2011), <http://www.census.gov/prod/2011pubs/p70-128.pdf>.

Policies that force women to leave the workforce when they are pregnant cut off vital income to families. Deborah A. Widiss, Gilbert

Breaks in workforce participation that are not accompanied by additional schooling are the single greatest contributor to the motherhood wage penalty. Jeremy Staff & Jeylan T. Mortimer,

, 49 *Demography* 1, 12 (2012). According to one study, women's wages decline by 11% when they accumulate 22 months of no work or school. at 14 Each time a woman is forced out of her job and spends months looking for work, she adds to her lifetime earnings penalty. Career interruptions – including unwanted ones – and the low-quality jobs they promote, contribute to women's lifetime earning being only 38% of men's. Joan C. Williams,

, 27 *Women's Rights. L. Rptr.*, Winter 2006, at 3, 4.

These financial consequences are further exacerbated by the fact that women pushed out of the workforce because of pregnancy face barriers to re-entering rooted in discrimination against pregnant women and mothers. Despite the PDA's clear

than that offered to non-mothers. Shelley J. Correll, et al.,
, 112 Am. J. of Soc. 1297, 1316 (March 2007), <http://www.jstor.org/stable/10.1086/511799>. Participants also judged mothers to be less competent and committed than women without children, whereas fathers were rated

“the single best predictor that a woman will end up in financial collapse.” Elizabeth Warren & Amelia Warren Tyagi,

6 (2003). One quarter of all poverty spells – periods of at least two months of income below the poverty threshold for a family – result from the birth of a child. Jane Waldfogel,

, *Future of Children*, Spring/Summer 2001, at 99-100. In the United States, motherhood is the single biggest risk factor for poverty in old age. Ann Crittenden,

6 (2001).

Employer policies, like Respondent’s, that unfairly deny pregnant women accommodations disadvantage women economically and undermine the core purpose of the PDA. They do so by forcing women who are eager and able to work to endure periods of compelled leave without income or benefits or to lose their jobs entirely. Members of Congress recognized that the “shocking statistics” concerning women’s economic inequality could not be improved upon “unless working women are provided effective protection against discrimination on the basis of their childbearing capacity.” 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams). Interpreting the statute to permit employer policies, like Respondent’s, that push women out when pregnant, does not provide the “effective protection” Congress envisioned.

D. Inequality Is Magnified When Women Are Pushed Out Of Jobs From Which They Were Traditionally Excluded.

Policies like Respondent's have the additional result of reinforcing women's historical exclusion from certain sectors where "breadwinner" jobs (those offering stable full-time employment and benefits such as paid leave and health insurance) can be found. Traditionally male-dominated occupations such as package driver and police officer remain closed off in many ways to female employees. Women still made up less than 12% of police officers as of 2007, up from 7.6% in 1987. Bureau of Justice Statistics, DOJ,

1987-2008, at 3 (2010),

<http://www.bjs.gov/content/pub/pdf/wle8708.pdf>. And women make up only 22.6% of transportation and utilities workers, a sector that includes the postal service, couriers, messengers, and warehouse workers. Bureau of Labor Statistics,

50 tbl.14 (2013),

<http://www.bls.gov/cps/wlf-databook-2012.pdf>. Yet these are some of the more financially secure jobs on the market, often affording benefits like insurance and paid vacation and sick time that women working in other sectors do not receive.

, Part II.A. Many of these occupations entail physically demanding or strenuous activities, which may necessitate accommodations for some women when they are pregnant. Renee Bischoff & Wendy Chavkin, N.Y.C. Dep't of Health & Mental Hygiene & Columbia Univ. Mailman Sch. Of Public Health,

5-6 (2008),

http://otrans.3cdn.net/70bf6326c56320156a_6j5m6fupz.pdf (detailing increased negative health risks of physically strenuous labor during pregnancy).

Women's capacity to break into these fields is greatly compromised when they are denied accommodations afforded to other workers. For example, women in the shipping industry, like Peggy Young, often already face a difficult time in a male-dominated workforce. report, , at 15. Policies like that of UPS treat pregnant women as unsuitable for the workplace, when they are as able as men afforded accommodation. They lose rank and seniority, and they sometimes lose their jobs. This pattern reaffirms gender stereotypes and conveys the message that men are meant to do certain types of work, to the exclusion of women workers, or at least the majority of women workers who become pregnant.

In a recent case filed with the EEOC, Florence, Kentucky Police Department patrol officer Lyndi Trischler alleged that she was forced onto unpaid leave at five months pregnant after a new city policy denied any modified duty for non-work related conditions. Brigid Schulte,

Wash. Post, Aug. 4, 2014, http://www.washingtonpost.com/national/health-science/pregnant-women-fight-to-keep-jobs-via-reasonable-accommodations/2014/08/04/9eb13654-1408-11e4-8936-26932bcfd6ed_story.html. Because of the heavy weight of her gun belt and the size of her bullet-proof vest, she could no longer physically do her job patrolling the city. She is one of only two female police officers on a staff of around 60.

The city's decision to no longer provide light duty for pregnant workers means that Officer Trischler must use up all of her paid sick days and vacation days to survive and feed her one-year-old daughter. All forms of payment will be exhausted long before her medically-recommended eight weeks of childbirth recovery time are completed. She alleged she was also told by Human Resources that her health benefits would cut off when she stopped receiving a paycheck.

The exclusion of women, and pregnant women in particular, from entire workplace sectors consisting of "breadwinner" jobs undermines Congress's original intent in drafting the PDA.

, 95th
Cong. 34 (1977) (statement of Alexis M. Herman, Director of Women's Bureau, Department of Labor). Lawmakers were aware that many families relied solely or primarily on mothers' income, at 309 (statement of Bella S. Abzug, Presiding Officer, National Commission on the Observance of International Women's Year, Department of State) (noting that "1973 data shows that the husband was the only earner in less than three out of eight husband-wife families"), a phenomenon that has only increased in the years sinc

lose income and benefits while other workers similar in their ability to work are permitted to stay in the labor force, undermines efforts to combat sex discrimination in the workplace. Respondent's policy thus perpetuates women's unequal status and reinforces outdated stereotypes about women's capacities and roles. Congress adopted the PDA precisely to prevent these results.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully Submitted,

Lenora M. Lapidus

Steven R. Shapiro
Ariela M. Migdal
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
llapidus@aclu.org

Deborah A. Jeon
American Civil Liberties
Union Foundation of
Maryland
3600 Clipper Mill Rd,
Suite 350
Baltimore, MD 21211

Dina Bakst
Phoebe Taubman
Elizabeth Gedmark
A Better Balance
80 Maiden Lane, Suite 606