No. 19-233

In The
Supreme Court of the United States

ERYON LUKE,

Petitioner,

v.

CPLACE FOREST PARK SNF, L.L.C., dba
NOTTINGHAM REGIONAL REHAB CENTER,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals for the Fifth Circuit correctly applied the framework established by this Court in *Young v. United Parcel Service, Inc*., 135 S. Ct. 1338 (2015) for evaluating pregnancy-related failure to accommodate claims brought pursuant to the Pregnancy Discrimination Act, 42 U.S.C. § 2000e-(k).

2. Whether the decision of the U.S. Court of Appeals for the Fifth Circuit conflicts with the decision of the Eighth Circuit in *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431 (8th Cir. 1987), or any other appellate court, regarding whether pregnant employees can serve as proper comparators in a pregnancy-related failure to accommodate claim brought pursuant to the Pregnancy Discrimination Act, 42 U.S.C. § 2000e-(k).

LISTING OF PARTIES TO PROCEEDING BELOW

The caption of the case in this Court contains the names of all parties to the proceeding in the U.S. Court of Appeals for the Fifth Circuit, whose judgment is under review.

RULE 29.6 STATEMENT

CPlace Forest Park SNF, LLC, d/b/a Nottingham Regional Rehab Center has no parent corporation and no publicly-held corporation owns 10% or more of its membership interests.

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The relevant opinions and orders below are:

1. *Eryon Luke v. CPlace Forest Park, SNF, LLC*, ***Per Curiam Order Denying Rehearing En Banc*,** No. 16-30992 (May 16, 2019), which is set forth in Appendix D to the Petition for Writ of Certiorari.

2. *Eryon Luke v. CPlace Forest Park, SNF, LLC*, **Per Curiam Opinion**, No. 16-30992 (January 14, 2019), 747 Fed. Appx. 978 (5th Cir. 2019), which is set forth in Appendix A to the Petition for Writ of Certiorari.

3. *Eryon Luke v. CPlace Forest Park, SNF, LLC*, ***Ruling and Order***, No.:13-00402-BAJ-EWD (August 9, 2016) is not reported but appears at 2016 WL 4247592 (M.D. La. August 9, 2016), and is set forth in Appendix B to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

This Court has jurisdiction over the Petition pursuant to 28 U.S.C. § 1254(1). The U.S. Court of Appeals for the Fifth Circuit issued its Order denying Petitioner's request for rehearing on May 16, 2019, and this Petition for Writ of Certiorari was filed on August 14, 2019.

STATUTE AT ISSUE

The only statute at issue is the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e-(k). The Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964, prohibits employers from discriminating against a female employee "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 . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e-(k).

STATEMENT OF THE CASE

I. Introduction.

This case presents fairly simple facts: Petitioner Eryon Luke (hereinafter "Luke" or "Petitioner") became unable to work as a certified nursing assistant ("CNA") during her employment with CPlace Forest Park SNF, LLC d/b/a Nottingham Regional Rehab Center (hereinafter "CPlace" or "Respondent") due to lifting restrictions imposed during her pregnancy; CPlace had no light duty positions that could accommodate those restrictions and had never provided such light duty to others; accordingly, CPlace provided Luke with leave until she exhausted the same and was still unable to return to work as a CNA, at which time she was separated from employment. Luke contends that CPlace's actions are in violation of the Pregnancy

Discrimination Act, 42 U.S.C. § 2000e-(k). However, CPlace complied with all applicable laws and Luke's Petition is nothing more than a blatant attempt to overturn a well-reasoned lower court decision that Luke simply cannot accept: Luke required a light duty position during her pregnancy and CPlace did not offer it—to anyone. Consequently, there was no violation of the PDA.

II. Undisputed Record Evidence.

On October 10, 2011, CPlace hired Luke to work at its skilled nursing rehabilitation center as a CNA. ROA.589, 595-96, 683, 690. As a CNA, Luke's job duties included providing food trays to residents and assisting residents that needed help eating; ensuring residents, their clothing and bed linens were clean, and, in the event a resident was unclean (such as due to having a bowel movement or urinating in bed), cleaning the resident, and changing the resident's clothing and bed linens; turning residents in beds; helping residents move from the bed into a wheelchair (including lifting the resident); pushing residents in wheelchairs; ensuring residents utilizing walkers did not fall by standing behind the resident to be able to catch the resident in the event of a fall; responding to "call lights" of the residents by promptly responding to any call light and physically checking on the resident; and the general grooming and personal care of residents. Luke testified she was responsible for approximately ten to fifteen residents at any given time. ROA.589-90, 600-03, 690.

On Friday, December 2, 2011, Luke learned she was pregnant and was released to return to work on December 3, 2011 with the restrictions of "Light duty work for 2 wks (no heavy lifting)." ROA.605, 612-16. At that time, CPlace had no light duty positions available nor did it offer light duty work to any employees, even employees who were injured on the job. ROA.693-95.

Luke reported to work on Saturday and Sunday, December 3 and 4, 2011, and the weekend supervisor allowed her to perform work that did not involve heavy lifting. ROA.623-25, 691. However, on Monday, December 5, CPlace's Human Resources Payroll Manager learned of Luke's lifting restrictions and explained to her that because the essential functions of the CNA position required heavy lifting and because CPlace did not have any light duty positions available, Luke should not report to work until after she discussed her lifting restrictions with her doctor. ROA.623-25, 691.

Luke remained off work until her doctor signed a release on December 12, 2011 allowing her to work without restrictions. ROA.691-92, 699-702. After Luke provided the release to CPlace, Luke was scheduled and worked December 14, 2011 through January 22, 2012 without restriction. *Id.*

On January 22, 2012, Luke clocked in and brought a note from her doctor stating "no heavy lifting throughout pregnancy." ROA.627, 692-93, 700-03, 708. CPlace's Human Resources Payroll Manager again explained to Luke that her duties as a CNA required heavy lifting

and that she could not return to work as a CNA with those lifting restrictions. ROA.627, 692-93, 700-03, 708.

In an effort to clarify her restrictions, Luke provided additional information from her physician which stated she was unable to perform any duties that required lifting over 30 pounds. ROA.693, 709-10. As stated, Luke's position as a CNA required her to regularly lift over 30 pounds and there were no available positions at CPlace that required lifting less than 30 pounds. ROA.693-94, 711-17, 732. Consequently, Luke was placed on a leave of absence in accordance with Louisiana's Employment Discrimination Act, La. R.S. 23:342(b), which allows for four months of unpaid leave "on account of pregnancy." ROA.684-87, 693. In her deposition, Luke repeatedly admitted that after she received the lifting restrictions, she was not able to perform the job responsibilities of a CNA, and that she was subject to these lifting restrictions through the remainder of her pregnancy. ROA.644-46, 662-63.

On May 23, 2012, after her four months of leave expired, Luke met with CPlace's Human Resources Payroll Manager who informed Luke there was still no work available within her restrictions and, that unless she could return to full duty, her employment would be terminated on May 24, 2012. ROA.655, 695. Luke understood that once she was able to perform the duties of a CNA, she could re-apply for work at CPlace. *Id.* During the meeting, Luke did not request CPlace to extend her leave. ROA.658. She additionally admitted that her termination only occurred after she was

placed on leave for four months and was unable to return to full duty after her four months of leave had expired. ROA.655.

Luke delivered her twins on June 21, 2012. ROA.658. Luke has not worked as a CNA since. ROA.588-89.

III. Procedural History.

Luke filed suit against CPlace alleging violations of the Pregnancy Discrimination Act, 42 U.S.C. § 2000e-(k). Specifically, Luke alleges that CPlace discriminated against her by failing to provide her with an accommodation after she was given lifting restrictions in connection with her pregnancy which precluded her from performing the essential functions of a certified nursing assistant.

After several rounds of protracted discovery, CPlace moved for summary dismissal of Luke's claims. On August 9, 2016, the District Court granted CPlace's Motion for Summary Judgment with respect to Luke's PDA claim.[1] Contrary to the liberties Luke has now taken with the record, the undisputed facts before the District Court were that CPlace never accommodated "others similar in their ability or inability to work" and therefore Luke could not make a prima facie case of pregnancy discrimination under this Court's standard

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[1] *See* Appendix B to Plaintiff's Petition for Writ of Certiorari, p. 7a. (The Appendix to the Petition for Writ of Certiorari will be referred to hereinafter as "App." and the Petition will be cited as "Petition.")

set forth in *Young v. United Parcel Service, Inc*., 135 S. Ct. 1338 (2015).

On January 14, 2019, in a per curiam decision, the Fifth Circuit affirmed the district court's dismissal of Luke's PDA claim.[2] In affirming summary judgment, the Fifth Circuit declined to rule on whether Luke had presented sufficient evidence for a prima facie case. Instead, the Court focused on the issue of pretext. More specifically, the Fifth Court found, "CPlace asserts that it fired Luke because being able to lift more than thirty-five pounds was essential to the job so certified nurses could lift residents when needed. It further contends that it did not offer light duty positions to its nurses. . . ."[3] Having found a legitimate, non-discriminatory reason for CPlace's conduct, the Court affirmed summary judgment because Luke "does not point to evidence that casts doubt on this explanation. . . ."[4]

On January 28, 2019, Luke then petitioned the Fifth Circuit for rehearing en banc, which the Fifth Circuit summarily denied on May 16, 2019.[5] This Petition for Writ of Certiorari then followed.

IV. Petitioner's Factual Errors.

Luke's Petition contains critical factual errors which cannot be overlooked because they form the

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[2] App., pp. 1a–6a.

[3] App., p. 5a.

[4] App., p. 5a.

[5] *See* App., pp. 36a–37a.

basis of Luke's arguments for review. *See* Sup. Ct. R. 10. These factual errors are noted below in accordance with Rule 10:

1. Despite Luke's assertions to the contrary,[6] Luke repeatedly admitted in her deposition that CNAs were required to routinely lift more than 30 pounds. ROA.644-46, 662-63.

2. Despite Luke's assertions to the contrary,[7] Luke repeatedly admitted that she could not perform the duties of a CNA because of her lifting restrictions. ROA.644-46, 662-63.

3. In support of her claim that CPlace purportedly accommodated others similar in their ability or inability to work, Luke points to CPlace's policy regarding accommodations, both as written and as described by Roy Bridges, the Chief Operating Officer for Traditions Senior Management (a management company that provided management services to CPlace).[8] Luke asserts that the written policy itself is evidence that CPlace accommodated others but did not accommodate pregnant workers. Luke's argument is flawed because the existence of a policy to provide reasonable accommodations is not evidence that accommodations were ever, in fact, provided.

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[6] Petition, pp. 2, 14–15.

[7] Petition, pp. 2, 20–21.

[8] Petition, pp. 2–3, 15.

4. Luke's assertion that CPlace's policies somehow favor non-pregnant workers is also misleading. The written policy contains no such language and witnesses for CPlace made it clear that the policy as implemented was to provide all accommodations required by law. ROA.675. There is no suggestion in the policy that accommodations will not be provided to workers disabled by virtue of pregnancy and CPlace witnesses testified that CPlace would make all accommodations required by law, including those for pregnancy. ROA.907. Accordingly, any reliance on CPlace's facially neutral policy is misplaced.

5. Luke's next attempt to obscure the record is by boldly asserting that there was evidence that CPlace accommodated non-pregnant workers who needed help with lifting.[9] However, CPlace witnesses were never asked and did not testify about any actual instances of an accommodation being provided (or denied). ROA.1012-13. Luke also cites to testimony from Belinda Glynn who testified about a single situation of light duty that she recalled during her tenure as a Resident Care Director *at another facility—not CPlace.* ROA.2889, 2898-99.

6. Luke also claims that CPlace modified duties to accommodate CNAs and had light duty positions that it made available to CNAs.[10] Luke points to testimony from Donna Duplantis

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[9] Petition, pp. 2–3, 15.

[10] Petition, pp. 2–4, 15.

who simply identified the kinds of positions a CNA could explore outside of resident care, not what types of accommodations had actually been provided to any CNA. ROA.2312.

7. Luke also claims that other pregnant employees were accommodated.[11] Luke cites to the testimony of a former co-worker, Lakesha Pye, who testified that co-workers would make polite gestures of assistance towards her while she was pregnant, not that CPlace, as an employer, offered her light duty or job modifications. ROA.2776-77. Luke also cites to the testimony of another former co-worker, Kimberly Barron Tucker, who Luke claims was accommodated during her pregnancy. However, Tucker testified that she had no restrictions during her pregnancy and never requested accommodation, but would, if she needed help, ask her husband to assist her (he also worked as a CNA at the facility). ROA.2839-40.

In sum, the record evidence is undisputed: CPlace did not offer light duty to its CNAs nor did it have any light duty available at the time of Luke's employment. Moreover, there is no evidence that CPlace accommodated any of its employees similar in their ability or inability to work.

[11] Petition, pp. 4, 15.

SUMMARY OF ARGUMENT

Review on a writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. And, further, a petition will be granted only for "compelling reasons." *Id.* Indeed, this Court grants certiorari review "only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict in the lower courts, or some matter affecting the interest of this nation demand such exercise." *Camreta v. Greene*, 131 S. Ct. 2020, 2033 (2011); *Braxton v. United States*, 500 U.S. 344 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.").

Rule 10 of the Supreme Court Rules describes the kind of "compelling reasons" the Court will consider when evaluating a petition, including:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ;
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> * * *
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

See Sup. Ct. R. 10. Notably, however, Rule 10 cautions that a petition "is rarely granted when the asserted error consists of factual findings or the misapplication of a properly stated rule of law." *Id.*

In the case at hand, Luke's Petition presents no "compelling reason" for this Court to accept her Petition. The ruling of the Fifth Circuit is not in conflict with prior rulings of this Court or any other federal appellate court. Moreover, the questions presented do not rise to the level of such importance to warrant review by this Court. Even so, the questions are so intricately intertwined with the facts of this case that it is simply not a proper vehicle to resolve the issues.

In sum, Luke's Petition presents nothing more than an attempt to overturn the application of a properly stated rule of law to an otherwise uncompelling set of facts.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because The Fifth Circuit's Opinion Is Unpublished And Has No Precedential Value.

As an initial matter, Luke's Petition should be denied because the decision rendered below is unpublished; thus it has no precedential value in the Fifth Circuit.[12] This Court typically does not review unpublished, non-precedential decisions because they do not reflect a

[12] App., p. 1a.

circuit's definitive position on a legal issue. *See Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from the denial of certiorari noting that an unpublished opinion "lacks precedential force . . . " which "preserves [a court's] ability to change course in the future"). Here, not only is the decision below non-precedential by operation of Fifth Circuit rules governing unpublished decisions, *see* 5th Cir. R. 47.5.4, the opinion clearly states as much in a footnote on the first page, " . . . the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4."[13] *See also Cua-Tumax v. Holder*, 343 Fed. Appx. 995, 997, n. 7 (5th Cir. Sept. 15, 2009) (unpublished decisions not binding); *United States v. Salinas*, 480 F.3d 750, 758, n. 8 (5th Cir. 2007) (expressly declining to endorse the reasoning of a prior unpublished opinion); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc noting conflict between the panel decision and a prior unpublished and therefore non-precedential opinion). Because this opinion has no precedential value in the Fifth Circuit or elsewhere, there is no reason for this Court to review the correctness of the ruling. Plaintiff's Petition should be dismissed on this basis alone.

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[13] App., p. 1a.

II. The Petition Should Be Denied Because The Fifth Circuit's Decision Is Not In Conflict With Prior Decisions Of This Court On An Important Issue Of Federal Law.

Luke asks this Court to review the decision of the Fifth Circuit on the basis that it conflicts with controlling precedent of this Court. More specifically, Luke contends that the Fifth Circuit failed to follow the framework established by this Court in *Young v. United Parcel Service, Inc*., 135 S. Ct. 1338 (2015) for deciding pregnancy-related failure-to-accommodate claims. Luke argues that the Fifth Circuit erred in its application of the *McDonnell Douglas* burden-shifting framework because it chose to bypass the prima facie case and focus solely on the second and third stages of the framework: the employer's legitimate, nondiscriminatory reason and the Plaintiff's evidence of pretext.[14]

A. The Fifth Circuit's Decision Is Consistent With *Young*.

There is no compelling reason to grant certiorari on this issue. Luke makes the strained argument that the Fifth Circuit failed to follow the framework set forth by this Court in *Young* when affirming summary judgment in favor of CPlace. Luke's reading of the Fifth Circuit opinion is wholly misconstrued. In its opinion, the Fifth Circuit painstakingly spelled out the modified *McDonnell Douglas* framework by quoting

[14] App., p. 4a.

directly from *Young*.[15] After setting forth the proper framework, the Court observed that the parties had focused "on the first step of this inquiry, as the district court held that Luke could not make out a *prima facie* case."[16] The Fifth Circuit determined, however, that it could affirm summary judgment in favor of the employer "*without deciding* whether she established a prima facie case."[17]

Indeed, the Fifth Circuit simply chose to bypass the prima face analysis and focus solely on whether CPlace had come forward with evidence of a legitimate, nondiscriminatory reason for its actions (failure to accommodate) and whether Luke offered evidence of pretext to rebut the reason. The Fifth Circuit's decision to affirm without deciding whether Luke met her prima facie burden is not legal error. It is simply a method of focusing on the ultimate issue in the case: intentional discrimination. *See Reeves v. Sanderson Plumbing Prod., Inc*., 530 U.S. 133, 143, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105 (2000), citing, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) ("Although intermediate evidentiary burdens shift back and forth under this framework, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'").

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[15] App., pp. 3a–4a.

[16] App., p. 4a.

[17] App., p. 4a (emphasis added).

Notably, this method has been followed by numerous appellate courts. In its opinion below, the Fifth Circuit cited to a decision authored by Judge Kavanaugh while sitting on the District of Columbia Circuit, *Brady v. Office of the Sergeant at Arms*, 520 F.3d 490 (D.C. Cir. 2008), which detailed the justification for this truncated approach. In relying on Supreme Court precedent found in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) and *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-16, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983), Judge Kavanaugh found that the prima facie stage of the *McDonnell Douglas* analysis was "almost always irrelevant." 520 F.3d at 493. To support that point, Judge Kavanaugh quoted this Court's analysis in *Aikens*: "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff." *Brady*, 520 F.3d at 494, quoting, *Aikens*, 460 U.S. at 715. In sum, the *Brady* court recommended that courts focus on "one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee. . . ." 520 F.3d at 494.

In deciding the case at bar, the Fifth Circuit followed the reasoning of the *Brady* court and focused on

whether Luke "presented evidence that would allow a jury to discredit the employer's nondiscriminatory reason for firing her. . . ."[18] It affirmed the ruling of the district court below because Luke could not meet her burden on this point.

Like the Fifth Circuit, other circuits have adopted this approach. *See Riser v. Target Corp.*, 458 F.3d 817, 820–21 (8th Cir. 2006) (reasoning that, in a Title VII case, on review of a district court's grant of summary judgment, an appellate court should focus on the ultimate question of employment discrimination rather than on the prima facie burden so that the court may "see the forest through the trees"); *Dunaway v. Int'l Bhd. of Teamsters*, 310 F.3d 758, 762–63 (D.C. Cir. 2002) (explaining that because the defendant "presented its full defense to [Plaintiff's] claims when it moved for summary judgment . . . [a]s in *Aikens*, the proper question now is whether the employer unlawfully discriminated against the plaintiff"); *Wixson v. Dowagiac Nursing Home*, 87 F.3d 164, 170 (6th Cir. 1996) (applying *Aikens* to a review of a district court's summary judgment ruling and choosing not to decide whether the plaintiffs made out a prima facie case but "to determine whether the plaintiffs had a 'full and fair opportunity to demonstrate pretext' . . . and to demonstrate intentional discrimination by the defendants."); *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 296 (7th Cir. 1998) (finding that under *McDonnell Douglas* framework "it is unnecessary for this Court to determine

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[18] App., p. 2a.

whether a plaintiff has established a prima facie case where a defendant has advanced a legitimate, nondiscriminatory reason for its action."); *Morrison v. City of Bainbridge, GA*, 432 Fed. Appx. 877, 881, n. 2 (11th Cir. 2011) (declining to review whether the plaintiff made out a prima facie case because, *inter alia*, "when an employer has offered a legitimate, nondiscriminatory reason for an employee's termination, whether a plaintiff made out a prima facie case is almost always irrelevant in considering a motion for summary judgment").

B. The Fifth Circuit Correctly Applied *Young* To The Facts Of This Case.

Despite the overwhelming support for the Fifth Circuit's approach, Luke complains that the Fifth Circuit's analysis resulted in a misapplication of *Young* in that it allowed CPlace to avoid its obligation to proffer a nondiscriminatory reason for refusing to accommodate Luke when it accommodated others who were similar in their ability to work.[19] Luke simply ignores the Fifth Circuit's findings on this point.

While Respondent admits that the Fifth Circuit's word choice may have been confusing, the analysis is nonetheless correct. Because the Fifth Circuit chose not to decide whether Luke established a prima facie case, the *Young* analysis required CPlace to come forward with a legitimate, nondiscriminatory reason for its actions (i.e. failure to accommodate). On this point, the Fifth Circuit stated, "CPlace asserts that it *fired*

[19] Petition, p. 13.

Luke because being able to lift more than thirty-five pounds was essential to the job so certified nurses could lift residents when needed. It further contends that it did not offer light duty positions to its nurses."[20] Although it appears that the Fifth Circuit may have conflated a termination claim with Luke's failure-to-accommodate claim, there is no dispute that the only claim on appeal to the Fifth Circuit was Plaintiff's failure-to-accommodate claim.[21] Thus, despite the Fifth Circuit's reference to Luke's termination, it correctly found that CPlace's legitimate, nondiscriminatory reason for its actions (i.e. not accommodating Luke) was because "being able to lift more than thirty-five pounds was essential to the job" and because "it did not offer light duty positions to its nurses."[22]

Having found that CPlace proffered a legitimate, non-discriminatory reason for its actions, the next step in the *Young* analysis required Luke to show that her employer's legitimate nondiscriminatory reason was a mere pretext for discrimination. In describing a plaintiff's burden at this stage under the *Young* framework, this Court stated, "[t]he plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of

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[20] App., p. 5a (emphasis added).

[21] App., pp. 3a–4a, 16a–17a, n. 8.

[22] App., p. 5a.

pregnant workers." *Young*, 135 S. Ct. at 1354. Luke offered no such evidence here.

In applying the *Young* analysis, the Fifth Circuit found that Luke: " . . . tries to show that other workers were given accommodations that involved less lifting. But this involved receiving help from coworkers when lifting, and there is no indication that the employer directed these *ad hoc* accommodations."[23] And further, "none of the workers who allegedly received these accommodations were, like Luke, under a doctor's orders not to engage in heavy lifting." And, finally, in addressing the ultimate issue in the case—discrimination—the Fifth Circuit said, "[b]ecause Luke has not pointed to any other CNAs who were accommodated when they had a similar medical restriction on heavy lifting, there is no evidence that would allow a jury to conclude that CPlace is insincere when it says that such lifting is an essential part of the job."[24]

Luke mistakenly suggests that the Fifth Circuit's analysis allowed CPlace to avoid "explaining why it accommodated others but not the pregnant employee . . . " A fundamental flaw to this argument is the fact that the undisputed record evidence established, and both the District Court and Fifth Circuit found, that CPlace *did not* accommodate others.[25] Consequently, there was no argument to avoid on this point. That Luke does not agree with these factual findings is not

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[23] App., p. 5a.

[24] App., p. 6a.

[25] App., pp. 5a, 6a, 14a.

a basis for this Court to grant certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is ***rarely*** granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.") (emphasis added).

While Luke argues that a review of this case would likely result in a finding of pretext, her confidence is overstated. Luke's pretext argument is based solely on the premise that CPlace accommodated others. This, however, is a false factual premise that was squarely rejected by both the District Court and the Fifth Circuit.[26]

C. The District Court Decision Is Also Consistent With *Young*.

Finally, Luke asks this Court to accept her Petition because the District Court opinion, like the Fifth Circuit opinion, also conflicts with *Young*. More specifically, Luke complains that the District Court interpreted *Young's* requirements for a prima facie case too narrowly. As noted above, the Fifth Circuit did not address Luke's prima facie case and it is not this Court's practice to review the opinion of a lower court particularly where, as here, it is fact intensive. *See Salazar-Limon v. City of Houston, Tex.*, 137 S. Ct. 1277, 1278, 197 L. Ed. 2d 751 (2017) (Concurrence by Alito, with Thomas joining) ("we rarely grant review where the thrust of

[26] App., pp. 5a, 6a, 14a.

the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case.").

In sum, Luke has not shown that the Fifth Circuit's analysis was inconsistent with the burden-shifting framework established by this Court in *Young*. Therefore, there is no compelling reason to grant certiorari on this issue and Luke's Petition should be denied.

III. The Petition Should Be Denied Because The Fifth Circuit's Decision Is Not In Conflict With The Decisions Of Any Other Appellate Court.

Next, Luke argues that her Petition should be granted because the Fifth Circuit's decision is at odds with a decision by the Eighth Circuit in *Deneen v. Northwest Airlines, Inc*., 132 F.3d 431 (8th Cir. 1987) which recognized that pregnant employees could be proper comparators for purposes of establishing pretext in a pregnancy discrimination claim. Luke overstates the conflict. And, to the extent any conflict exists, it is not a compelling conflict which requires review by this Court.

A. There Is No Conflict With The Eighth Circuit As Luke Claims.

Luke contends that the Fifth Circuit's opinion is flawed because it failed to properly consider Luke's evidence regarding the treatment of other pregnant

workers.[27] Luke's purported evidence of other pregnant workers involved her mischaracterization that other pregnant workers were accommodated with varying forms of assistance.[28] The Fifth Circuit considered this evidence and rejected it: "[Luke] tries to show that other workers were given accommodations that involved less lifting. But this involved receiving help from coworkers when lifting, and there is no indication that the employer directed these *ad hoc* accommodations."[29] And, further, "none of the workers who allegedly received these accommodations were, like Luke, under a doctor's orders not to engage in heavy lifting."[30] The "workers" referred to in the Fifth Circuit opinion are the other pregnant workers that Luke claimed had been accommodated by CPlace.[31] The Fifth Circuit found no merit to this evidence.

Notably, however, the Fifth Circuit did not address *Deneen* in its opinion nor did it directly address the issue of whether pregnant employees were proper comparators under the *Young* analysis. Thus, there is nothing in the Fifth Circuit decision to suggest it contradicts *Deneen* in any way. Moreover, the Eighth Circuit limited its ruling in *Deneen* to the unique facts of that particular case. *Deneen*, 132 F.3d at 437-38.

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[27] Petition, Point II, p. 18.

[28] Petition, p. 20.

[29] App., p. 5a.

[30] App., p. 6a.

[31] Petition, p. 4.

Consequently, *Deneen* has little, if any, application outside those unique circumstances.

B. Luke's Real Agenda Is To Overturn The District Court Ruling Which Correctly Applied *Young* To The Facts Of The Case.

Luke's real purpose on this point is to seek review of the District Court's ruling rejecting her prima facie case. That is, Luke does not agree with the District Court's application of controlling precedent to the facts of her case. This is not a legitimate basis for review. Sup. Ct. R. 10.

Nonetheless, the District Court's ruling below was proper. In accordance with *Young*, a plaintiff alleging "that the denial of an accommodation constituted disparate treatment" under the second clause of the PDA may make out a prima facie case of discrimination by showing that (1) she belongs to the protected class, (2) she sought accommodation, (3) the employer did not accommodate her, and (4) the employer did accommodate others "similar in their ability or inability to work." *Id*. at 1354. Applying this evidentiary standard, the District Court found that Luke could not meet her prima facie burden because there was no evidence that CPlace accommodated others who were similar in their ability or inability to work. As the District Court stated, " . . . Plaintiff has failed to do what *Young* requires. That is, to present evidence that 'light duty' was

an accommodation that Defendant afforded to others similar in their ability or inability to work."[32]

Luke argues that the District Court ruling was flawed because it interpreted the fourth element of the prima facie case too narrowly. That is, Luke contends that when considering whether CPlace accommodated others similar in their ability or inability to work, the District Court should have considered evidence of how Luke, herself, was treated during the time period that she was not pregnant (all of two months). Luke offers no relevant legal authority to support this position. Indeed, the scant cases cited by Luke in her Petition are district court cases addressing discriminatory termination claims, not failure-to-accommodate claims under the *Young* standard. Luke has not identified a single appellate court decision that dictates her result.

Additionally, Luke argues that the District Court's analysis is flawed because it only considered the accommodation of "light duty" when it should have evaluated whether CPlace provided any accommodations to non-pregnant employees. Luke's reading of *Young* is both nonsensical and contrary to the Court's rejection of the "most-favored-nation" status urged by the plaintiff in *Young*. As this Court stated in *Young*:

> The problem with Young's approach is that it proves too much. It seems to say that the statute grants pregnant workers a "most-favored-nation" status. As long as an employer provides one or two workers with an

[32] App., p. 14a.

> accommodation . . . then it must provide similar accommodations to all pregnant workers (with comparable physical limitations), irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria."

Young, 135 S. Ct. at 1349-50.

Even while rejecting the most-favored-nation approach, the Supreme Court recognized that both the comparators (as well as their respective limitations) and the accommodations at issue must be similar. It would make no sense to urge otherwise in the context of a disparate treatment claim. The inquiry is not whether any accommodations have ever been provided to any employees (the most-favored-nation approach rejected by *Young*), it is whether employees similar in their ability or inability to work, i.e. employees requiring light duty due to lifting restrictions, were either provided or denied accommodation based upon pregnancy. In short, the District Court correctly focused on light duty because it is inextricably intertwined with the analysis of whether employees similar in their ability or inability to work were treated differently. The District Court then correctly determined that, in light of the undisputed facts, Luke's claims failed because CPlace never provided light duty to any other employees.

Luke's argument that CPlace could have provided other accommodations is flawed for several other reasons. The most important of these reasons is the fact that Luke is asking the Court to engage in a fiction: an

irrelevant analysis of hypothetical accommodations she never requested. That inquiry is made even more theoretical insofar as it requires this court to ignore her own testimony that given her lifting restriction, she could not perform her job as a CNA. The argument that something short of light duty could have been considered is contrary to Luke's clear and unmistakable testimony that her restrictions prevented her from working as a CNA.

To the extent that Luke is attempting to argue that "lifting assistance" is a form of job modification that CPlace should have considered in light of her restrictions, even the ADA does not require job modification that eliminates an essential function of a position.[33] *See Lang v. Wal-Mart*, 813 F.3d 447 (1st Cir. 2016) (because lifting up to 60 pounds was essential, employee's "proposed accommodation—excusing her from manual lifting— is a non-starter" because "an employer is not required to accommodate an employee by exempting her from having to discharge an essential job function."); *Minnihan v. Mediacom Communications*

[33] It is important to note that this is not a failure to accommodate claim under the Americans with Disabilities Act ("ADA"), this is a disparate treatment claim under Title VII. Unlike in the context of an ADA claim, the question at the prima facie case stage of a PDA claim is not whether some accommodation could have been provided, it is whether a particular accommodation was requested and denied while being provided to others similar in their ability or inability to work. In other words, elements two and three of the prima facie case are necessarily evaluated with respect to the particular accommodation requested. To find otherwise would be to create a claim for hypothetical disparate treatment.

Corp., 779 F.3d 803 (8th Cir. 2015) (because driving was an essential function of the plaintiff's job, the employer was not required to restructure the job to eliminate driving); *Snowden v. Trustees of Columbia University*, 612 Fed. Appx. 7 (2d Cir. 2015) (sorting and filing were essential for a mail clerk's job, as such, she was not qualified where she could not perform those functions without "help" from another employee); *James v. Hyatt Regency Chicago*, 707 F.3d 775 (7th Cir. 2013) (holding that an employer does not need to reassign essential functions, in this case, certain lifting and bending duties, as a reasonable accommodation).

Thus, transfer to a light duty position was the only accommodation that would have permitted Luke to continue work (and, of course, was the precise accommodation she sought). Thus, the District Court properly confined its analysis to evaluating whether there was evidence that CPlace provided light duty to non-pregnant employees. The undisputed evidence before the District Court was that it did not. Accordingly, the District Court's decision was proper.

In sum, Luke has not shown a conflict among any of the circuit courts on an important matter that requires this Court's review. On the contrary, Luke is simply seeking to overturn the District Court's factual and legal finding that she failed to establish a prima facie case of pregnancy discrimination. It is not the province of this Court to overturn a lower court's application of a properly stated rule of law to undisputed

record evidence. For this reason, Luke's Petition should be denied.

CONCLUSION

There is no "compelling reason" to grant certiorari in this case. Luke's argument that the Fifth Circuit failed to follow Supreme Court precedent in *Young* is overstated. Likewise, Luke's argument that the Fifth Circuit's decision conflicts with the Eighth Circuit's opinion in *Deneen* is simply incorrect. In truth, Luke seeks to overturn a lower court's application of a properly stated rule of law to undisputed record evidence. Luke has not met the standard for granting a petition of certiorari under Rule 10 and, therefore, her Petition should be denied.

Respectfully submitted,

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