No. 19-233

IN THE

Supreme Court of the United States

ERYON LUKE,

Petitioner,

v.

CPLACE FOREST PARK SNF, L.L.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner, Eryon Luke, seeks a writ of certiorari of the Fifth Circuit's decision that held her failure-to-accommodate claim fails because she was unable to show, as required by the fourth prong of the *McDonnell Douglas* that Respondent's reason to accommodate was not pretextual. The Fifth Circuit committed significant error by failing to properly apply the Court's holding in *Young,* supra Petitioner now responds to objections raised by Respondent to her Petition for Writ of Certiorari as follows:

I. Petitioner's Petition for Writ of Certiorari does assert compelling issues regarding whether *Young vs. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015) been applied correctly.

II. The Fifth Circuit's decision in which Petitioner Eryon Luke is seeking a writ of certiorari conflicts with the Court's new framework in reviewing cases under the modified McDonnell test rendered in *Young vs. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015).

III. There is a conflict regarding the Fifth Circuit decision pertaining to the application and type of comparators that maybe used in determining whether a pretext exist concerning an employer's reason for denying an accommodation in contradiction to those allowed by the Eighth Circuit as enunciated in *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431 (8th Cir. 1987).

ARGUMENT

The Fifth Circuit committed legal error by failing to properly apply the Court's holding in *Young*, supra. It failed to apply the modified McDonnell Douglas analysis that the Court outlined for cases involving denial of a pregnancy accommodation under the Pregnancy Discrimination Act; hereinafter referred to as the PDA, and failed to consider comparator evidence that the plaintiff proffered in support of her case as stated in argument herein as follows:

I. Petitioner's Petition for Writ of Certiorari does assert compelling issues regarding whether *Young vs. United Parcel Service, Inc.*,135 S.Ct. 1338 (2015) been applied correctly.

Contrary to Respondent's assertion, Petitioner does present significant issues of importance. Respondent's assertion that Luke's writ should be rejected on the basis that the Fifth Circuit's decision was unpublished is unsound.

Respondent cites Justice Clarence Thomas' dissent in *Plumley vs. Austin* 135 S. Ct. 828, 831 (2015) as a basis for denial of certiorari due to an opinion being unpublished; however, upon review of Justice Thomas dissenting opinion it states the opposite. He argues that the court should have granted certiorari to review the unpublished decision of the 4th U.S. Circuit Court of Appeals in *Plumley*. Justice Thomas writes:

> "True enough, the decision below is unpublished and therefore lacks precedential force in the

> Fourth Circuit. *Minor* v. *Bostwick Labs., Inc.*, 669 F. 3d 428, 433, n. 6 (CA4 2012). But that in itself is yet another disturbing aspect of the Fourth Circuit's decision, and yet another reason to grant review. The Court of Appeals had full briefing and argument on Austin's claim of judicial vindictiveness. It analyzed the claim in a 39-page opinion written over a dissent. By any standard—and certainly by the Fourth Circuit's own—this decision should have been published. The Fourth Circuit's Local Rule 36(a) provides that opinions will be published only if they satisfy one or more of five standards of publication. The opinion in this case met at least three of them: it "establishe[d] . . . a rule of law within th[at] Circuit," "involve[d] a legal issue of continuing public interest," and "create[d] a conflict with a decision in another circuit." Rules 36(a)(i), (ii), (v) (2015). It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit."

Petitioner's case on appeal to the Fifth Circuit was also fully briefed, oral arguments were heard after requested, and a written decision given. Petitioner contends that the Fifth Circuit's decision involves a legal issue of continuing public interest and created a conflict with a decision in another appellate court, more specifically the Eighth Circuit.

As further Pointed out in a 2015 ABA article citing a New York Times article, it was said:

> "The Times points out that Thomas isn't the only Supreme Court justice to have raised questions about unpublished opinions. In a 1991 dissent, Justice Harry A. Blackmun said nonpublication "must not be a convenient means to prevent review.
>
> Justice John Paul Stevens said in a 2006 interview he was more likely to grant review of unpublished decisions "on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify."[1]

Federal Rule of Appellate Procedure 32.1 permits attorneys to cite to federal courts of appeals their unpublished opinions issued in 2007 or later.[2] Respondents position that Petitioner's writ should be denied without further justification because the Fifth Circuit deemed it of no precedential value fails to recognize that the Federal Rules allow such opinions to be cited in support of or contradiction to a legal premise. To deny review solely on the basis that a decision is unpublished would weaken our system of review as stated by William D. Bader and David R. Cleveland as follows:

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1. Are some opinions unpublished to avoid review? Thomas dissent highlights the issue by DEBRA CASSENS WEISS FEBRUARY 4, 2015, 6:15 AM CST

2. "Citing Unpublished Federal Appellate Opinions Issued Before 2007" by Robert Timothy Reagan of Federal Judicial Center, March 9, 2007

> "Some decisions failed to locate any principle of jurisprudence that would justify the creation of unpublished opinions and non-precedential precedents. In fact, the whole idea of justifying such a fundamental departure from the common law's treatment of precedent was dubbed a "morass of jurisprudence," and no further inquiry was made into the propriety of courts removing their decisions from the body of precedent. Without any jurisprudential justification or even open examination, our federal judicial system has abandoned the core mechanism of the common law in order to manage the increased caseload. By creating and perpetuating a system of non-precedential decision-making within our common law courts, it has unwittingly and unreflectively weakened the cornerstone of our system of justice."[3]

The Court sought to clarify the meaning of the PDA in its decision in *Young*; however, the Fifth Circuit still has veered away from the reasoning set forth. Although the PDA has been around for 40 years, pregnancy discrimination is still a reality for many workers. Certainly, Respondent's argument that this case has no precedential value is clearly incorrect given there is a significant deviation by the Fifth Circuit regarding its interpretation of the modified McDonell test and failure to determine what type of comparators may be used.

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3. "Precedent and Justice" Valparaiso University ValpoScholar Law Faculty Publications Law Faculty Presentations and Publications 2011, William D. Bader David R. Cleveland Valparaiso University,

"Giving birth should be your greatest achievement, not your greatest fear."[4] A pregnant woman should not have to fear whether she will be able to take care of her child because she loses her job when giving her child life. Clarity regarding a pregnant woman's right under the Pregnancy Discrimination Act as further defined under *Young,* supra. would help alleviate that fear.

II. The Fifth Circuit's decision in which Petitioner Eryon Luke is seeking a writ of certiorari conflicts with the Court's new framework in reviewing cases under the modified McDonnell test rendered in *Young vs. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015).

The 5th Circuit's decision held Petitioner's failure-to-accommodate claim fails because she was unable to show, as required by the fourth prong of the *McDonnell Douglas* that Respondent's reason to accommodate was not pretextual. The only stated reason for denying an accommodation by Respondent was that they did not offer light duty giving no further explanation. The Court's ruling leads to the conclusion that the Fifth Circuit is relying on its Pre- Young precedent that a pregnant woman was not entitled to an accommodation if they could not perform essential functions of her job, As a practical matter, the 5th Circuit's ruling allows an employer to escape liability by merely claiming they do not offer light duty without having to provide further explanation as required by *Young*, supra. The Court's acceptance without further clarification meant that if a pregnant woman

4. Statement of American singer and actress Mary Weidman

needed an accommodation in order to work when light duty was required, she could never meet the fourth prong of showing pretext. *Young* modified the standard regarding the obligation of employer regarding its nondiscriminatory reason. See *Young*, 135 S. Ct. at _____ which states:

> "The employer may then seek to justify its refusal to accommodate the plaintiff by relying on "legitimate, nondiscriminatory" reasons for denying her accommodation. 411 U. S., at 802. But, consistent with the Act's basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ("similar in their ability or inability to work") whom the employer accommodates. After all, the employer in Gilbert could in all likelihood have made just such a claim."

Respondent's only stated reason for denying Petitioner light duty was that it did not offer such. With its holding in *Luke*, the Fifth Circuit has, in effect, reinstated the satisfactory performance requirement by permitting employers to escape their obligation to accommodate pregnant employees if the employer says that the employee could not perform the essential functions of her job. If the *Luke* ruling is allowed to stand, pregnant workers in the Fifth Circuit will once again be unable to get necessary accommodations if they need them in order to do their jobs – even if the employer gives accommodations to others, such as those injured on the job, who are unable to perform the essential functions of their jobs without accommodation.

The Fifth Circuit's opinion in Luke deviates from the standard enunciated in *Young.* After assuming Luke had presented a sufficient prima facie case, the panel accepted the employer's stated reason for terminating Luke, namely, that it did not provide light duty thereby essentially denying her the ability to work because she could not "perform an essential aspect of her job," which it found to be the "ultimate question." Slip op. at 3-4. But *Young* directed that, instead, it should have considered whether Luke's employer had proffered a legitimate nondiscriminatory reason for refusing to accommodate her when it did accommodate non-pregnant employees who were similar in their ability to work, and whether the proffered reason was based on something other than the employer's cost or convenience. See *Young*, 135 S. Ct. at 1354 (describing second step of analysis). The Fifth Circuit's opinion's deviation from *Young* is underscored by the fact that Peggy Young had a lifting restriction, *Young*, 135 S. Ct. at 1344, and whether she could perform an essential aspect of her job never entered this Court's analysis. The Fifth Circuit's avoidance of the refusal to accommodate claim allowed the employer to avoid explaining why it accommodated others but not the pregnant employee – thereby exempting the employer from meeting the second step of the *Young* framework and preventing Luke from challenging its explanation in the third step of that framework. It allowed the employer to benefit from a fact pattern that it had itself created: the only reason Luke could not perform all of the functions of her job is that the employer refused to accommodate her with lifting assistance or job modification, even though it provided both to other employees.

The approach taken in the Fifth Circuit's opinion conflicts with the spirit and letter of *Young* in additional

ways. It distorted Luke's refusal-to-accommodate claim into a termination claim, even though Young made clear that the refusal to accommodate when similarly-abled non-pregnant employees are accommodated is a presumptive violation of the PDA. If allowed to stand, this distortion would allow employers to insulate themselves from PDA liability by first denying pregnant employees the accommodations they need – regardless of whether they accommodate nonpregnant employees who are similar in their ability or inability to work – and then terminating them for not being capable of performing all of their job duties. The conflict with *Young* arises because the Fifth Circuit's opinion deemed the employer's reason for termination to be the "ultimate question" (slip op. at 4) – even though, according to *Young*, the ultimate question is "why, when the employer accommodated so many, could it not accommodate pregnant women as well?" Id. at 1355.

Rather than merely consider whether Luke had"offer[ed] evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act," *Teamsters v. United States*, 431 U.S. 324, 358 (1977) (emphasis added), the court instead effectively demanded that she "succeed on 'an ultimate finding of fact as to' a discriminatory employment action." *Young*, 135 S. Ct. at 1354 (quoting Furnco, 438 U.S. at 576). The analytical framework used by the Fifth Circuit to reach its legal conclusions is contrary to the modified McDonnell Douglas framework enunciated in Young. More specifically, The Fifth Circuit's legal analysis regarding a legitimate nondiscriminatory reason was too narrowly defined considering the Court's decision in *Young*. These holding flouts *Young's* directive, poses a nearly insuperable bar to liability, and should not stand.

III. There is a conflict regarding the Fifth Circuit decision pertaining to the application and type of comparators that maybe used in determining whether a pretext exist concerning an employer's reason for denying an accommodation in contradiction to those allowed by the Eighth Circuit as enunciated in *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431 (8th Cir. 1987).

There is a wide variation among courts regarding what constitutes an appropriate comparator; however, the language of the Eighth Circuit is instructive regarding a pregnant woman being compared as a comparator to herself. Respondent does not dispute that the Fifth Circuit did not address Petitioner's contention that a pregnant woman could be considered as a comparator to herself pre-pregnancy as recognized in *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431 (8th Cir. 1987). Respondent's argument that the Fifth Circuit's silence on this issue suggest that there is no conflict is a false assumption. To the contrary, the Fifth Circuit's silence to Petitioner's claim that she should be compared to herself pre-pregnancy when she received lifting assistance was in fact a denial of the of that very principle as set forth in *Deneen*.

Petitioner asserts a compelling reason for grating its writ is due to the need for clarification of what constitutes a comparator. The Fifth Circuit refused to even address the issue; although, in *Deneen* where the plaintiff likewise presented evidence of pregnant comparators, the Eighth Circuit found the evidence relevant.

The Fifth Circuit brushed aside Luke's evidence regarding this form of comparator evidence, Further,

the Fifth Circuit based its decision on faulty factfinding asserted by Respondent.. The Fifth Circuit accepted Respondent's claim that its CNAs had a lifting requirement that Luke could not meet, despite Luke's evidence disputing the existence of a lifting requirement, and the absence of a claim or evidence from Respondent that it gave Luke a written job description that contained a lifting requirement. Moreover, Respondent's policies expressly required CNAs to get help to lift patients and heavy objects and, similar to *Deneen*, Respondent did not consistently require employees to be able to lift heavy amounts as shown by its practice of requiring employees to get assistance with lifting and providing modified work assignments that did not require lifting. Luke submits that the evidence of her being accommodated prior to being pregnant with lifting assistance was enough to raise a genuine issue of material fact regarding whether Respondent discriminated and to cast doubt on Respondent's proffered reason for its actions. Moreover, it raised the inference that Respondent did not require all CNAs to be able to engage in heavylifting, but rather demanded the ability to engage in heavy lifting only from Luke because her pregnancy complications restricted her lifting and Respondent could therefore use a lifting requirement to force Luke out of her job. The Fifth Circuit has refused to consider Luke's premise because it has failed to recognize that Luke could be compared to herself as a comparator regarding accommodations afforded to her pre-pregnancy.

CONCLUSION

In the matter of *Durham vs. Rural/Metro Corporation* bearing docket number 18-14687-pending before the United States Court of Appeals for the Eleventh Circuit, the Equal Employment Opportunity Commission filed an amicus brief in support of Petitioner Kimberlie Michelle Durham, alleging violation of the Pregnancy Discrimination Act in ways very similarly alleged by Petitioner Luke. In its statement of interest, the EEOC asserts:

> "The Equal Employment Opportunity Commission ("EEOC") is charged by Congress with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, which includes the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). In this case, the district court ruled that the plaintiff failed to establish the fourth prong of her prima facie case of pregnancy discrimination stemming from the company's failure to accommodate her pregnancy-related lifting restriction. The court's decision relied on abrogated caselaw and is contrary to the Supreme Court's decision in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015).
>
> The EEOC has a strong interest in ensuring that *Young* is applied correctly. The court's misapplication hampers the EEOC's enforcement efforts and makes it more difficult for individuals acting as private attorneys

> general to pursue meritorious claims. We therefore offer our views to the Court pursuant to Federal Rule of Appellate Procedure 29(a)."

Petitioner, Eryon Luke asserts that the Fifth Circuit's misapplication of *Young,* will too make it more difficult for individuals to pursue meritorious claims. As such Petitioner asserts that her Petition for Certiorari sought herein should be granted.

Respectfully Submitted,

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