

No. 12-1226

IN THE
Supreme Court of the United States

PEGGY YOUNG,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

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

**BRIEF OF
U.S. WOMEN'S CHAMBER OF COMMERCE,
GREATER NEW YORK CHAMBER OF COMMERCE,
KINGSTON 11 CUISINE, LEARNING EXPRESS, INC.,
MAIN STREET ALLIANCE, THE SHUCHART GROUP,
AND TIGRESS FINANCIAL PARTNERS
AS *AMICI CURIAE* SUPPORTING PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

The U.S. Women’s Chamber of Commerce is a non-profit organization designed to advance the interests of women in the business community. The Women’s Chamber supports strong education and employment opportunities with fair pay and advancement, and promotes work environments that are hospitable to women and families, in an effort to transform the economics of the labor market and to dismantle barriers that stifle sustainable economic growth. The Women’s Chamber often files briefs to inform courts of legal and policy issues of concern to its membership, including in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

The Greater New York Chamber of Commerce is an organization that provides valuable services to more than 22,000 business and civic leaders who represent the backbone of the New York business community.

Kingston 11 Cuisine is a restaurant operating in Oakland, California, that has more than 30 employees.

Learning Express, Inc., headquartered in Devens, Massachusetts, is the nation’s leading franchisor of educational toy stores. To date, there are more than

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represents that all parties have consented to the filing of this brief. Letters granting blanket consent to the filing of *amicus* briefs have been filed by the parties.

120 locations across the country, each one locally owned and operated.

The Main Street Alliance is a national network of state-based small business coalitions that creates opportunities for small business owners to speak for ourselves, advancing public policies that are good for our businesses, our employees, and the communities we serve.

The Shuchart Group is a privately owned consulting company specializing in sales and marketing.

Tigress Financial Partners is a woman-owned and -operated Broker Dealer and Investment Bank in New York City. Tigress believes in and encourages diversity of thought, culture, and opinion.

INTRODUCTION AND SUMMARY

Working women play an increasingly important role in the Nation's economy. Over the past several decades, the percentage of women in the workforce has risen significantly to the point that nearly half of all workers are women. That substantial increase also includes women of child-bearing years.

To address and encourage working women as valuable members of the workforce, businesses have become increasingly flexible in their policies concerning employees' health needs, from ordinary wellness programs to workers with disabilities. The purpose of this *amicus* brief is to demonstrate that flexibility has become much more common in recent years, much more important in addressing specific needs of workers, much less expensive than might be perceived, and much more economically productive than anticipated. In short, accommodating workers who are pregnant leads to greater productivity at minimal cost.

Amici take no position on the specific legal question in dispute, but write to address a concern raised by the Fourth Circuit below. In rejecting petitioner’s appeal, the Fourth Circuit indicated that petitioner’s reading of the statute would result in “pregnancy [being] treated more favorably than any other basis,” App. 21a, and thus would “transform an antidiscrimination statute into a requirement to provide accommodation to pregnant employees, perhaps even at the expense of other, nonpregnant employees,” App. 22a.

As this brief will describe, for many employers today, providing reasonable accommodations for those pregnant workers who need them is completely consistent with their treatment of the workforce as a whole. Today, smart businesses recognize that their success depends on the wellness, retention, commitment, and morale of their workforce. Accordingly, employers today increasingly seek to empower their employees by providing them the flexibility and accommodations to allow them to balance work and family. Far from constituting preferential treatment, much less an undue burden, accommodating the needs of pregnant workers by allowing them access to existing programs is no more than a consistent application and outgrowth of this broader philosophy and approach, which evenhandedly addresses the needs of employees.

Moreover, the “consequences” of providing reasonable accommodations and workplace flexibility responsive to employees’ needs are benefits both to workers and to the bottom line. When businesses invest in their employees in this manner, they reduce costly workforce churn, enhance workplace safety, and increase employee engagement and productivity.

Providing reasonable accommodations to pregnant workers who need them thus not only protects the health and economic security of workers, but also promotes the health and financial success of the organizations that employ them. Providing those accommodations also benefits the national economy, because ensuring that pregnant workers can continue to do their jobs both protects the buying power of these women and their families and harnesses the productivity of workers who otherwise would be forced out of work, and perhaps out of the labor market entirely, by pregnancy.

In short, from the perspective of the employers and business associations represented in this brief, consistency in extending to pregnant workers accommodations that some other temporarily disabled workers already receive is neither troubling nor burdensome. On the contrary, it is part and parcel of modern business practices that value employees, invest in the workforce, and realize the business gains that flexibility, wellness, and other comprehensive programs make possible.

STATEMENT OF THE CASE

Women in the workforce long have faced significant challenges after becoming pregnant. In colonial times, a woman who worked as an indentured servant could be forced to add on additional time “to make up for her reduced services during the pregnancy and recovery after birth, as well as while she cared for the infant.”²

In the nineteenth century, women increasingly assumed roles in the industrial workplace, from textile mills to factories. In the period between 1880 and 1910, the number of women gainfully employed grew dramatically – particularly in the mercantile, clerical, and industrial sectors – from 13.5% of the total bread winners in the United States to 21.2%.³ Yet, even as the number of working women rose, attitudes about pregnancy among workers were slow to change. “In the nineteenth and early twentieth centur[ies], ‘doctors openly denounced the concept of two-career marriage,’ of course meaning that a wife belonged in the home.”⁴ The predominant view, reflected in medical advice, corporate policy, and public policy, was that workers who became pregnant had to leave their jobs.⁵ As a result, in 1900, although

² Courtni E. Molnar, “*Has the Millenium Yet Dawned?*”: *A History of Attitudes Toward Pregnant Workers in America*, 12 Mich. J. Gender & L. 163, 176 (2005).

³ See Annie Marion MacLean, *Women Workers and Society* 21-22 (Chicago, A.C. McClurg & Co. 1916), available at <http://pds.lib.harvard.edu/pds/view/2573741?n=39>.

⁴ Molnar, 12 Mich. J. Gender & L. at 168 (quoting Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 310 (1992)).

⁵ See *id.*

20% of all women worked for pay, less than 6% of married women older than 15 did so.⁶

That was not necessarily true for women of color. Due in part to the lack of job opportunities for black males after the Civil War, the percentage of black women who worked in the late nineteenth and early twentieth centuries – even after becoming pregnant – was significant.⁷ Consequently, “black women were still far more likely to work than white women.”⁸ That also was true of poorer working class women.⁹

This Court’s decision in *Muller v. Oregon*, 208 U.S. 412 (1908), was an early important case addressing views about women in the workplace. In that case, this Court upheld a maximum hour law for women workers. *Id.* at 421. Although this Court’s decision upholding the legislation in *Muller* reflected a certain protective solicitude of working women, social legislation that followed had the effect of facilitating practices that forced women out of work when they became pregnant. Even as social legislation addressed the issue of maximum hours of work for women, for example, laws and corporate policies placed women who became pregnant in a particularly difficult bind. Many employers forced them out of jobs at a certain point in their pregnancy, and then state laws denied them unemployment compensation on the theory that their pregnancy or child-bearing made them ineligible to participate in the workforce. Midway

⁶ See Dora L. Costa, *From Mill Town to Board Room: The Rise of Women’s Paid Labor*, 14 J. Econ. Persp. 101, 101 (Fall 2000).

⁷ See Molnar, 12 Mich. J. Gender & L. at 169.

⁸ *Id.* (internal quotation marks omitted).

⁹ See Costa, 14 J. Econ. Persp. at 101.

through the twentieth century, some 35 States denied women unemployment insurance benefits. As Reva Siegel explained, “pregnancy was excluded from state unemployment insurance coverage, on the presumption that the pregnant woman was no longer an active candidate in the labor market – a statutory presumption that prevailed until prohibited by federal law.”¹⁰

During World War II, the role of women in the industrial workforce increased dramatically. An estimated 8 million women entered the workforce during the war, approximately three-quarters of whom were married.¹¹ A national campaign to support women in the workforce – popularized in song, film, and posters with the fictional “Rosie the Riveter” – promoted women workers in shipyards, steel mills, foundries, and lumber mills as electricians, mechanics, and boilermakers, as well as operators of streetcars, buses, cranes, and tractors. The war effort increased opportunities for women in all types of roles, from engineers, physicists, and chemists to doctors and lawyers, and from farm workers and managers to journalists and police officers.¹² The need for women to replace men on factory lines, however, did not alter longstanding policies requiring

¹⁰ Reva Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929, 942 n.63 (1985).

¹¹ See Mary P. Ryan, *Womanhood in America* 316-17 (1975).

¹² See Penny Colman, *Rosie the Riveter: Women Working on the Home Front in World War II* 16-18 (1995).

that they be fired or forced to take an unpaid leave of absence when they became pregnant.¹³

By the 1950s and 1960s, “many employers had mandatory leave policies requiring women to leave work upon reaching a certain month of pregnancy, regardless of whether they were able and willing to continue working.”¹⁴ Even as late as 1960, “women were still commonly fired if they became pregnant.”¹⁵

In 1974, this Court struck down mandatory maternity leaves imposed by public employers that operated regardless of the woman’s desire or ability to perform her job functions. *See Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 632 (1974). Passage of the Pregnancy Discrimination Act (“PDA”) in 1978 followed shortly thereafter and had a profound effect on the corporate world. Whereas in the late 1960s, “many corporations still required pregnant women to resign; by the late 1970s, few did so.”¹⁶

During the last three decades, the number of women in the workforce has continued to increase. In 1980, women made up 43% of the U.S. workforce, up from 29% in 1950, with a total of approximately 45 million in the workforce (up from 18 million in

¹³ See Sheila B. Kamerman, Alfred J. Kahn & Paul Kingston, *Maternity Policies and Working Women* 35 (1983); Molnar, 12 Mich. J. Gender & L. at 175.

¹⁴ Molnar, 12 Mich. J. Gender & L. at 170.

¹⁵ *Id.* at 170-71 (citing Wendy Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325, 335 (1984-85)).

¹⁶ Erin Kelly & Frank Dobbin, *Civil Rights Law at Work: Sex Discrimination and the Rise of Maternity Leave Policies*, 105 Am. J. Soc. 455, 456 (1999).

1950).¹⁷ Currently, women make up nearly half (47%) of the U.S. labor force, up from 38% in 1970.¹⁸ In 1980, approximately 52% of all women age 16 and over were working or looking for work, compared to 34% in 1950.¹⁹ In the 1970s, the participation rate for women in their prime years for child-bearing and early childrearing increased from 43% in 1970 to 65% in 1980.²⁰ As those numbers have increased, so too have attitudes changed about working women and the policies businesses have adopted to address flexibility in the workplace.

¹⁷ See Linda J. Waite, *U.S. Women at Work* iv (The Rand Publication Series, Dec. 1981) (“Waite, *U.S. Women at Work*”).

¹⁸ See Pew Research Center, *Modern Parenthood: Roles of Moms and Dads Converge as They Balance Work and Family* 9 (2013) (“Pew, *Modern Parenthood*”), available at http://www.pewsocialtrends.org/files/2013/03/FINAL_modern_parenthood_03-2013.pdf.

¹⁹ See Waite, *U.S. Women at Work* at 2.

²⁰ See *id.* at 2-3.

ARGUMENT

I. PROVIDING PREGNANT WORKERS WITH TEMPORARY ACCOMMODATIONS IS GOOD BUSINESS PRACTICE AND CONSISTENT WITH THE PROGRAMS THAT TODAY'S FIRMS OFFER THEIR EMPLOYEES

Many businesses already are accommodating pregnant workers and workers with other health-related needs. Practices, however, are not uniform and vary depending on the situation in each work setting. Data show that a substantial percentage of current employers offer flexible working arrangements. A wealth of data and studies shows that flexible accommodations can be beneficial to workers and businesses alike.

A. In Today's Workforce, Firms Have Adopted A Range Of Workplace Flexibility And Employee Health Programs Aimed At Creating Strong, Flexible Teams And Retaining Talent

For a variety of reasons pertaining to recruitment, retention, productivity, and cost, businesses increasingly more commonly understand the values of workplace flexibility and health and wellness programs for their employees. Retaining workers and motivating them to remain loyal and committed to their existing employer has substantial economic benefits. The types of programs now routinely offered by companies include:

- Employee assistance programs, such as smoking cessation and addiction programs.
- Wellness programs, including gym membership, food services, and recreational programs.

- Flexible work programs, including telecommuting, flexible shift programs, and longer hours/fewer days schedules.

More than three-quarters (77%) of employers provide Employee Assistance Programs (“EAPs”) that help employees deal with personal problems that may negatively affect their work or personal lives. In addition, more than one in five (21%) provide work-life seminars or workshops at the workplace addressing issues of parenting, child development, elder care, and so forth.²¹ Among large employers with more than 1,000 employees, 95% provide EAPs.²²

Wellness programs also have become more common over the years, and “92 percent of employers with 200 or more employees reported offering them in 2009.”²³ They can include fitness programs (e.g., Motorola Mobility²⁴), healthy living and smoking cessation classes (e.g., Kaiser Permanente²⁵), weight management (e.g., AT&T²⁶), and on-site health and

²¹ See Kenneth Matos & Ellen Galinsky, *2014 National Study of Employers* 32 tbl. 13 (Families & Work Inst. 2014) (“Matos & Galinsky”).

²² See *id.*

²³ Soeren Mattke, Christopher Schnyer & Kristin R. Van Busum, *A Review of the U.S. Workplace Wellness Market* 5 (July 2012) (“*U.S. Workplace Wellness*”), available at <http://www.dol.gov/ebsa/pdf/workplacewellnessmarketreview2012.pdf>.

²⁴ See <http://mot-mobilitylivesmart.com/benefitsatmoto/april14/index.html>.

²⁵ See <http://www.kaiserpermanentejobs.org/work-life-balance.aspx>; <http://www.kaiserpermanentejobs.org/benefits.aspx>.

²⁶ See http://att.jobs/media/47959/benefits-overview_mgmt-11-14_final_121613.pdf.

wellness centers (e.g., Verizon²⁷). Many companies also now offer a range of work-life benefits, such as on-site child care (e.g., Motorola Mobility²⁸).

One study explains that many workplace flexibility programs popular among the largest employers

allow at least some groups of workers to have control over when they take breaks (92%), take time off for important family and personal needs without loss of pay (82%), and periodically change their starting and quitting times within some range of hours (81%). They are next most likely to allow at least some groups of employees to return to work gradually after leaves for child-birth and adoption (74%) and work some of their regular paid hours at home occasionally (67%).²⁹

As one report by the Society for Human Resource Management recently explained, “work-flex benefits represent a possible low-cost way to stand out from other potential employers.”³⁰ That same report found, for example, that more than one-half of employers permit telecommuting on an ad hoc basis.³¹ Those data and examples confirm the increasing numbers and types of flexible arrangements offered by employers.

²⁷ See <http://responsibility.verizon.com/engaging-employees/#benefits>.

²⁸ See http://mot-mobilitylivesmart.com/USBenefitsBooks/WorkLife/MMI_2014_Benefits_Book_W2W_WorkLife.htm#TopOfPage.

²⁹ Matos & Galinsky at 18 (footnote omitted).

³⁰ Society for Human Resource Management, *2014 Employee Benefits: An Overview of Employee Benefits Offerings in the U.S.* 7 (June 2014), available at http://www.shrm.org/Research/SurveyFindings/Documents/14-0301%20Benefits_Report_TEXT_FNL.pdf.

³¹ *Id.* at 35, tbl. G-1.

B. Significant Numbers Of Pregnant Workers Want To Stay On The Job Where Possible

A likely reason for greater flexibility in workplace arrangements is that employees value their jobs and their relationships with employers and want to find ways to accommodate working life with their personal situations. A large percentage of companies' talent consists of women, many of whom will be pregnant and return to work after giving birth. In modern workplaces, half of employees are women, and mothers make up a significant percentage of personnel in the workplace. In 2012, 47% of employees in the United States were women,³² and 36% of full-time wage and salary workers were mothers of children under age 18.³³ In recent years, more than half of working mothers have returned to work within one year after having a baby.³⁴

Yet just as women have a variety of motivations for continuing to work during and after their pregnancy – economic, satisfaction with their work, mental stimulation, and the like – so, too, do they face differing circumstances and needs during pregnancy. “[E]ven during a ‘normal’ pregnancy, many women will have different needs than before they became pregnant,”³⁵ and some pregnant workers need no

³² See Bureau of Labor Statistics, *Women in the Labor Force: A Databook 2* (May 2014), available at <http://www.bls.gov/cps/wlf-databook-2013.pdf>.

³³ See Bureau of Labor Statistics, *Highlights of Women's Earnings in 2012*, at 5 (Oct. 2013), available at <http://www.bls.gov/cps/cpswom2012.pdf>.

³⁴ See Wen-Jui Han et al., *The Timing of Mothers' Employment After Childbirth*, *Monthly Labor Rev.* 15, 15 (June 2008), available at <http://www.bls.gov/opub/mlr/2008/06/art2full.pdf>.

³⁵ Molnar, 12 Mich. J. Gender & L. at 185.

special accommodations at all. Accommodating those varying circumstances, therefore, becomes important for the pregnant worker and the workplace alike. Like employees with temporary disabilities, pregnant workers sometimes may be advised by their doctors to refrain from heavy lifting, to sit more frequently, or to take more water breaks during the circumscribed period of pregnancy.

C. Common-Sense Measures To Retain Employees And Maximize Their Ability To Contribute Can Provide A Useful Framework For Understanding How Accommodations For Pregnancy Yield Gains For Employers

One of the important developments over the past quarter-century has been the increasing recognition that flexibility and accommodation to workers' needs actually makes good business sense. Accommodating employees with disabilities and employees who require schedule adjustments due to illness, family needs, and other factors can promote important business values. Changing attitudes about such practices has not always been easy, but data increasingly reveal the business justifications for workplace accommodations. By analogy, many of the accommodations already provided by many businesses are of types that would benefit pregnant workers and provide corresponding benefits to businesses.

1. Accommodations Decrease Employee Turnover

A Department of Labor Job Accommodation Network ("JAN") survey found that 90% of employers reported that providing an accommodation for disabilities allowed them to retain valued employees, and 61% said that it "[e]liminated costs associated

with training a new employee.”³⁶ Surveys also reveal a high correlation between worker quit rates and workplace policies. Data from the Bureau of Labor Statistics show that the businesses with the highest quit rates are such services as hotels, motels, and food-services industries. In 2011, approximately 37% of employees in those sectors reported that they quit their jobs that year, nearly twice as many as left their jobs involuntarily. In addition to being businesses that tend to pay low wages, they also “often have little in the way of workplace benefits or policies to help workers address conflicts between work and family.”³⁷

An inability of a company to retain valuable employees imposes substantial costs on a business. Job turnover can be particularly expensive for employers, who need to re-hire and re-train a new employee. “Thirty case studies taken from the 11 most-relevant research papers on the costs of employee turnover demonstrate that it costs businesses about one-fifth of a worker’s salary to replace that worker.”³⁸ That is true even in replacing workers who earn less than \$50,000 annually – which covers three-quarters of all workers in the United States – as 22 case

³⁶ Beth Loy, Job Accommodation Network, *Workplace Accommodations: Low Cost, High Impact* 5 (Sept. 2013) (“JAN Survey”), available at <http://www.askjan.org/media/downloads/LowCostHighImpact.pdf>.

³⁷ Heather Boushey & Sarah Jane Glynn, Center for American Progress, *There Are Significant Business Costs to Replacing Employees* 3 (Nov. 16, 2012), available at <http://cdn.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf>.

³⁸ *Id.* at 1.

studies “show a typical cost of turnover of 20 percent of salary.”³⁹

To replace workers (whether their termination is voluntary or involuntary), firms have to incur substantial costs, including for advertising for the positions, time spent interviewing candidates, and agency and search firm fees. For certain positions, such costs might include hiring a company recruiter and paying relocation assistance. Those costs represent tangible out-of-pocket expenditures for businesses. In addition, workers who separate from a firm take with them firm-specific knowledge (such as how to manage a computer program used only by that firm or corporate procedures and methods of doing business).⁴⁰ All told, therefore, the costs of replacing workers can be substantial.⁴¹

Providing accommodations that induce workers to stay in their positions can be a valuable means of reducing employee turnover. The JAN Survey found that 61% of employers reported providing accommodations for employees with disabilities eliminated costs associated with training a new employee.⁴² In such fields as sales and customer service, workplace flexibility improves employee retention and reduces

³⁹ *Id.* at 1-2.

⁴⁰ See Executive Office of the President, Council of Economic Advisers, *Work-Life Balance and the Economics of Workplace Flexibility* 17 (Mar. 2010) (“*Work-Life Balance*”), available at <http://www.whitehouse.gov/files/documents/100331-cea-economics-workplace-flexibility.pdf>.

⁴¹ *Id.* See also PricewaterhouseCoopers, *2009/2010 US Human Capital Effectiveness Report – Executive Summary* 9 (Dec. 2009), available at http://www.pwc.com/en_US/us/hr-saratoga/assets/human-capital-effectiveness-report-0910.pdf.

⁴² JAN Survey at 5.

recruitment and training costs of new employees.⁴³ Employees surveyed about flexible workplace arrangements generally reported that they were 30% “more likely than employees without flexibility to intend to stay with their employers for more than two years.”⁴⁴

Other studies explain that the reason for such retention is that flexible workplace arrangements deepen the level of commitment by employees to their workplace. Notably, this is not just a phenomenon for higher-wage workers. The studies reveal that, even among lower-wage workers, flexibility can make a profound effect on loyalty to an employer. “Job commitment was 63% higher among low-wage employees who felt their managers provided sufficient flexibility to meet their personal and family responsibilities than among employees who felt their managers did not offer sufficient flexibility.”⁴⁵ And an in-depth study of five companies that had implemented flexibility for their hourly and nonexempt workers showed that “employee commitment is 55 percent higher for employees who have the flexibility they need, compared to those who do not.”⁴⁶

⁴³ See Liz Watson & Jennifer E. Swanberg, Workplace Flexibility 2010, *Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation* 24 (May 2011) (“Watson & Swanberg”), available at <http://workplaceflexibility2010.org/images/uploads/whatsnew/Flexible%20Workplace%20Solutions%20for%20Low-Wage%20Hourly%20Workers.pdf>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Amy Richman et al., Corporate Voices for Working Families, *Business Impacts of Flexibility: An Imperative for Expansion* 14 (Feb. 2011) (“*Business Impacts of Flexibility*”), available at http://www.wfd.com/PDFS/BusinessImpactsOfFlexibility_March2011.pdf.

Concrete examples of these effects include:

- “A study of more than 1,500 U.S. workers reported that nearly a third considered work-life balance and flexibility to be the most important factor in considering job offers. In another survey of two hundred human resource managers, two-thirds cited family-supportive policies and flexible hours as the single most important factor in attracting and retaining employees.”⁴⁷
- “[S]tudies of the effect of policies that allow new parents to take paid time away from work on the employment and wages of workers find that such arrangements encourage new parents to stay in the labor force.”⁴⁸
- “In a survey of 120 randomly-selected employers in New York, economists found that those that offered flexible sick leave and child care assistance had significantly lower rates of turnover. Other studies report that firms with more flexible telecommuting practices had lower turnover.”⁴⁹

⁴⁷ *Work-Life Balance* at 16 (footnote omitted); see also Press Release, Hudson Highland Group, Inc., *In the Game of Hiring, Flexible Employers Win* (Feb. 12, 2008), available at <http://us.hudson.com/Portals/US/documents/us-hudson-index-release-021208.pdf>; Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford Univ. Press 2000).

⁴⁸ *Work-Life Balance* at 17-18.

⁴⁹ *Id.* at 18 (footnote omitted). See Christopher J. Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 113 Q.J. Econ. 285-317 (1998); Philippa Yasbek, *The Business Case for Firm-Level Work-Life Balance Policies: A Review of the Literature* (Wellington, UK: Dep’t of Labour Jan. 2004); Computer Economics, *Telecommuting Policies Can Lower IT Employee Turnover* (Sept. 2008), available at <http://www.computereconomics.com/article.cfm?id=1395>.

- “Based on responses from almost 42,000 IBM employees in 79 countries, the survey found that work-life balance – of which flexibility is a significant component – is the second leading reason for potentially leaving IBM, behind compensation and benefits.”⁵⁰
- “Deloitte has quantified flexibility’s cost savings by calculating the turnover expense for those professionals who said they would have left the firm had they not had a flexible arrangement. Based on this calculation, the firm determined that it saved an estimated \$41.5 million in turnover-related costs in 2003 alone.”⁵¹

Although businesses can be expected to engage in rational choices that promote profitability, the empirical evidence seems to indicate that taking a longer-term view of profitability and costs can more than make up for any short-term costs incurred by providing a more flexible approach to workplace accommodations. When firms choose not to offer workplace flexibility arrangements, nearly one-third cite costs or limited funds. Yet “the benefits of adopting such management practices can outweigh the costs by reducing absenteeism, lowering turnover, improving the health of workers, and increasing productivity.”⁵² Because providing pregnancy accommodations would keep pregnant women on the job and thereby reduce turnover, reading the statute to require that pregnant workers be given access to the same accommodation programs already offered to other workers with temporary disabilities and on-the-job injuries will not be unduly costly or burdensome; on the

⁵⁰ *Business Impacts of Flexibility* at 9.

⁵¹ *Id.* at 10.

⁵² *Work-Life Balance* at Executive Summary.

contrary, as explained above, it will cut down on turnover and save re-training and replacement costs.

2. Flexible Work Arrangements Improve Worker Attendance, Morale, and Productivity

Data from situations involving flexible accommodations for workers with disabilities and workers who are caregivers confirm the success of such programs in reducing employee turnover and its associated costs. Substantial evidence also shows additional benefits to flexible arrangements with effects on productivity. Providing accommodations to pregnant workers can be expected to improve employees' attendance, because workers would be able to utilize an accommodation rather than skip work altogether. Accommodations also enhance workers' morale and engagement, and therefore their productivity. Similar results have been seen in workplaces that provide disability accommodations and flexible work arrangements.

Providing flexible work arrangements and time off for personal and family needs can reduce the need for unscheduled absences. Studies show that employees able to use flexible work arrangements report less work-life stress and, consequently, fewer unscheduled absences and increased productivity.⁵³ Fewer unscheduled absences also means less overtime paid to other workers, thereby improving firm profitability.⁵⁴

⁵³ See Anna Danziger & Shelley Waters Boots, Urban Inst., *The Business Case for Flexible Work Arrangements* 1 (2008) ("Danziger & Boots"), available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1001&context=legal>.

⁵⁴ See Watson & Swanberg at 24.

In the disability context, survey data reveal that workplace accommodations increase productivity by increasing overall morale. The JAN Survey found that 60% of employers reported that providing accommodations to workers with disabilities increased overall company morale, 71% of employers stated that it increased the employee's productivity, and 56% responded that providing accommodations increased overall company productivity.⁵⁵ That increased morale also translated into better attendance. The JAN Survey found that 54% of employers reported better attendance from an employee after providing an accommodation for a disability.⁵⁶

Data also support the common-sense notion that increased attendance and improved morale also will enhance productivity and performance. A 2010 report on work-life balance and workplace flexibility policies by the President's Council of Economic Advisers noted that "[w]orkers with more flexible arrangements report higher levels of job satisfaction, more loyalty and commitment to their employers, and 'high likelihood[s]' of remaining with their employers for the following year."⁵⁷ In a study of more than 700 firms in the United States, the United Kingdom, France, and Germany, researchers found a "significant positive relationship between work-life balance practices and total factor productivity."⁵⁸ Another study found that "[e]mployees with access to

⁵⁵ See JAN Survey at 5.

⁵⁶ See *id.*

⁵⁷ *Work-Life Balance* at 17 (second alteration in original). See Paul L. Gerhardt, Jr., *Employee Retention Through Job Satisfaction* (Tacoma, WA 2001).

⁵⁸ *Work-Life Balance* at 20.

[flexible work arrangements] tend to be more satisfied, committed, and engaged with their jobs,” which in turn “leads to increased innovation, quality, productivity, and market share.”⁵⁹

The Corporate Leadership Council conducted research in which it found that each incremental improvement in a worker’s commitment by 10% can increase an employee’s level of discretionary effort by 6% and performance by 2%.⁶⁰ A 2013 survey concluded that a high percentage of managers reported that flexibility programs improved employee engagement and motivation (64% and 65%, respectively). By contrast, only 6% of managers thought such programs negatively affected engagement and motivation.⁶¹

Such increased productivity facilitates a company’s ability to grow. Hewitt Associates’ research found that double-digit growth companies “have 39% more employees who are highly engaged” and “45% fewer highly disengaged employees” than single-digit growth companies.⁶²

⁵⁹ Danziger & Boots at 1. See Nick Bloom, Toby Kretschmer & John Van Reenen, *Work-Life Balance, Management Practices and Productivity* (Centre for Economic Performance, London School of Economics Jan. 2006), available at http://eprints.lse.ac.uk/4668/1/Work-Life_Balance%2C_Management_Practices_and_Productivity.pdf.

⁶⁰ See *Business Impacts of Flexibility* at 12.

⁶¹ See WorldatWork, *Survey on Workplace Flexibility 2013*, at 30 (Oct. 2013), available at <http://www.worldatwork.org/adim/Link?id=73898>.

⁶² Hewitt Assocs. LLC, *Research Brief: Employee Engagement Higher at Double-Digit Growth Companies* 5 (2004), available at <http://www.mckpeople.com.au/SiteMedia/w3svc161/Uploads/Documents/016fc140-895a-41bf-90df-9ddb28f4bdab.pdf>.

3. Flexible Arrangements Improve Safety and Reduce Workers' Compensation Claims

Data from the disability context suggest strongly that providing pregnancy accommodations can reduce workplace injuries and associated costs, such as workers' compensation payments and, possibly, litigation costs. It also can reduce rates of employee stress, which in turn would improve productivity. Accommodations can better enable workers to avoid making the choice between doing tasks related to their job and following doctor's advice about actions that can increase the likelihood of injury.

Costs associated with pregnancy complications, injury, and stress are significant. "Employers spend more than \$12 billion annually on claims related to prematurity and complicated births in the United States."⁶³ Nor can employers avoid such costs by moving pregnant workers onto unpaid leave because other research shows that "stress from job loss can increase the risk of having a premature baby."⁶⁴ Studies show generally that, when employers reduce stress, the number of workers' compensation claims goes down. A plastics manufacturer in Minnesota, for example, decreased workers' compensation claims

⁶³ March of Dimes, *Protect New York's Moms From Pregnancy Discrimination* (2014), available at http://www.marchofdimes.com/pdf/newyork/Pregnancy_Discrimination_Fact_Sheet.pdf.

⁶⁴ A Better Balance, *Fact Sheet: Reasonable Accommodations for Pregnancy in New York 1* (Mar. 2012), available at http://www.abetterbalance.org/web/images/stories/Documents/fairness/factsheets/NY_RA_Fact_Sheet_3-19-12.pdf; see also David Lee, *Managing Employee Stress and Safety: A Guide to Minimizing Stress-Related Cost While Maximizing Employee Productivity 1* (2000), available at <http://www.memc.com/Portals/0/docs/Safety/ManagingStress.pdf>.

by 56% after introducing new initiatives to manage employee stress.⁶⁵ The JAN Survey found that 44% of employers reported that providing accommodations to employees with disabilities increased workplace safety and 39% reported reduced workers' compensation and other insurance costs.⁶⁶ Providing appropriate accommodations to pregnant workers to facilitate a safer workplace during pregnancy "will undoubtedly reduce stress on these workers, and these studies suggest reduced stress will lower their risk of injury."⁶⁷

Although the data are not directly comparable, the experience of wellness programs is instructive. Such programs, which seek to improve employee health and well-being, can significantly decrease overall business costs. Among larger firms (defined as greater than 200 workers), 81% "affirmed that workplace wellness improved health" and 69% "said that it reduced cost."⁶⁸ Wellness programs have significant effects on workplace productivity. The RAND Corporation's study of workplace wellness programs found a return on investment of \$15.60 per dollar spent, \$1,350 saved per employee in short-term disability costs, and \$180 per participant per year saved (taking into account health care costs).⁶⁹

⁶⁵ See National Women's Law Center, *Fact Sheet: The Business Case for Accommodating Pregnant Workers* 3 (Dec. 2012) ("NWLC, *Business Case*"), available at http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers_business_case_12.04.12.pdf.

⁶⁶ JAN Survey at 5.

⁶⁷ NWLC, *Business Case* at 3.

⁶⁸ *U.S. Workplace Wellness* at 22.

⁶⁹ *Id.* at 25.

Similar savings seem likely for pregnancy-related accommodations.

D. The Kinds Of Accommodations Pregnant Workers Need Are Not Costly And Should Be Relatively Straightforward To Provide

1. Most Accommodations Sought by Pregnant Workers Are Low-Cost or No-Cost

Pregnancy produces physiological changes in a woman's body. One of the hormones produced during pregnancy, relaxin, "causes ligaments to soften and stretch."⁷⁰ The body produces that hormone to loosen the pelvic structure to accommodate growth in the fetus and delivery of the baby. A byproduct of relaxin, however, is in the relaxation effect it causes to other ligaments, including in the neck, shoulder, elbow, knees, and back. With less support from ligaments, the muscles must do more of the work of supporting key joints, which in turn produces muscle fatigue and reduces strength.⁷¹

The effect of those physiological changes alters some pregnant workers' ability to lift, to engage in repetitive motions, and to climb stairs or ladders. While many pregnant workers are able to continue working with no modification throughout pregnancy, others, particularly those whose jobs involve heavy physical activity, require some temporary modifications. For example, some pregnant workers may need to sit more frequently, to drink water more frequently, and to rotate into non-heavy-lifting assignments at some point in their pregnancies.

⁷⁰ Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 Stetson L. Rev. 1, 3 (1995).

⁷¹ *See id.* at 3-4.

Most pregnancy-related accommodations are short-lived, by nature, and thus are not costly due to longevity (i.e., they will not go on indefinitely). In considering a state pregnancy accommodations law, for example, the California Fair Employment and Housing Commission (“FEHC”) estimated the “[c]ost of average pregnancy reasonable accommodation” as \$500.⁷² A high percentage of accommodations (58%) “cost absolutely nothing to make.”⁷³ Another 36% of the businesses surveyed by JAN reported only a one-time cost.⁷⁴ Only approximately 4% reported an ongoing, annual cost to the company.⁷⁵ “In general, pregnancy accommodation can be expected to be less costly than average disability accommodations because no special equipment is usually needed to accommodate a pregnant woman and the accommodation is needed for a short, finite period of time.”⁷⁶

Those results comport with the experience of providing accommodations for workers with disabilities, many of which entail greater longevity than the term of a pregnancy.

Of the employers who gave cost information related to accommodations they had provided, 355 out of 610 (58%) said the accommodations needed by employees cost absolutely nothing.

⁷² FEHC, Notice of Proposed Rulemaking, *Sex Discrimination: Pregnancy, Childbirth or Related Medical Conditions*, California Regulatory Notice Register 563, 566 (Apr. 16, 2010) (“FEHC Notice”), available at <http://www.oal.ca.gov/res/docs/pdf/notice/16z-2010.pdf>. See also JAN Survey at 4.

⁷³ JAN Survey at 3.

⁷⁴ *Id.* at 4.

⁷⁵ *Id.*

⁷⁶ FEHC Notice at 567.

Another 222 (36%) experienced a one-time cost. Only 24 (4%) said the accommodation resulted in an ongoing, annual cost to the company and 9 (1%) said the accommodation required a combination of one-time and annual costs; however, too few of these employers provided cost data to report with accuracy. Of those accommodations that did have a cost, the typical one-time expenditure by employers was \$500.⁷⁷

Employers surveyed that had implemented such accommodations also reported that they were effective. On a scale of 1 to 5, with 5 being extremely effective, 76% of respondents reported the accommodations were either “very effective or extremely effective.”⁷⁸

2. Accommodating Pregnant Workers Generally Imposes Workplace Changes That Are Limited in Scope and Duration

On a national level, the scope of accommodations needed for pregnant workers is relatively modest. In any given State, the share of workers who gave birth in a particular year typically is between 1.2% and 2%.⁷⁹ In the years 2009-2011, women workers who gave birth represented an average of just 1.6% of

⁷⁷ JAN Survey at 4.

⁷⁸ *Id.*

⁷⁹ See National Women’s Law Center, *Fact Sheet: Pregnant Workers Make Up a Small Share of the Workforce and Can Be Readily Accommodated: A State-By-State Analysis 1* (Mar. 2013) (“NWLC, *State-By-State Analysis*”), available at http://www.nwlc.org/sites/default/files/pdfs/state_by_state_analysis.pdf (citing data from, *inter alia*, Integrated Public Use Microdata Series – American Community Survey, Minnesota Population Center, University of Minnesota, available at <http://usa.ipums.org/usa/sda/> (“IPUMS”)).

all employed people each year.⁸⁰ “Even when only employed women of childbearing age are considered, an average of just 4.7 percent had given birth in a particular year.”⁸¹ In light of the relatively short duration in which a woman is within her childbearing years, the overall effect on the workplace (compared to longevity for a working career overall) is relatively small.

E. Today’s Workplaces Are Adept At Providing Accommodations

Many of the accommodations that can be important for a pregnant worker already are provided to workers with other conditions under the Americans with Disabilities Act of 1990 (“ADA”), provided those accommodations do not cause undue hardship. *See* 42 U.S.C. § 12101. These include:

- **Schedule modification**, which enables a worker to take more frequent breaks because of nausea, as upheld in the ADA context for HIV-positive employees who must take nausea-inducing medications.⁸²
- **Modified workplace policies**, such as no food or drink, which can be important for pregnant workers who experience painful and potentially dangerous uterine contractions when not drinking water regularly, and also can be important for employees with diabetes.⁸³

⁸⁰ *See* NWLC, *State-By-State Analysis* at 1 (citing data from, *inter alia*, IPUMS).

⁸¹ NWLC, *State-By-State Analysis* at 1.

⁸² *See* Equal Employment Opportunity Comm’n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act*, 2002 WL 31994335, at *4 (Oct. 17, 2002) (“EEOC Guidance”).

⁸³ *See id.* at *19-20.

- **Temporary reassignment to a vacant position**, when available, to avoid heavy lifting, which can be necessary for pregnant workers.⁸⁴
- **Providing or modifying equipment**, which can be a reasonable accommodation to a person with a disability, and also important to a pregnant worker.⁸⁵
- **Restructuring assignments or reassigning tasks to other employees**, so that, for example, a pregnant worker need not be required to stand for long periods, just as an employee with lupus would not need to do so.⁸⁶
- **Light duty**, which many employers already provide both to workers who are injured on the job as well as to workers with temporary disabilities.⁸⁷

Reading the PDA to require employers to provide the same accommodations to pregnant workers that it does to others with temporary disabilities will not require the creation of new or burdensome programs. Rather, pregnant workers should be able to access existing “light duty” programs and other accommoda-

⁸⁴ See *id.* at *20; 29 C.F.R. § 1630.2(o)(2)(ii).

⁸⁵ See 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).

⁸⁶ See EEOC Guidance, 2002 WL 31994335, at *3.

⁸⁷ See EEOC, *Technical Assistance Manual: Title I of the ADA* § 9.4 (Jan. 1992), available at <http://askjan.org/links/ADAtam1.html#IX>; *EEOC Enforcement Guidance: Workers' Compensation and the ADA* Q.28 (Sept. 1996), available at <http://www.eeoc.gov/policy/docs/workcomp.html>; see generally *Office of the Architect of the Capitol v. Office of Compliance*, 361 F.3d 633, 641 (Fed. Cir. 2004) (“[T]he fact that a possible accommodation may conflict with an employer’s workplace rules and policies does not necessarily mean that such an accommodation is not reasonable.”).

tions that employers provide to workers with other needs and disabilities.

Like UPS, many firms have existing “light duty” and other programs designed to ensure that employees who are temporarily unable to perform certain job functions can nonetheless continue to provide value to the company, and earn a paycheck, by being reassigned on a time-limited basis to light duty and other alternative rotations. *See* App. 6a-7a. Frequently these programs are made available to workers injured on the job. One likely effective and low-cost approach is to include in these existing programs pregnant workers who are, for example, temporarily restricted from lifting or traveling towards the ends of their pregnancies. Companies routinely make that type of straightforward business adjustment. Including pregnant workers in these existing programs does not add significant cost.

II. PROVIDING ACCOMMODATIONS FOR PREGNANT WORKERS IS IMPORTANT TO THE NATIONAL ECONOMY

For decades, working women have fueled economic growth in the United States. “In 1968, 48 percent of children were raised in households where the father worked full-time, the mother was not in the labor force, and the parents were married; by 2008, only 20 percent of children lived in such households.”⁸⁸ Currently, women make up nearly half (47%) of the U.S. labor force, up from 38% in 1970.⁸⁹ The economic effect of that work also has been significant. If no additional women had joined the paid economy since 1970, U.S. Gross Domestic Product (“GDP”) would be

⁸⁸ *Work-Life Balance* at 2.

⁸⁹ *See* Pew, *Modern Parenthood* at 9.

approximately 75% of its current size.⁹⁰ As Federal Reserve Chair Janet Yellen has noted: “[I]t is no coincidence that America’s great success in the past century came as women steadily increased participation in every aspect of society. . . . [O]ur economic success has been due in substantial part to the fuller participation and contribution of women to the economy.”⁹¹

Between 2006 and 2008, two-thirds of women were working when they had their first child, and 88% of those worked into their last trimester.⁹² “Almost two-thirds of American women (62 percent) with a birth in the last year were in the labor force in 2008.”⁹³ Statistics confirm that the stay-at-home-mom phenomenon of the post-World War II era has greatly diminished. A majority (59%) of working-age parents with young children who are either married or living with a partner are dual-income couples, and approximately 6% of couples now have mothers who are the sole provider for the family.⁹⁴ All told, working mothers who are the sole or primary earner

⁹⁰ See Joanna Barsh & Lareina Yee, *Unlocking the Full Potential of Women in the U.S. Economy* 4 (Wall Street Journal Executive Task Force for Women in The Economy 2011), available at <http://online.wsj.com/public/resources/documents/WSJExecutiveSummary.pdf>.

⁹¹ Chair Janet L. Yellen, Remarks on Women’s History Month, At the Women’s History Month Reception, U.S. Capitol, Washington, D.C., March 25, 2014, available at <http://www.federalreserve.gov/newsevents/speech/yellen20140325a.htm>.

⁹² See U.S. Census Bureau, *Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008*, at 4, 6 (Oct. 2011), available at <http://www.census.gov/prod/2011pubs/p70-128.pdf>.

⁹³ *Id.* at 1.

⁹⁴ See Pew, *Modern Parenthood* at 44.

compose 40% of all American households with children under the age of 18.⁹⁵

Although the importance of women in the workforce can be measured in numerous ways, in the sole metric of the macroeconomic impact of women as consumers, the effects are significant. Women are, by a large measure, much more significant consumers than men, and pregnant women and mothers are especially valuable consumers to the national economy. Women control 73% of household spending, which translates into more than \$4 trillion in annual discretionary spending – a very powerful role in an economy driven by consumption.⁹⁶ “Fleishman-Hillard Inc. estimates that women will control two-thirds of the consumer wealth in the U.S. over the next decade and be the beneficiaries of the largest transference of wealth in our country’s history.”⁹⁷ Success in integrating even more women into the

⁹⁵ See Wendy Wang et al., Pew Research Social & Demographic Trends, *Breadwinner Moms: Mothers Are the Sole or Primary Provider in Four-in-Ten Households with Children; Public Conflicted about the Growing Trend* (May 29, 2013), available at <http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/>; Sarah Jane Glynn, Center for American Progress, *The New Breadwinners: 2010 Update – Rates of Women Supporting Their Families Economically Increased Since 2007*, at 2 (Apr. 2012), available at <http://cdn.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/breadwinners.pdf>.

⁹⁶ See *Invest in Women, Invest in America: A Comprehensive Review of Women In the U.S. Economy*, A Report by the Majority Staff of the Joint Economic Committee 7 (Dec. 2010), available at http://www.jec.senate.gov/public/?a=Files.Serve&File_id=9118a9ef-0771-4777-9c1f-8232fe70a45c.

⁹⁷ Nielsen, *U.S. Women Control the Purse Strings* (Apr. 2, 2013), available at <http://www.nielsen.com/us/en/insights/news/2013/u-s--women-control-the-purse-strings.html>.

workforce will have additional substantial effects on the Nation's economy.

As the country's aging population retires or otherwise transitions out of the workplace, concerns arise about the slowing of workplace participation and consumer spending – leading to slower GDP, deeper recessions, and slower recovery periods. Economists have noted that higher female labor force participation can boost growth by mitigating the impact of a shrinking workforce.

The challenges of growth, job creation, and inclusion are closely intertwined. While growth and stability are necessary to give women the opportunities they need, women's participation in the labor market is also a part of the growth and stability equation. In particular, in rapidly aging economies, higher female labor force participation can boost growth by mitigating the impact of a shrinking workforce.⁹⁸

In some States, that effect already is occurring. According to a White House report, “if the United States raised female labor participation rates to the average participation rate of the top 10 states, our economy would add 5.1 million women workers, the equivalent of a 3-4% increase in GDP.”⁹⁹

⁹⁸ Katrin Elborgh-Woytek et al., IMF Staff Discussion Note, *Women, Work, and the Economy: Macroeconomic Gains from Gender Equity* 4 (Sept. 2013), available at <https://www.imf.org/external/pubs/ft/sdn/2013/sdn1310.pdf>.

⁹⁹ The White House Council on Women and Girls, *Keeping America's Women Moving Forward: The Key to an Economy Built to Last* i (Apr. 2012), available at http://www.whitehouse.gov/sites/default/files/email-files/womens_report_final_for_print.pdf.

The continued macroeconomic effects of accommodating pregnant workers in their jobs therefore can be significant. Ensuring that women are able to continue working and earning income throughout pregnancy allows them to be more effective workers, more affluent consumers, and even more important contributors to economic growth while avoiding the devastating personal effects of cutting off women from their earning potential at the precise moment of greatest economic need.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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