16-30992

United States Court of Appeals
For the Fifth Circuit

ERYON LUKE,

Plaintiff-Appellant,

v.

CPLACE FOREST PARK SNF, LLC,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF LOUISIANA; A BETTER BALANCE; CENTER FOR WORKLIFE LAW; 9TO5, NATIONAL ASSOCIATION OF WORKING WOMEN; CALIFORNIA WOMEN'S LAW CENTER; EQUAL RIGHTS ADVOCATES; GENDER JUSTICE; INDEPENDENT WOMEN'S ORGANIZATION OF NEW ORLEANS; LEGAL AID AT WORK; LEGAL MOMENTUM; LIFT LOUISIANA; LOUISIANA EMPLOYMENT LAWYERS ASSOCIATION; LOUISIANA NATIONAL ORGANIZATION FOR WOMEN; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; NATIONAL ORGANIZATION FOR WOMEN; NATIONAL ORGANIZATION FOR WOMEN OF MISSISSIPPI; NATIONAL WOMEN'S LAW CENTER; TEXAS EMPLOYMENT LAWYERS ASSOCIATION; TEXAS STATE CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN, INC.; WOMEN'S LAW CENTER OF MARYLAND, INC.; and WOMEN'S LAW PROJECT IN SUPPORT OF PLAINTIFF-APPELLANT ERYON LUKE

LENORA M. LAPIDUS
GILLIAN L. THOMAS
Women's Rights Project
American Civil Liberties Union Foundation
125 Broad Street
New York, N.Y. 10004
(212) 549-2500

BRUCE HAMILTON
American Civil Liberties Union
Foundation of Louisiana
P.O. Box 56157
New Orleans, LA, 70156
(504) 522-0617

DINA BAKST
ELIZABETH GEDMARK
CARA SUVALL
A Better Balance
80 Maiden Lane, Suite 606
New York, NY 10038
(212) 430-5982

ELIZABETH MORRIS
CYNTHIA THOMAS CALVERT
Center for WorkLife Law
UC Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
(415) 565-4640

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT……...iii

TABLE OF AUTHORITIES……iv

SUMMARY OF THE ARGUMENT……1

INTERESTS OF *AMICI CURIAE*……2

ARGUMENT...……2

I. The Supreme Court's Ruling in *Young v. United Parcel Service, Inc.* Reaffirmed the Pregnancy Discrimination Act's Central Purpose of Assuring Employers Do Not Force Women Off the Job Due to Pregnancy……..2

II. The District Court Erred by Rejecting Three Categories of Evidence at the Prima Facie Stage from which a Reasonable Factfinder Could Infer Discrimination……..7

A. An Employer's Refusal to Accommodate a Pregnant Employee While Maintaining a Formal Policy of Accommodating Non-Pregnant Employees Similar in Their Ability or Inability to Work is Evidence from which a Factfinder Could Infer Discrimination, Even in the Absence of Individual Comparators..…….8

B. An Employer's Differential Treatment of an Employee Before and After Her Pregnancy is Evidence from which a Factfinder Could Infer Discrimination..……..……..……10

C. An Employer's Practice of Providing Lifting Assistance to Some Pregnant Workers While Denying the Same Assistance to Pregnant Workers with Known Medical Conditions is Evidence from which a Factfinder Could Infer Discrimination ……..…12

III. The Lower Court Erred in Finding That *Young* Obligates the Employer to Consider Only the Specific Accommodation Proposed by the Plaintiff……15

A. Absolving the Employer of the Obligation to Engage in Dialogue About Potential Accommodations Places a Significant Burden on the Pregnant Worker……17
B. In the Absence of a Dialogue with the Pregnant Employee, the Employer's Reason for Denying Accommodation is Not "Sufficiently Strong" Under *Young*……...…..22

CONCLUSION……..24

CERTIFICATE OF COMPLIANCE……..25

CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS…….26

APPENDIX: INTERESTS OF *AMICI CURIAE* A-1

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record certifies that none of the *amici curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10 percent or more of its stock. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated: January 26, 2017

s/ Bruce Hamilton
BRUCE HAMILTON
American Civil Liberties Union
Foundation of Louisiana
P.O. Box 56157
New Orleans, LA 70156
(504) 522-0617

Attorney for Amici Curiae

TABLE OF AUTHORITIES

Cases

Brown v. Henderson, 257 F.3d 246 (2d Cir. 2001) 12
Browning v. Sw. Research Inst., No. 07-50434, 2008 WL 3009894 (5th Cir. Aug. 5 2008) 12
Burlington Indus. v. Ellerth, 524 U.S. 742 (1998) 18
Burlington N. & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006) 18
Burwell v. E. Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980) 3
Byrd v. Roadway Express, Inc., 687 F.2d 85 (5th Cir. 1982) 12
Calabro v. Westchester BMW, Inc., 398 F. Supp. 2d 281 (S.D.N.Y. 2005) 10
Chadwick v. WellPoint, Inc., 561 F.3d 38 (1st Cir. 2009) 14
Clanton v. Orleans Parish Sch. Bd., 649 F.2d 1084 (5th Cir. 1981) 3
Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) 3
Condit v. United Air Lines, Inc., 631 F.2d 1136 (4th Cir. 1980) 3
Connecticut v. Teal, 457 U.S. 440 (1982) 12
Cutrera v. Bd. of Supervisors of La. State Univ., 429 F.3d 108 (5th Cir. 2005) ... 19, 21
Deneen v. Nw. Airlines, Inc., 132 F.3d 431 (8th Cir.1998) 13
EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015) 18
EEOC v. Chevron Phillips Chem. Co., LP, 570 F.3d 606 (5th Cir. 2009) . 19, 20, 21
EEOC v. Chrysler Corp., 683 F.2d 146 (6th Cir. 1982) 3
Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 18
Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) 6, 8
General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 4, 5
Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670 (9th Cir. 1980) 3
Hitchcock v. Angel Corps, Inc., 718 F.3d 733 (7th Cir. 2013) 11
Hornsby v. Conoco, Inc., 777 F.2d 243 (5th Cir. 1985) 12
Hunter v. Mobis Alabama, LLC, 559 F. Supp. 2d 1247 (M.D. Ala. 2008) 11
Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011) 18
Laxton v. Gap, 333 F.3d 572 (5th Cir. 2003) 13, 14
Legg v. Ulster Cty., 820 F.3d 68 (2d Cir. 2016) 9, 17, 21, 22
Luke v. CPlace Forest Park SNF, LLC, No. 13-00402-BAJ-EWD, 2016 WL 424759 (M.D. La. Aug. 8, 2016) 8, 9, 10, 12, 15
Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995) 18

Martin v. Canon Bus. Solutions, Inc., No. 11 C 2565-WJM-KMT, 2013 WL 11132134 (D. Colo. Sept. 9, 2013).....11
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1971).....5, 9
Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).....4
Nieto v. L&H Packing Co., 108 F.3d 621 (5th Cir. 1997).....12
Teamsters v. United States, 431 U.S. 324 (1977).....8
Tobin v. Liberty Mut. Ins. Co., 433 F.3d 100 (1st Cir. 2005).....19
Young v. United Parcel Serv., Inc., 784 F.3d 192 (4th Cir. 2014).....5
Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015)..... *passim*

Constitution, Statutes, and Regulations

42 U.S.C. § 2000e(k).....2, 4

Other Authorities

H.R. Rep. No. 95-948 (1978).....4
S. Rep. No. 95-331 (1978).....3
S. Rep. No. 3-103 (1993).....19

SUMMARY OF THE ARGUMENT

In *Young v. United Parcel Service, Inc.*, the Supreme Court reaffirmed the central purpose of the Pregnancy Discrimination Act: to assure that pregnancy does not force women out of the workforce. The liability standards announced in *Young* specifically sought to place pregnant women who need accommodation of their pregnancy symptoms on equal footing with other workers temporarily unable to work at full capacity. But the District Court's decision in this case misinterpreted and misapplied those standards. It ignored several categories of relevant evidence as to Appellee CPlace Forest Park SNF, LLC's ("Appellee") policies and practices, while also excusing Appellee's failure to engage in any dialogue with Appellant Eryon Luke ("Luke") to identify reasonable accommodations that would have allowed her to keep working. As a result, the court approved Luke's being forced on leave, then fired, because of her pregnancy. These errors demand reversal. If they are permitted to stand, the Court's mandate in *Young* – and by extension, the letter and the spirit of the Pregnancy Discrimination Act – will remain unfulfilled.

INTERESTS OF *AMICI CURIAE*[1]

Amici are a coalition of 25 civil rights groups and public interest organizations committed to preventing, combating, and redressing sex discrimination and protecting the equal rights of female workers in the United States. More detailed statements of interest are contained in the accompanying appendix.

Amici have a vital interest in ensuring that the Pregnancy Discrimination Act is interpreted so as to fulfill, not impede, the law's promise of equal employment opportunity for women affected by "pregnancy, childbirth, and related medical conditions." *Amici* take no position on the other issues presented by this appeal.

ARGUMENT

I. The Supreme Court's Ruling in *Young v. United Parcel Service, Inc.* Reaffirmed the Pregnancy Discrimination Act's Central Purpose of Assuring Employers Do Not Force Women Off the Job Due to Pregnancy

Congress enacted the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) ("PDA"), to assure that pregnant women participate in the labor force on an equal footing. Prior to the PDA's passage, a wide array of employer policies disadvantaged female workers who became pregnant, none more so than policies that forced women to stop working when they became pregnant, regardless of their

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure and Local Rule 29.1, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

capacity to work. *See*, *e.g.*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634-35 (1974) (forcing pregnant teachers to take unpaid leave five months before they were due to give birth, with no guarantee of re-employment); *EEOC v. Chrysler Corp.*, 683 F.2d 146, 147 (6th Cir. 1982) (requiring pregnant women to take leave in the fifth month of pregnancy); *Clanton v. Orleans Parish Sch. Bd.*, 649 F.2d 1084, 1086-87 (5th Cir. 1981) (placing teachers on leave in the beginning of the sixth month of their pregnancy); *Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1137 (4th Cir. 1980) (requiring that flight attendants "shall, upon knowledge of pregnancy, discontinue flying"); *Harriss v. Pan Am. World Airways*, Inc., 649 F.2d 670, 673 (9th Cir. 1980) (same); *Burwell v. E. Air Lines, Inc.*, 633 F.2d 361, 363 (4th Cir. 1980) (same).

Congress recognized that workers with other temporary impairments did not suffer such systemic discrimination, or the resulting economic disadvantage. *See*, *e.g.*, S. Rep. No. 95-331, at 4 (1977) ("[T]he bill rejects the view that employers may treat pregnancy and its incidents as sui generis, without regard to its functional comparability with other conditions. . . . Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working."); H.R. Rep. No. 95-948, at 4 (1978) ("The bill would simply require that pregnant women be treated the same as other employees on the basis

of their ability or inability to work."). Indeed, the PDA was intended as a direct rebuke to the Supreme Court's conclusion, in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), that an employer's exclusion of pregnancy from an otherwise comprehensive temporary disability benefit policy was not discrimination "because of sex." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 677-78 (1983).

Thus, the PDA amended Title VII not only to make explicit the fact that discrimination "because of sex" included discrimination "because of . . . pregnancy, childbirth, and related medical conditions," but also to expressly mandate, by a second clause, that pregnant workers "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).

By 2014, though, these bedrock principles of the PDA had become muddied with respect to women's right to "accommodation" of their pregnancy-related needs. Several appellate courts had deemed pregnant women insufficiently "similar" to various categories of non-pregnant workers to warrant being treated the "same." Indeed, in the decision that ultimately was reversed by the Supreme Court in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015), the Fourth Circuit refused to find Peggy Young, a pregnant delivery driver with a lifting restriction, "similar" to three separate categories of workers, to whom UPS granted job modifications when they were unable to fulfill all of their duties as drivers:

workers entitled to accommodation under the Americans with Disabilities Act (ADA); those injured on the job; and those who had lost their commercial drivers' license – even if the reason was a DUI conviction, rather than physical impairment. *See Young v. United Parcel Serv., Inc.*, 784 F.3d 192, 196 (4th Cir. 2013).

Recognizing the "lower-court uncertainty about interpretation of the [PDA]" as to pregnancy accommodation, the Supreme Court granted *certiorari*. *Young*, 135 S. Ct. at 1348 (collecting cases). In its resulting opinion, the Court reaffirmed the three-part *McDonnell Douglas* burden-shifting framework applicable to disparate treatment cases that rely on circumstantial evidence *Id.* at 1345. It then articulated a modified *McDonnell Douglas* analysis for PDA cases arising out of the statute's second clause, aimed at fulfilling the PDA's animating principle of "respond[ing] directly to *Gilbert*" – that is, assuring that an employer not "treat pregnancy less favorably than diseases or disabilities resulting in a similar inability to work." *Id.* at 1353. First, a plaintiff makes out a prima facie case if she shows (1) that she "belongs to the protected class"; (2) "that she sought accommodation"; (3) "that the employer did not accommodate her"; and (4) "that the employer did accommodate others 'similar in their ability or inability to work.'" *Id.* at 1354. The employer then puts forward "legitimate, nondiscriminatory' reasons for denying her accommodation," which the plaintiff "may in turn show . . . are in fact pretextual." *Id.*

Applying this framework, the Court in *Young* reversed the Fourth Circuit's grant of summary judgment. It first went to great lengths to reiterate that the prima facie standard is "not intended to be an inflexible rule," "not onerous," and "not as burdensome as succeeding on an 'ultimate finding of fact as to' a discriminatory employment action." *Id.* at 1353-54 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575-76 (1978)). The Court explained that the prima facie case does not require the plaintiff "to show that those whom the employer favored and those whom the employer disfavored were similar in *all* but the protected ways." *Young*, 135 S. Ct. at 1354 (emphasis added).

The Court also offered an alternate pretext analysis plaintiffs may rely on for claims under the PDA's second clause:

> We believe that the plaintiff may reach a jury on [the issue of pretext] by providing sufficient evidence that the employer's policies impose a *significant burden* on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather – when considered along with the burden imposed – give rise to an inference of intentional discrimination.

Id. (emphasis added).

Notably, in defining that standard, the Court admonished that, "consistent with the Act's basic objective, [the employer's legitimate, nondiscriminatory] 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." *Id.* Rather, the twin

touchstones of this inquiry are feasibility and fairness: "[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?" *Id.* at 1355.

As discussed further below, the district court misapplied these standards, in contravention of *Young*'s – and the PDA's – letter and spirit, and its decision should be reversed.

II. The District Court Erred by Rejecting Three Categories of Evidence at the Prima Facie Stage from which a Reasonable Factfinder Could Infer Discrimination

The court below improperly concluded that Luke did not make out a prima facie case of pregnancy discrimination. By relying on an overly rigid interpretation of what proof will satisfy the fourth element – "that the employer did accommodate others similar in their ability or inability to work" – the District Court contravened *Young*. The court disregarded three categories of evidence that, alone and in concert, should have been sufficient to satisfy the prima facie test: (1) Defendant-Appellee's written policies of accommodating ADA-qualifying employees and providing lifting assistance to other workers; (2) accommodations extended to Luke herself prior to her pregnancy; and (3) accommodations extended to other workers who were pregnant, but whose pregnancies were demonstrably different from Luke's, and thus perceived to be less of a "problem" than hers. *Luke v. CPlace Forest Park SNF, LLC*, No. 13-00402-BAJ-EWD, 2016 WL 4247592, at

*3-*4 (M.D. La. Aug. 8, 2016).[2] 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). This holding flouts *Young*'s directive, poses a nearly insuperable bar to liability, and should not stand.

A. An Employer's Refusal to Accommodate a Pregnant Employee While Maintaining a Formal Policy of Accommodating Non-Pregnant Employees Similar in Their Ability or Inability to Work is Evidence from which a Factfinder Could Infer Discrimination, Even in the Absence of Individual Comparators

The *Young* case itself illustrates that a plaintiff can prevail on a pregnancy discrimination claim by looking to the employer's accommodation *policy* rather than whether, and what, accommodations were granted to *specific individuals*. In *Young*, the Court looked to UPS's policy of providing alternative and light-duty assignments to three groups of employees, while denying the same to the plaintiff, and concluded that she had not only satisfied the prima facie test but created a sufficient question of fact as to pretext. *Young*, 135 S. Ct. at 1354-55. In reaching that conclusion, the Court noted the facts of *McDonnell Douglas* itself, where the

[2] As outlined *supra* and in Luke's brief to this Court, Br. Pl.-Appellant 15-24, it also was error for the District Court not to consider, at the prima facie stage, additional evidence that Defendant-Appellee extended accommodations to non-pregnant employees. Because the nature of this proof is especially fact-specific, however, it is more appropriately addressed by Luke.

Court considered statistical evidence to raise an inference of pretext as to the employer's policy. *Id.* at 1355 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973)). Similarly, in one of just two appellate rulings issued since *Young*, the Second Circuit held that the employer's policy of accommodating employees injured on the job, but not pregnant workers, was sufficient to make out a prima facie case. *Legg v. Ulster Cty.*, 820 F.3d 68, 74 (2d Cir. 2016).

Here, Luke presented analogous evidence, but the court below did not consider it. She pointed to Appellee's written policy of making accommodations as required by the ADA and local law, and further, to Appellee's written policy that not only *afforded* lifting assistance to non-pregnant employees– but also *instructed* workers to seek such assistance, which Appellee in fact *provided* on many occasions. Br. Pl.-Appellant 13; Mem. Supp. Pl.'s Mot. Summ. J. 8-9, 14; Pl.'s Mem. Opp'n Def.'s Renewed Mot. Summ. J. 4; Pl.'s Suppl. Mem. Opp'n Def.'s Renewed Mot. Summ. J. 5. By disregarding this evidence, *Luke*, 2016 WL 4247592, at *2 n.3, *3, the District Court improperly turned the non-onerous prima facie standard into an insurmountable burden.

B. An Employer's Differential Treatment of an Employee Before and After Her Pregnancy is Evidence from which a Factfinder Could Infer Discrimination

The District Court also erred in disregarding Luke's evidence that she personally received lifting assistance before she became pregnant, but was refused the same assistance after she became pregnant. The District Court held that such

evidence was immaterial to the prima facie case because she had to show that "'light duty' was an accommodation that Defendant afforded to *others* similar in their ability or inability to work." *Luke,* 2016 WL 4247592, at *3 (emphasis in original). Unlike the defining features of other protected classes under Title VII such as race or national origin, however, pregnancy is temporary in nature. Contrary to the lower court's conclusion, therefore, comparing an employee before and during a pregnancy – or after a pregnancy, for that matter – may provide strong evidence from which a factfinder could infer discrimination and, therefore it is sufficient to make out a prima facie case.

For example, in *Calabro v. Westchester BMW, Inc.*, 398 F. Supp. 2d 281, 285 (S.D.N.Y. 2005), the court considered the PDA claim brought by a car saleswoman who was fired shortly after her pregnancy was disclosed. In rejecting the employer's contention that the plaintiff could not satisfy the "qualified" prong of the prima facie case because she temporarily could not drive (due to suspension of her driver's license), the court observed that, prior to her pregnancy, plaintiff's inability to drive a manual transmission car had not resulted in any discipline. *Id.* at 290; *see also Hitchcock v. Angel Corps, Inc.,* 718 F.3d 733, 742 (7th Cir. 2013) (treating an employee "significantly *differently*—and in a manner that a reasonable jury could find deviated anomalously from standard practice—*after* the supervisor learned of her pregnancy" is evidence of an employer's discriminatory animus) (emphasis in original); *Martin v. Canon Bus. Solutions, Inc.*, No. 11-cv-02565-

WJM-KMT, 2013 WL 11132134 (D. Colo. Sept. 9, 2013) (evidence that plaintiff received multiple awards as salesperson before announcing pregnancy, but began receiving negative reviews days afterward, is evidence of pretext); *Hunter v. Mobis Alabama, LLC.,* 559 F. Supp. 2d 1247, 1257-58 (M.D. Ala. 2008) (evidence that employer did not "care about" attendance policy until plaintiff became pregnant supported plaintiff's prima facie case even in the absence of comparator evidence).

A comparison between how the same employee is treated before and during a pregnancy, far from being irrelevant, is actually distinctly useful in determining whether that protected trait motivated the employer's adverse action. It offers highly probative evidence that the differential treatment is due to the one changed circumstance: the employee's pregnancy. The District Court improperly disregarded such evidence here.

C. An Employer's Practice of Providing Lifting Assistance to Some Pregnant Workers While Denying the Same Assistance to Pregnant Workers with Known Medical Conditions is Evidence from which a Factfinder Could Infer Discrimination

The District Court rejected out of hand Luke's evidence that pregnant co-workers who did not have documented pregnancy-related medical conditions or restrictions were given lifting assistance while she was not. It claimed that this evidence was immaterial because those workers are not "*outside* of [her] protected class." *Luke*, 2016 WL 4247592, at *3 (emphasis in original). This was error.

This Court has previously recognized that adhering to a strict rule limiting comparators to those outside the protected class is not always appropriate, as it may not capture the complexities of discriminatory animus. *Nieto v. L&H Packing Co.*, 108 F.3d 621, 624 n.7 (5th Cir. 1997) (quoting *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 246-47 (5th Cir. 1985)). *Accord Browning v. Sw. Research Inst.*, No. 07-50434, 2008 WL 3009894, at *4 n.5 (5th Cir. Aug. 5 2008); *Byrd v. Roadway Express, Inc.*, 687 F.2d 85, 86 (5th Cir. 1982) ("no single formulation of the prima facie evidence test may fairly be expected to capture the many guises in which discrimination may appear"). *Cf. Brown v. Henderson*, 257 F.3d 246, 252-53 (2d Cir. 2001) ("[D]iscrimination against one employee cannot be cured, or disproven, solely by favorable, or equitable, treatment of other employees of the same race or sex") (citing *Connecticut v. Teal*, 457 U.S. 440, 455 (1982)).

In the context of pregnancy, social science has confirmed that stereotypes and biases concerning pregnant – and later, parenting – workers are entrenched, and complex. This Court has found evidence that an employer "harbor[s] a stereotypical presumption about [an employee's] ability to fulfill job duties as a result of her pregnancy," *Laxton v. Gap*, 333 F.3d 572, 584 (5th Cir. 2003), to be probative of bias: "Discriminatory animus can be inferred from [an employer's] willingness to assume the worst." *Id.*

Because pregnancy by its nature is individualized and evolving in a way that most other protected traits are not, pregnant women are particularly susceptible to differential treatment within the class. For example, if an employer were shown regularly to retain pregnant workers in their first and second trimesters, but regularly to fire workers once they reached their third, there would be no question that the workers fired in their third trimester would have a proper claim of pregnancy discrimination despite the earlier favorable treatment.

Similarly, a pregnant worker with complications who is treated adversely because of stereotypical presumptions about her ability to work experiences discrimination even if other women with "easy" or "normal" pregnancies are treated well. In *Deneen v. Northwest Airlines, Inc.,* 132 F.3d 431, 437 (8th Cir. 1998), the Eighth Circuit found in favor of an airline customer service representative who was forced on leave after her doctor imposed a lifting restriction during the pregnancy. While the airline had deemed its lifting

requirement to be an insurmountable barrier to the plaintiff's continuing to work after it learned that she was suffering "pregnancy complications," it had permitted the plaintiff's pregnant co-workers to continue working. *Id.* at 437. The court found the distinction to be "circumstantial evidence also indicating a discriminatory animus on the basis of [plaintiff's] pregnancy related condition." *Id.* *Accord Laxton*, 333 F.3d at 583-84. *See also Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 42 n.4 (1st Cir. 2009) (in Title VII case brought by mother of four children – including 6-year-old triplets – where evidence showed decisionmakers held stereotyped views about mothers of small children, inference of animus not lessened by fact that successful candidate was mother of two children, aged 9 and 14; "[T]he stereotype that [plaintiff] complains of would arguably be more strongly held as to a mother of four children, three of whom were only six years old, than as to a mother of two older children.").

In this case, Luke presented evidence that while other pregnant workers were provided assistance with lifting, she was forced on to leave, and eventually fired, for requesting similar help. Br. Pl.-Appellant 6-7; Pl.'s Separate Statement of Material Facts Supp. Renewed Mot. Summ. J. ¶¶ 4, 11-12; Pl.'s Suppl. Mem. Opp'n Def.'s Renewed Mot. Summ. J. 3-8. The summary judgment record contained evidence that Luke had a pregnancy-related medical condition, was pregnant with twins, and had medical documentation of her lifting restriction, whereas the others did not. Decl. Rachael Carcamo 7-9, 21; Pl.'s Suppl. Mem.

Opp'n Def.'s Renewed Mot. Summ. J. 3-8. Based on this evidence, a reasonable factfinder could find that Appellee refused to accommodate Luke because of negative assumptions about her fitness to work that were based on the nature of her pregnancy and related medical conditions. That Appellee extended such accommodations to Luke's pregnant co-workers who, in contrast, were perceived as having "normal" pregnancies, did not preclude such a conclusion. Indeed, it is further evidence of bias against Luke.

III. The Lower Court Erred in Finding That *Young* Obligates the Employer to Consider Only the Specific Accommodation Proposed by the Plaintiff

The district court found that Luke failed to make out a prima facie case because the only accommodation she sought was "light duty," and she could not, in the court's estimation, show that any coworkers "similar in their ability or inability to work" were afforded light duty at the time of her request. In reaching that conclusion, the court noted Luke's contention that "her 'failure to accommodate claim is broader' than the 'light duty' accommodation that she sought," in that "[she] believes that she could have continued to work as a CNA throughout her pregnancy if she had been afforded increased 'lifting assistance and mechanical lifts.'" *Luke*, 2016 WL 4247592, at *3 (quoting Br. Opp. Summ. J., at 3, 4-6). Put differently, Luke argued that in addition to assigning her to an alternative position that did not require heavy lifting, Appellee also could have allowed her to continue working as a CNA but simply provided assistance with lifting – an accommodation

that, as discussed *supra*, she noted had been extended to other workers (including Luke herself).

The court rejected this argument, finding that "[i]t is self-evident that where, as here, Plaintiff sought a specific accommodation, *her PDA claim is limited to Defendant's denial thereof*." *Id.* at *3 (emphasis added).[3]

This conclusion is doubly flawed. First, it puts responsibility for identifying a reasonable accommodation solely on the pregnant employee, while absolving the employer of any obligation to engage in a dialogue aimed at finding an *alternative* solution if her proposed accommodation is not workable. This standard gives employers not just a green light but also an incentive to "hide the ball" when it comes to accommodating pregnancy, thus posing a "significant burden" as defined by *Young*. Second, without having engaged in a dialogue with the pregnant worker about any other potential accommodations, the employer's stated legitimate, nondiscriminatory reason for denying her accommodation is not "sufficiently strong" under *Young* to avoid an inference of pretext.[4]

[3] The court went on to give a cursory review of Luke's evidence that other workers were allowed reprieves from heavy lifting before deeming it insufficient to satisfy the fourth prong of the prima facie case. *Id.* at *3 n.6.

[4] Although the court's decision occurred at the prima facie stage of the case, while the "significant burden" and "sufficiently strong" inquiries occur during the pretext phase, the court's unequivocal statement – "where, as here, Plaintiff sought a specific accommodation, *her PDA claim is limited* to Defendant's denial thereof" – improperly and artificially excludes relevant evidence not only from the prima facie inquiry but, ultimately, the entire analysis as to liability. In so doing, the court places on PDA plaintiffs the same burden of persuasion as other discrimination plaintiffs without the benefit of access to the full range of proof as to pretext.

A. Absolving the Employer of the Obligation to Engage in Dialogue About Potential Accommodations Places a Significant Burden on the Pregnant Worker

As noted above, in *Young*, the Supreme Court adopted a new framework that plaintiffs may use to show pretext for failure-to-accommodate claims that considers whether the employer's policies impose a *significant burden* on pregnant workers, and whether the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden. *Young*, 135 S. Ct. at 1354 (emphasis added). The Court did not define "significant burden," but it provided one example of proof that would create a genuine issue of fact: "[E]vidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers." *Id.*[5]

According to the district court, when a pregnant worker informs her employer of her need for accommodation, the employer need only passively receive her proposed solution, then grant or veto it. And in the case of a veto, even if the employer *knows* of another potential accommodation that would meet the employee's medical needs, the employer has no obligation to disclose it. Under the district court's framing, because the pregnant worker never asked for the particular

[5] In the one published decision since *Young* that has addressed the "significant burden" standard, *Legg*, 820 F.3d at 70, the Second Circuit reversed judgment for the defendant Department of Corrections that denied a pregnant corrections officer's request for light duty. Because the county's denial resulted in the officer being forced onto unpaid leave, the court concluded that sufficient questions of fact existed as to the "significant burden" inquiry to warrant a trial. *Id.* at 75-77.

accommodation that might have served both her and her employer's needs, her PDA claim is barred.

This one-sided guessing game contrasts starkly with the cooperative dialogue between employer and employee that the Supreme Court has long required to avoid escalation of conflicts – in myriad contexts, under a wide variety of statutory schemes. *See*, *e.g.*, accommodating religious practice under Title VII, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015); insulating workers from retaliation for engaging in protected activity under the Fair Labor Standards Act, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 17 (2011); insulating workers from retaliation for engaging in protected activity under Title VII, *Burlington N. & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006); encouraging employers to adopt preventive and remedial sexual harassment policies, *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998) *and Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998). This Court has recognized a similar obligation applies to employers covered by the Family and Medical Leave Act ("FMLA"), requiring them to inform a qualifying employee of her right to job-protected leave, *see Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 763 (5th Cir. 1995) ("We reject the contention that the FMLA requires employees not only to invoke the statute's protection by name, but to refer to the

specific subparagraph of the FMLA under which they claim protection. These are workers, not lawyers.").[6]

The most analogous context, of course, is the ADA, under which the employer is required to engage in an "interactive process" with qualifying workers needing accommodation.[7] *See EEOC v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 621 (5th Cir. 2009) (once an employee's need for accommodation under the ADA is "known" to the employer, it then is obligated to commence an "interactive process" – a "meaningful dialogue with the employee to find the best means of accommodating that disability") (citing *Tobin v. Liberty Mut. Ins. Co.*, 433 F.3d 100, 108 (1st Cir. 2005). *See also Cutrera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005) ("An employer may not stymie the interactive process of identifying a reasonable accommodation for an employee's disability by

---

[6] The court went on to observe that facilitating employees' access to their FMLA rights

> is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment." S. Rep. No. 3 at 4, *reprinted in* 1993 U.S.C.C.A.N. 3, 6–7. Significantly, none of these other federal labor laws granting benefits to employees requires those employees to refer to the specific statute, much less the specific statutory subsection, in order to avail themselves of its benefits.

66 F.3d at 763.

[7] That the interactive process arises pursuant to a different statutory scheme does not preclude its application in the PDA context. In fact, in *Young*, the Supreme Court characterized ADA-qualifying workers, as well as the other two categories of workers to whom UPS granted modified duty, as having "situation[s] [that] cannot reasonably be distinguished from Young's." *Young*, 135 S. Ct. at 1355.

preemptively terminating the employee before an accommodation can be considered or recommended.").

Indeed, *Chevron Phillips* is especially illustrative here. In that case, a female employee with Chronic Fatigue Syndrome ("CFS") presented her supervisor with two consecutive doctor's notes proposing different accommodations – first, reassigning her to a job location closer to home (so that she could avoid driving long distances while fatigued) or alternatively, retaining her at her current job location but allowing her to alternate between tasks and take more frequent breaks. 570 F.3d at 610-11. Her supervisor responded to the first note by stating, "No. We just can't take this. This isn't going to work," while he said nothing in response to the second note. *Id.* Ultimately, the employee was fired. *Id.* at 612.

The court, reversing the district court's summary judgment order, ruled that whether the company ("CPChem") engaged in the interactive process was a question for the jury:

> [As to the first note, a] jury . . . reasonably could find that, since CPChem knew that [the plaintiff] had required medical leave due to her CFS, it knew that the release related to this condition, and that she therefore had adequately communicated the nature of her condition and her requested accommodations. *Further, [the employee] was not required to come up with the solution (i.e., a CPChem location closer to home) on her own.* Under the ADA, once the employee presents a request for an accommodation, the employer is required to engage in the interactive process so that *together* they can determine what reasonable accommodations might be available.

570 F.3d at 621 (citing *Cutrera*, 429 F.3d at 113) (emphasis added). As to the

second note submitted by the plaintiff, this Court found that the employer's silence upon receiving it similarly failed the interactive process requirement. *Id.*

Requiring employers to collaborate with employees to identify solutions to a wide array of thorny workplace issues – including but not limited to potential accommodations of physical impairment – while excusing them from such collaboration when it comes to a pregnant worker's proposals is precisely the sort of *sui generis* disadvantage that the PDA is intended to remedy. The practical implications are obvious: regardless of how new to the workplace the employee is, or how familiar with the employer's past and present accommodations of other workers presenting a range of impairments, the pregnant worker alone is charged with identifying all of the potential accommodations that her employer reasonably could provide in order to mitigate her physical limitations. An employee is far less likely than her employer to possess the information necessary to identify a mutually-agreeable solution. She therefore is far more likely than her similarly-situated peers to have to stop working altogether, as occurred with Luke here. *See Legg*, 820 F.3d at 76 (finding plaintiff prison guard's being forced on leave by employer's policy of granting light duty only for occupational injuries posed "significant burden").

Given the well-settled standard in multiple legal contexts that demands a cooperative dialogue between employers and employees, an employer's "categorical[ ] fail[ure]" to extend such a benefit to pregnant workers constitutes a

"significant burden" under *Young*. 135 S. Ct. at 1354.

B. In the Absence of a Dialogue with the Pregnant Employee, the Employer's Reason for Denying Accommodation is Not "Sufficiently Strong" Under *Young*

As outlined *supra*, a plaintiff may raise an inference of pretext under *Young* by showing the employer's "legitimate, nondiscriminatory reason" for denying her accommodation is not "sufficiently strong" to justify the significant burden upon her. *Young*, 135 S. Ct. at 1354.

If mere cost or convenience does not meet the "sufficiently strong" standard, *Young*, 135 S. Ct. at 1354, nor should an employer's robotic refusal to engage the pregnant worker in a discussion that could lead to a solution ("we have no light duty at this time"). *See Legg*, 820 F.3d at 75 (finding insufficiently "strong" the defendant county's defense that it reserved light duty for prison guards injured on the job because New York's workers' compensation statute obligated it to pay those officers their full salary; such obligation did not preclude extending same benefit to pregnant workers). As detailed above, employers already are obligated to have such discussions with a large number of workers presenting a variety of other problems to solve.

In light of the foregoing, where an employer's stated justification for denying *any* accommodation to a pregnant worker is simply that the *particular* accommodation she requested was infeasible, *Young*'s criteria for raising an inference of pretext are satisfied. To paraphrase the Supreme Court, "[W]hy, when

the employer engaged in dialogue with so many, could it not engage in a dialogue with pregnant women as well?" A jury could reasonably conclude that that knee-jerk refusal to engage with Luke reflected pregnancy-based animus.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

Dated: January 26, 2017

Respectfully submitted,

s/ Bruce Hamilton

BRUCE HAMILTON
American Civil Liberties Union
Foundation of Louisiana
P.O. Box 56157
New Orleans, LA, 70156
(504) 522-0617

LENORA M. LAPIDUS
GILLIAN L. THOMAS
Women's Rights Project
American Civil Liberties Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

DINA BAKST
ELIZABETH GEDMARK
CARA SUVALL
A Better Balance
80 Maiden Lane, Suite 606
New York, NY 10038
(212) 430-5982

ELIZABETH MORRIS
CYNTHIA THOMAS CALVERT
Center for WorkLife Law
UC Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
(415) 565-4640

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

Dated: January 26, 2017

s/ Bruce Hamilton

BRUCE HAMILTON
American Civil Liberties Union
Foundation of Louisiana
P.O. Box 56157
New Orleans, LA 70156

Attorney for Amici Curiae

CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on January 26, 2017, I electronically filed the foregoing Brief of *Amici Curiae* American Civil Liberties Union; American Civil Liberties Union Foundation of Louisiana; A Better Balance; Center for WorkLife Law; 9to5, National Association of Working Women; California Women's Law Center; Equal Rights Advocates; Gender Justice; Independent Women's Organization of New Orleans; Legal Aid at Work; Legal Momentum; Lift Louisiana; Louisiana Employment Lawyers Association; Louisiana National Organization for Women; National Association of Women Lawyers; National Center for Law and Economic Justice; National Employment Lawyers Association; National Partnership for Women & Families; National Organization for Women; National Organization for Women of Mississippi; National Women's Law Center; Texas Employment Lawyers Association; Texas State Chapter of the National Organization for Women, Inc.; Women's Law Center of Maryland, Inc.; and Women's Law Project on Behalf of Plaintiff-Appellant Eryon Luke, with the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be

accomplished by the appellate CM/ECF system.

s/ Bruce Hamilton

BRUCE HAMILTON
American Civil Liberties Union
Foundation of Louisiana
P.O. Box 56157
New Orleans, LA 70156
Attorney for Amici Curiae

APPENDIX: INTERESTS OF *AMICI CURIAE*

The **American Civil Liberties Union** (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU, through its Women's Rights Project, has long been a leader in legal advocacy aimed at ensuring women's full equality and ending discrimination against women in the workplace, including pregnancy discrimination.

The **American Civil Liberties Union Foundation of Louisiana** (ACLU-LA) is the Louisiana affiliate of the American Civil Liberties Union. Its supporters share a commitment to defend the rights guaranteed by the Constitution. The ACLU-LA regularly appears before courts in Louisiana and other jurisdictions in cases involving employment discrimination, including cases, like this one, asserting the rights of women. The ACLU-LA has a strong interest in ensuring that the rights of Louisianians' Constitutional freedoms are not violated.

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through legislative advocacy, litigation, research, and public education, A Better Balance is committed to helping workers care for their families without risking their economic security. A Better Balance has been a

leader at the local, state, and national level in advancing the rights of pregnant and breastfeeding women in the workplace. The organization runs a legal clinic in which the discriminatory treatment of pregnant women can be seen firsthand. In 2014, A Better Balance opened a Southern Office providing services to low-wage workers and pushing for policy change in the Southeast United States.

The **Center for WorkLife Law** (WorkLife Law) at the University of California, Hastings College of the Law is a national research and advocacy organization widely recognized as a thought leader on the issues of work-family conflict, work accommodations for pregnant and breastfeeding employees, and family responsibilities discrimination. WorkLife Law collaborates with employers, employees, and lawyers representing both constituencies to ensure equal treatment in the workplace for pregnant women, nursing mothers, and other caregivers.

9to5, National Association of Working Women (9to5) is a national membership organization of women in low-wage jobs dedicated to achieving economic justice and ending discrimination. 9to5's members and constituents are directly affected by workplace discrimination, including pregnancy discrimination, and poverty, among other issues. They experience first-hand the long-term negative effects of discrimination on economic well-being, and the difficulties of seeking and achieving redress. 9to5's toll-free Job Survival Hotline fields thousands of phone calls annually from women facing these and related problems

in the workplace. The issues of this case are directly related to 9to5's work to end workplace discrimination and our work to promote policies that aid women in their efforts to achieve economic self-sufficiency. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their long-term economic well-being and that of their families.

The **California Women's Law Center** (CWLC) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy and education. CWLC's issue priorities include gender discrimination, reproductive justice, violence against women, and women's health. Since its inception in 1989, CWLC has placed an emphasis on eliminating all forms of gender discrimination, including discrimination against pregnant and breastfeeding women. CWLC remains committed to supporting pregnancy rights and accommodations in the workplace.

Equal Rights Advocates (ERA) is a national non-profit legal advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has pursued this mission by engaging in high-impact litigation, legislative advocacy, and other efforts aimed at eliminating discrimination and achieving gender and racial equity in education and employment. ERA attorneys have served as counsel and participated as amicus curiae in numerous cases involving the interpretation

and enforcement of Title VII of the Civil Rights Act of 1964 and other laws prohibiting discrimination against women in the workplace, including two pregnancy discrimination cases in which ERA helped to advance principles of interpretation that were later codified in the Pregnancy Discrimination Act of 1978 (PDA), *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified Sch. Dist. v. Berg*, 434 U.S. 158 (1977), as well as in post-PDA cases, such as *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009) and *Young v. United Parcel Service, Inc.*, *575 U.S.*__, 135 S. Ct. 1338 (2015). Twelve years after helping to pass landmark legislation requiring California employers to provide reasonable accommodations for pregnant workers, ERA released a groundbreaking report that highlights the importance of these protections for working women and families, *Expecting a Baby, Not a Lay-Off: Why Federal Law Should Require the Reasonable Accommodation of Pregnant Workers* (2012). ERA has a strong interest in ensuring that women's employment access and opportunities are adequately protected by a fair application of the Pregnancy Discrimination Act by courts.

Gender Justice is a non-profit advocacy organization based in the Midwest that works to eliminate gender barriers through impact litigation, policy advocacy, and education. Gender Justice helps courts, employers, schools, and the public better understand the root causes of gender discrimination, such as implicit bias and stereotyping. As part of its impact litigation program, Gender Justice acts as

counsel in cases involving gender equality in the Midwest region, including providing direct representation of pregnant employees and new parents facing discrimination in the workplace. Gender Justice also participates as *amicus curiae* in cases that have an impact in the region. The organization has an interest in protecting and enforcing women's legal rights in the workplace, and in the proper interpretation of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act of 1978.

The **Independent Women's Organization of New Orleans** is focused on supporting issues that affect women's lives and families. We advocate for paid family leave and for workplace protections. This case represents exactly the type of discrimination women face all too often. Our hope is that employers will seek fairer outcomes for pregnant women. Our work is to make sure these women feel supported.

Legal Aid at Work (formerly Legal Aid Society-Employment Law Center) is a public interest legal organization that advances justice and economic opportunity for low-income people and their families at work, in school, and in the community. Since 1970, Legal Aid has represented low-wage clients in cases involving a broad range of employment-related issues, including discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. Legal Aid has extensive policy

experience advocating for the employment rights of pregnant women and new parents. Legal Aid has a strong interest in ensuring that pregnant women and nursing mothers are granted the full protections of the Pregnancy Discrimination Act and other anti-discrimination laws.

Legal Momentum, the Women's Legal Defense and Education Fund, is a leading national non-profit civil rights organization that for nearly 50 years has used the power of the law to define and defend the rights of girls and women. Legal Momentum has worked for decades to ensure that all employees are treated fairly in the workplace, regardless of their gender or sexual orientation. Legal Momentum has litigated cutting-edge gender-based employment discrimination cases, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and has participated as amicus curiae on leading cases in this area, including *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Legal Momentum has also worked to secure the rights of women under state constitutions, including the right of lesbians to marry.

Lift Louisiana works in diverse ways to advance the interests and well-being of pregnant and parenting women and their families and to protect their constitutional and human rights including advocating for solutions that advance maternal, fetal and child health. Lift Louisiana, members of its Advisory Board,

volunteers, and donors, support pregnant women's dignity and autonomy through laws and policies preventing pregnancy discrimination, affording workplace fairness and providing benefits meaningfully designed to meet the needs of pregnant, birthing, and parenting women. Lift Louisiana is concerned that the employers' decision to deny Eryon Luke accommodation of her lifting restriction during her pregnancy, violates the standards established by the Supreme Court's 2015 *Young v. United Parcel Service, Inc.* decision.

The **Louisiana Employment Lawyers Association** (LELA) is a voluntary membership organization of Louisiana lawyers who regularly represent employees in labor, employment, and civil rights disputes. LELA members represent their clients in litigation throughout the state of Louisiana, and in the federal courts throughout the Fifth Circuit. Because the employment law established by this Court directly affects many (if not most) of its members' clients, LELA submits that its role as *amicus curiae* in this case is appropriate.

Louisiana National Organization for Women (Louisiana NOW) has chapters in New Orleans, Baton Rouge, and Shreveport and is one of the founding members of the Legislative Agenda for Women, a coalition of women's rights organizations. NOW is a multi-issue, multi-strategy organization that takes a holistic approach to women's rights. Our priorities are winning economic equality and securing it with an amendment to the U.S. Constitution that will guarantee

equal rights for women; championing abortion rights, reproductive freedom and other women's health issues; opposing racism; fighting bigotry against the LGBTQIA community; and ending violence against women.

The mission of the **National Association of Women Lawyers** (NAWL) is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and collective success. As part of its mission, NAWL promotes the interests of women and families by participation as amicus curiae in cases of interest. That includes cases of discrimination against working women because they are pregnant. Such discrimination negatively impacts women in their careers as well as in their basic freedom to decide whether to bear children and become a mother.

The **National Center for Law and Economic Justice** (NCLEJ) has provided legal representation, support, and advice to people living in poverty and their advocates since 1965. Historically, NCLEJ advocated for the rights of public benefits recipients. While we continue our public benefits work, in more recent years, we have included advocating for the rights of low income workers in our efforts to protect the rights of low income individuals and communities, including

low income pregnant women. NCLEJ is committed to ensuring that all workers are afforded dignity and fair treatment on the job.

The **National Employment Lawyers Association** (NELA) is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The **National Organization for Women** (NOW) Foundation is a 501(c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing women's health and reproductive rights, among other objectives, and works to assure that women are treated fairly and equally under the law. Discrimination by employers

against pregnant workers is pervasive despite the 1978 Pregnancy Discrimination Act and the U.S. Supreme Court's 2015 decision in *Young v. United Parcel Service, Inc.* Accommodation claims by pregnant workers must not be made onerous and an appellate court ruling that interprets *Young's* liability standards expansively is needed. That outcome is essential for the 75 percent of women currently entering the workforce who will become pregnant while employed and to the more than 40 percent of families with a mother who is the primary breadwinner.

The **National Organization for Women of Mississippi** advocates for women's equality in our state. Women's economic security is one of our priority issues. Mississippi is one of the poorest states in our nation and rated very low for women's economic security. The ability to continue to work during a pregnancy is essential to economic security for women.

The **National Partnership for Women & Families** (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help achieve fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of work and family. Since its founding in 1971, the National Partnership has worked to advance equal employment opportunities and health through several means, including by taking a leading role in the passage of the

Pregnancy Discrimination Act of 1978 and the Family and Medical Leave Act of 1993 and by challenging discriminatory employment practices in the courts.

The **National Women's Law Center** is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women and women of color, and has participated as counsel or *amicus curiae* in a range of cases before the Supreme Court and the federal Courts of Appeals to secure the equal treatment of women under the law, including numerous cases addressing the scope of Title VII's protections. The Center has long sought to ensure that rights and opportunities are not restricted on the basis of pregnancy and gender stereotypes, and that all individuals enjoy the protection against such discrimination promised by federal law.

The **Texas Employment Lawyers Association** (TELA) is a voluntary membership organization of Texas lawyers who regularly represent employees in labor, employment, and civil rights disputes. TELA members represent their clients in litigation throughout the state of Texas, and in the federal courts throughout the Fifth Circuit. Because the employment law established by this

Court directly affects many (if not most) of its members' clients, TELA submits that its role as *amicus curiae* in this case is appropriate.

The **Texas State Chapter of the National Organization for Women, Inc.** (Texas NOW) is the Texas subunit of the National Organization for Women, Inc. (NOW). Texas NOW consists of the more than 2,500 dues-paying NOW members residing in Texas and all Texas-based local NOW chapters and working groups. The National Organization for Women, Inc. (NOW) is a nationwide, nonprofit, nonpartisan organization with members and chapters in all 50 states who work at the grassroots level to promote feminist ideals, lead societal change, eliminate discrimination, and achieve and protect the equal rights of all women and girls in all aspects of social, political, and economic life. Ending gender-based employment discrimination, specifically including discrimination on account of pregnancy, has long been a top priority for NOW at both the national and state levels.

The **Women's Law Center of Maryland, Inc.** is a nonprofit membership organization established in 1971 with a mission of improving and protecting the legal rights of women, especially regarding gender discrimination in the workplace and in family law issues. Through its direct services and advocacy, and in particular through the operation of a statewide Employment Law Hotline, the Women's Law Center seeks to protect women's legal rights and ensure equal

access to resources and remedies under the law. The Women's Law Center is participating as an *amicus* in *Luke v. CPlace Forest Park SNF* because this brief is in line with the Women's Law Center's mission to eradicate pregnancy discrimination.

The **Women's Law Project** (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP is dedicated to creating a more just and equitable society by advancing the rights and status of women through high-impact litigation, advocacy, and education. Throughout its history, the WLP has worked to eliminate sex discrimination by bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. Through its telephone counseling service and direct legal representation, the WLP assists women who have been victims of pregnancy discrimination, including women who have been denied accommodations in the workplace. The WLP has a strong interest in the proper application of the Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, to ensure equal treatment in the workplace.