No. 18-14687

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KIMBERLIE DURHAM,

Plaintiff-Appellant,

---v.---

RURAL/METRO CORPORATION

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
CASE NO. 4:16-CV-01604-VEH

BRIEF OF *AMICI CURIAE* A BETTER BALANCE, CENTER FOR WORKLIFE LAW, ET AL. IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

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ISSUES PRESENTED BY AMICI

1. Did the district court contravene the Supreme Court's holding in *Young v. United Parcel Service, Inc*. by ruling that a plaintiff cannot present a prima facie case of failure-to-accommodate brought under the second clause of the Pregnancy Discrimination Act with evidence that her employer accommodated employees who were injured on the job?

2. Did the district court's failure to apply the framework established by the Supreme Court in *Young v. United Parcel Service, Inc*. cause it to rule erroneously that Plaintiff had not presented a sufficient prima facie case of discrimination?

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are 20 organizations dedicated to achieving equal rights for women in employment and supporting the rights of pregnant and breastfeeding workers to be free from discrimination on the job. Individual Amici's Statements of Interest are attached as Appendix A.

Amici file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and with the consent of counsel for both parties to this appeal.

Counsel for the Appellant did not author the brief in whole or in part. Appellant's counsel did not contribute financial support intended to fund the preparation or

submission of this brief. No individual(s) or organization(s) contributed financial support intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015) , the Supreme Court reaffirmed the central purpose of the Pregnancy Discrimination Act: to ensure that pregnancy does not force women out of the workforce. The standard announced in *Young* places pregnant women on an equal plane at work by requiring employers to make accommodations for pregnant employees to the same extent they do so for their non-pregnant coworkers who have a similar ability or inability to work. However, the district court in the present case ignored the legal framework set out by the Supreme Court in *Young* and reached a decision directly contrary to the Court's ruling. If left undisturbed, the lower court's decision would give employers license to treat pregnant women worse than their non-pregnant colleagues and frustrate the PDA's animating purpose of ensuring pregnant women are able to earn an income.

Instead of applying the four-part standard announced in *Young* to establish a prima facie case of discrimination based on an employer's failure to accommodate pregnancy, the district court applied a pre-*Young* analysis. The district court, as a result, concluded that Kimberlie Durham ("Ms. Durham") failed to produce sufficient evidence of an "adverse action" to satisfy the third prong of the analysis. *Young* makes clear, however, that all a plaintiff must show to satisfy the third prong of the prima facie case is that her

"employer did not accommodate her." The defendant employer, Rural/Metro Corporation ("the employer" or "Rural/Metro"), acknowledged that it did not accommodate Ms. Durham, and therefore the district court should have found that Ms. Durham had satisfied the third prong.

The district court also misapplied the final prong of the *Young* prima facie standard when—despite undisputed evidence that Rural/Metro maintains a policy and practice of accommodating employees injured on the job—the court concluded Ms. Durham had failed to show that others with a similar ability or inability to work were accommodated. The district court found that Rural/Metro's refusal to accommodate Ms. Durham was legally permissible because she had not presented evidence that the company accommodated employees who were injured *off* the job. This distinction is not only unsupported by *Young* but is in fact based on flawed logic that was explicitly rejected by the *Young* Court.

The district court's grant of summary judgment to Rural/Metro permits employers to prevent pregnant employees from working if they need temporary modified job assignments even though the employer gives non-pregnant employees modified assignments. Congress's intent in passing the Pregnancy Discrimination Act, as reaffirmed by the Supreme Court in *Young*, was to prohibit precisely this type of disfavoring of pregnant employees. The district court's decision should be reversed.

ARGUMENT

I. In *Young v. United Parcel Service, Inc.,* the Supreme Court Reaffirmed the Pregnancy Discrimination Act's Central Purpose of Ensuring That 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 ensure that pregnant women participate in the labor force on an equal plane with other employees. Prior to the PDA's passage, a wide array of employer policies disadvantaged female workers who became pregnant, including policies that forced women to stop working when they became pregnant. *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).

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 to 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.").

The PDA amended Title VII not only to make explicit the fact that discrimination "because of sex" includes 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 whom employers accommodated, and found that they need not be 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 the employer granted job modifications when they were unable to fulfill all of their duties as drivers: employees injured on the job; those entitled to accommodation under the Americans with Disabilities Act ("ADA"); and those who had lost their commercial drivers' license. *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 articulated a modified three-part *McDonnell Douglas*[1] burden-shifting analysis for cases arising out of the PDA's second clause, aimed at ensuring 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 that she (1) "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 [that] 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*. If the employer proffers such a reason, the plaintiff "may in turn show [that it is] in fact pretextual." *Id.*

Applying this framework, the Court in *Young* reversed the Fourth Circuit's grant of summary judgment. It first reiterated that the prima facie showing is "not onerous," "not intended to be an inflexible rule," and "not as burdensome as succeeding on an 'ultimate finding of fact as to' a discriminatory employment action." *Id.* at 1353-54 (quoting

[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

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.

The Court concluded that Peggy Young satisfied her prima facie burden. As to pretext, the Court remanded with an instruction to focus on practicality and equal treatment: "[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?" *Id.* at 1355. The district court's view in the present case that accommodations for pregnant workers are "special accommodations," Doc. 55 at 9, flies in the face of this fairness principle, as well as this Court's recent interpretation of the PDA.

The *Young* Court made clear that providing to pregnant employees job modifications that are provided to similarly-abled non-pregnant employees is not special treatment, but equal treatment. The Court demonstrated this when it declined to give pregnant workers "most favored nation" status, 135 S. Ct. at 1349-50, and yet required employers to carry out the purpose of the PDA by treating pregnant workers the same as they treat others who are similar in their ability or inability to work. *See Young*, 135 S. Ct. at 1355 (stating that in failing to accommodate her pregnancy, UPS "treated Young *less favorably* than it treated these other nonpregnant employees") (emphasis added).

The Eleventh Circuit also recently reaffirmed that the accommodations required by the PDA are not "special accommodations" but rather constitute equal treatment. In *Hicks v. Tuscaloosa*, this Court held that a police officer who sought an accommodation for breastfeeding "was not asking for a *special* accommodation, or more than equal treatment – she was asking to be treated the same as 'other persons not so affected but similar in their ability or inability to work' as required by the PDA." 870 F.3d 1253, 1261 (11th Cir. 2017) (emphasis in original).

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 Failed to Apply the New Framework Announced in *Young v. United Parcel Service, Inc.*, and Accordingly Erred When It Concluded Ms. Durham Did Not Meet Her Prima Facie Burden

This Court has recognized that courts analyzing claims brought under the PDA's second clause should apply the new prima facie standard set out by the Supreme Court in *Young*. *Everett v. Grady Mem. Hosp. Corp.*, 703 Fed. Appx. 938, 947-48 (11th Cir. 2017) (unpublished). Nevertheless, the district court analyzed Ms. Durham's claim using a pre-*Young* standard. Doc. 55 at 7 (plaintiff "carries the initial burden to establish: '(1) she was a member of a protected class, (2) she was qualified to do the job, (3) she was subjected to an adverse employment action, and (4) similarly situated employees outside the protected class were treated differently.'"). The district court purported to quote

directly the *Young* opinion in support of this erroneous standard. *Id*. The quoted language, however, not only conflicts with *Young*'s holding, it in fact appears nowhere in the *Young* opinion at all.

When the district court turned to the relevant inquiry—whether Rural/Metro treated Ms. Durham less favorably than others—its reasoning and analysis are wholly inconsistent with *Young*. The district court's failure to apply the proper legal standard led it to make a number of legal errors, discussed in turn below.

a. A Plaintiff Alleging Failure to Accommodate Under the PDA's Second Clause Satisfies the Adverse Action Prong with Evidence that She Was Denied Accommodation

In *Young*, the Supreme Court made clear that failing to accommodate pregnancy is, categorically, an adverse action. It did so by holding, in no uncertain terms, that a plaintiff meets her burden under the third prong of the prima facie case by showing simply "the employer did not accommodate her." *Young*, 135 S. Ct. at 1354.

The Supreme Court has previously made similar categorical decisions about what constitutes an adverse action for particular types of discrimination cases. For example, in *McDonnell Douglas*, the genesis for the familiar three-part, burden-shifting framework that is used to analyze discrimination claims based on circumstantial evidence, the Court was presented with a claim of discriminatory failure to hire and stated that a plaintiff could meet the third prong of his prima facie case by showing "that, despite his qualifications, he was rejected." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802

(1973). This Court has similarly predetermined categorical evidence for the prima facie case of a particular type of discrimination claim. *See Robertson v. Interactive College of Technology/Interactive Learning Sys*., 743 Fed. Appx. 269, 274 (11th Cir. 2018) (unpublished) (to make a prima facie case for a Title VII wage discrimination claim, plaintiff must show that "he received low wages"), *citing Cooper v. S. Co*., 390 F.3d 695, 734-35 (11th Cir. 2004), *overruled on other grounds by Ash v. Tyson Foods, Inc*., 546 U.S. 545, 457 (2006).

In *Young*, the Supreme Court similarly stated what evidence categorically satisfies the "adverse action" third prong when an employee claims her employer failed to accommodate pregnancy in violation of the PDA's second clause. A plaintiff satisfies the third prong of the prima facie case by showing "that the employer did not accommodate her." *Young*, 135 S. Ct. at 1354. Peggy Young presented evidence that her employer did not accommodate her, *id.* at 1346, and the Court required no further showing that she suffered an adverse action.

Like Peggy Young, Ms. Durham presented evidence that her employer denied her requested accommodation for pregnancy, either a light duty assignment or transfer. *See* Doc. 55 at 7 (referencing employer's acknowledgement that it denied Ms. Durham a light duty assignment and a transfer). Like Peggy Young, Ms. Durham has satisfied the third prong of the prima facie case with evidence that her employer failed to provide her requested accommodation. Ms. Durham was not required to present any further evidence

that she suffered an adverse action, and the district court erred when it granted summary judgment on the grounds that she had failed to do so.

b. The District Court Erred in Concluding that Employees Injured On-The-Job Were Not Valid Comparators

The district court recognized, "[n]o one disputes that Rural/Metro accommodates employees who had lifting restrictions imposed due to an *on the job* injury." Doc. 55 at 9 (emphasis added). Despite this evidence, it concluded that Ms. Durham could not survive summary judgment without offering "substantial evidence of employees placed on light duty assignment who were injured *off the job*. . ." *Id.* (emphasis added). The district court's flawed reasoning contravenes the Supreme Court's holding in *Young*, as well as Congress's intent in passing the PDA.

The Court in *Young* made no distinction between on-the-job and off-the-job injuries. Indeed, the Supreme Court explained that an employee is *not* required to point to a comparator who is "similar in *all* but the protected ways." *Young*, 135 S. Ct. at 1354 (emphasis added). Thus, the relevant inquiry is not *where* non-pregnant employees were injured or the *reason* why they require accommodation, but only whether they are similar to plaintiff in ability or inability to work. *Id*. at 1344, 1354. *See also Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (explaining, in a pre-*Young* decision, that distinguishing between employees injured on-the-job and off-the-job had nothing to do with their ability to work).

To survive summary judgment, Ms. Durham needed to demonstrate only that "there is a genuine dispute as to whether [Rural/Metro] provided more favorable treatment to *at least some employees whose situation cannot reasonably be distinguished* from [her own]." *Young*, 135 S. Ct. at 1355 (emphasis added). Evidence of accommodations made for employees injured on the job, as here, is enough to meet this non-onerous burden. *See Legg v. Ulster Cty.*, 820 F.3d 67, 74 (2d Cir. 2016) (on-the-job injury-accommodation policy is sufficient on its own, if not adequately justified, for a reasonable jury to find discriminatory intent behind failure to accommodate pregnant workers).[2]

The district court's reasoning resembles the flawed logic overruled by the Supreme Court in *Young*. The Fourth Circuit in that case concluded that Peggy Young failed to show that similarly situated employees received more favorable treatment, because "Young was different from those 'injured on the job because, quite simply, her inability to work [did] not arise from an on-the-job injury.'" *Young*, 135 S. Ct. at 1348. Young more closely resembled, according to the Fourth Circuit, "an employee who injured his back while picking up his infant child or . . . an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter." *Id*.

[2] The City of Florence, Kentucky entered into a consent decree with the Department of Justice after its policy of limiting light duty to employees injured on the job was challenged as a violation of the PDA. Consent Decree, *United States v. City of Florence*, No. 2:16-cv-00190 (E.D. Ky. December 20, 2016).

The Supreme Court rejected this rationale, finding that its adoption would fail to carry out the important Congressional objective in passing the Pregnancy Discrimination Act: to overrule *Gilbert*.[3] *Id*. at 1355. *Gilbert* concerned an employer benefit plan that provided payments to all employees for non-occupational sickness or accidents, but not for pregnancy. The Supreme Court in *Gilbert* concluded that the plan did not run afoul of Title VII's prohibition on sex discrimination, because pregnancy was neither a sickness nor an accident – pregnancy did not fall into either of those neutral categories. *Id*. at 1353. Congress's "unambiguous" intent in passing the PDA was to overturn "both the holding and the reasoning of the Court in the *Gilbert* decision." *Id*. The district court's refusal to find that Ms. Durham was treated less favorably than other non-pregnant employees because those other employees fall into a neutral accommodation category that doesn't capture pregnancy harkens back to the same flawed reasoning that was rejected by Congress and the Court in *Young*. *See id*. at 1355.

c. The District Court Erred by Requiring Ms. Durham To Show that Rural/Metro Accommodated "Several Different Types of Disabilities"

The district court distinguished Ms. Durham's case from *Young* on the grounds that "[t]he Rural/Metro policy accommodates one discrete group of employees," whereas UPS accommodated "many" workers with non-pregnancy-related disabilities. Doc. 55 at 10. But the Court in *Young* did not require, or even suggest, that a pregnant plaintiff must offer "several different types" of categories of accommodated workers to make her prima

[3] *General Elec. Co. v. Gilbert,* 429 U.S. 125 (1976).

facie case. To the contrary, the Court made clear that the showing is "not onerous." *Young*, 135 S. Ct. at 1354.

The Supreme Court found Peggy Young satisfied the fourth prong of the prima facie case of discrimination simply because she showed that "at least some" non-pregnant employees were accommodated. *Id*. at 1355. The only relevance of the fact that UPS accommodated "so many" was that it might be used to show pretext at the third step in the *McDonnell Douglas* burden-shifting framework. That is, once the employee has established her prima facie case and the employer has offered a legitimate, nondiscriminatory reason for denying her an accommodation, *then* the employee may introduce evidence to demonstrate that the employer's proffered reason is a pretext for discrimination.

In *Young*, the Court announced a new way plaintiffs may choose to show pretext in PDA second clause cases: "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." *Young*, 135 S. Ct. at 1354. The Court explained that one possible way to demonstrate this burden is by showing that the employer accommodated a large percentage of non-pregnant workers, while failing to accommodate a large percentage of pregnant workers. *Id.* Applying this rule to Young's case, the Court explained that the "combined effects" of UPS's three separate accommodation policies—which Young argued imposed a

significant burden on pregnant women—were relevant to determining whether UPS's justifications for treating pregnant employees less favorably than non-pregnant employees were *pretextual*, and it remanded the case to the Fourth Circuit to consider that question. *Id*. at 1355-56.

Two distinctions about the pretext analysis are important to note: first, even if a plaintiff chooses to show pretext by comparing the percentages of pregnant and non-pregnant employees accommodated, the number of categories of accommodated employees is immaterial. In other words, if an employer accommodates a large percentage of non-pregnant workers because it accommodates those with on-the-job injuries and fails to accommodate a large percentage of pregnant workers, then a plaintiff has offered enough evidence to show that the employer's policy imposes a significant unjustified burden on pregnant workers. *Young*, 135 S. Ct. at 1354. Second, the Supreme Court offered numerical evidence as an example of one way a plaintiff might establish pretext – not the only way. A plaintiff may still show pretext—that a defendant's proffered reason for the disparate treatment is a pretextual cover for discriminatory intent—through the traditional means of offering evidence that tends to discredit the employer's explanation. *See, e.g., Legg*, 820 F.3d at 75 (employer's shifting justifications for declining to extend light duty accommodations to pregnant employees were sufficient to demonstrate pretext, without any numerical evidence).

Contrary to the district court's reasoning, the Supreme Court in *Young* did *not* hold that the fact that a large number of non-pregnant workers were accommodated by UPS was *necessary* in order to establish pretext, let alone to meet the prima facie threshold—it was merely likely *sufficient* in that instance. In requiring Ms. Durham to show that "many" were accommodated, the district court ignored the Court's instruction in *Young* that the prima facie burden is not onerous.[4]

d. The Record Includes Sufficient Evidence to Satisfy Plaintiff's Prima Facie Burden

It is undisputed that Ms. Durham satisfied the first three prongs of the prima facie case because (1) she belonged to the protected class (i.e., she was pregnant); (2) she sought accommodation; and (3) her employer did not accommodate her. *Young*, 135 S. Ct. at 1354. Regarding the final prong, the district court disregarded two types of evidence that, alone and in concert, are sufficient to satisfy the fourth element of the prima facie case "that the employer did accommodate others 'similar in their ability of inability to work.'" *Young*, 135 S. Ct. at 1354. Rural/Metro's written policy of providing light duty positions to employees who are temporarily disabled because of work-related

[4] Additionally, by conflating the evidence necessary to establish a prima facie case with evidence that *may* (but is not required to) be used to demonstrate pretext, the court effectively required Ms. Durham to rebut Rural/Metro's reason for not accommodating her as a threshold matter, in contravention of *Young* and well-established case law. *See, e.g., Liebman v. Metro. Life Ins. Co.*, 808 F.3d 1294, 1300 (11th Cir. 2015) (reversing summary judgment because district court "conflated the burden shifting stages of the *McDonnell Douglas* framework").

injuries or illness is alone sufficient to satisfy the fourth prong. Taken with the evidence of light duty accommodations *actually* extended to three non-pregnant employees, a reasonable jury could find that Rural/Metro's failure to accommodate pregnancy, if not adequately justified, was motivated by discriminatory intent.

The *Young* standard allows a plaintiff to defeat a defendant's motion for summary judgment on a PDA failure-to-accommodate-pregnancy claim by providing evidence of an employer's accommodation policy alone, without evidence that accommodations were granted to specific individuals. *See Young*, 135 S. Ct. at 1344 ("[T]he [PDA] requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work"). And indeed, in evaluating whether others similar to Peggy Young in their working abilities had been accommodated, the Court looked to UPS's policy of providing light duty assignments to drivers who were injured on the job, had lost their commercial driver's licenses, or had ADA-qualifying disabilities. *Id*. at 1347. The Court gave no weight to the reasons particular individuals needed an accommodation, focusing instead on the fact that the policy made them eligible for a light duty assignment. *Id*. at 1347, 1355. In one of only a few appellate rulings interpreting the PDA's second clause following *Young*, the Second Circuit held that the employer's policy of accommodating employees injured on the job was enough, if not adequately explained by the employer, for a reasonable jury to find discriminatory intent behind the employer's failure to

accommodate pregnant employees. *Legg*, 820 F.3d at 74 (2d Cir. 2016). The same is true here.

Ms. Durham also presented a second category of evidence that, even in the absence of a written policy, would be enough to show that "at least some" other employees with a similar ability or inability to work were accommodated: three employees were in fact granted light or modified duty assignments. Doc. 55 at 8. Identifying one or more comparators who are similar to a pregnant worker in their ability or inability to work is sufficient to establish a prima facie case of pregnancy discrimination. *See, e.g., Martin v. Winn-Dixie Louisiana, Inc*., 132 F. Supp. 3d 794, 820 (M.D. La. 2015) (evidence that male employee with a back injury was accommodated is sufficient to survive summary judgment); *Taylor v. C&B Piping, Inc*., No. 2:14-CV-01828-MHH, 2017 WL 1047573, at *4 (N.D. Ala. Mar. 20, 2017) (allegation that male employees with lifting restrictions were accommodated is sufficient to survive motion to dismiss); *Gonzales v. Marriott Int'l, Inc*., 142 F. Supp. 3d 961, 978 (C.D. Cal. 2015) (allegation that non-pregnant employees with disabilities or medical conditions were accommodated is sufficient to survive motion to dismiss).

CONCLUSION

The district court's grant of summary judgment to Rural/Metro allows employers to prevent pregnant employees from working if they need accommodations, even when the employer provides accommodations to non-pregnant employees. Congress's intent in passing the Pregnancy Discrimination Act, as reaffirmed by the Supreme Court in *Young*, was to prohibit precisely this type of disfavoring of pregnant employees. The district court's decision should be reversed.

Respectfully Submitted,

Dated: February 8, 2019

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 4,464 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-counting feature of Microsoft Office 2010.
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 in 14-point Times New Roman.

Dated: February 8, 2019

/s/ Elizabeth Morris
ELIZABETH MORRIS

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system with a resulting electronic notice to all counsel of record on February 8, 2019.

Dated: February 8, 2019

/s/ Elizabeth Morris
ELIZABETH MORRIS

APPENDIX A: STATEMENTS OF INTEREST OF *AMICI CURIAE*

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** 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.

The **California Women's Law Center** ("CWLC") is a statewide, nonprofit law and policy center dedicated to breaking down barriers and advancing the potential of

women and girls through transformative litigation, policy advocacy and education. CWLC's issue priorities include gender discrimination, economic justice, violence against women and women's health. Since our inception in 1989, CWLC has placed an emphasis on eliminating all forms of gender discrimination, including discrimination against pregnant and parenting students and employees in education and at their places of work.

Equal Rights Advocates ("ERA") is a national non-profit 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 class and individual 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). 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*. Through a free Advice & Counseling program, ERA helps hundreds of women each year navigate pregnancy discrimination and other hurdles to economic security.

Family Values @ Work is a national network of 24 state and local coalitions helping spur the growing movement for family-friendly workplace policies such as paid sick days and family leave insurance. Too many people have to risk their job to care for a loved one, or put a family member at risk to keep a job. We're made to feel that this is a personal problem, but it's political – family values too often end at the workplace door. We need new workplace standards to meet the needs of real families today. The result will be better individual and public health, and greater financial security for families, businesses and the nation. Our coalitions represent a diverse, nonpartisan group of more than 2,000 grassroots organizations, ranging from restaurant owners to restaurant workers, faith leaders to public health professionals, think tanks to activists for children, seniors and those with disabilities.

First Shift Justice Project is a Washington D.C.-based nonprofit organization that helps working mothers in low wage jobs assert their workplace rights to prevent job loss. For the past five years, First Shift has provided legal services to help hundreds of

mothers fight pregnancy discrimination and obtain workplace accommodations that enable them to continue to work during pregnancy. At stake in this case is the Alabama district court's misinterpretation of a recent Supreme Court case, *Young v. UPS*, which will potentially have broad national implications for how other courts interpret this opinion, including in Washington D.C., Maryland, and Virginia, the jurisdictions in which First Shift operates and provides legal services to women who need pregnancy-related workplace accommodations.

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.

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 employer's decision to deny Kimberlie Michelle Durham 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 **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 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 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.* We believe that when working women become pregnant, give birth and nurture an infant they deserve the full protections of the Pregnancy Discrimination Act, the Family and Medical Leave Act, and the Reasonable Break Time for Nursing Mothers requirement in federal law. Reasonable accommodation of pregnant women and nursing mothers must be provided and every

effort to enable women to maintain employment during this period is important because families depend upon women's income for their economic security.

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 and the FMLA'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.

NELA-AL is a state chapter of the National Employment Lawyers Association ("NELA"), the largest professional membership organization in the country comprised of 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. The Alabama Chapter, NELA-

AL, has approximately 40 affiliated attorneys. 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. NELA-AL has filed or joined the filing of 3 *amicus curiae* briefs in federal court.

National Employment Lawyers Association ("NELA"), Georgia Chapter ("NELA-GA") was founded in 1993 and has approximately 125 affiliated attorneys. It is the Georgia state chapter of the NELA, the largest professional membership organization in the country comprised of 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. As a recognized affiliate of NELA, NELA-GA espouses the same interests, ideals, and goals as its national counterpart and, likewise, its attorneys are responsible for providing

representation and counseling to thousands of workers statewide both public and private. Indeed, NELA-GA has filed or joined in the filing of *amicus curiae* briefs on a number of employment issues in both state and federal courts. As an organization of attorneys devoted to the protection of the rights of workers across the State of Georgia, NELA-GA joins this brief in support of the rights of pregnant employees.

The **Southwest Women's Law Center** is a non-profit policy and advocacy Law Center that was founded in 2005 with a focus on advancing opportunities for women and girls in the state of New Mexico. We work to ensure that women have equal access to quality, affordable healthcare, access to equal pay and that girls in middle and high school have equal access to sports programs. Accordingly, the Law Center is uniquely qualified to comment on the decision in *Durham v. Rural/Metro Corporation*.

The **Texas Employment Lawyers Association** ("TELA") is a voluntary membership organization comprised of Texas lawyers who regularly represent employees in labor, employment, and civil rights disputes. TELA members regularly represent clients in federal court and the organization therefore has great interest in the consistent and correct interpretation of such laws. Moreover, TELA has a particular interest in the issue presently before this Court, having previously joined an *amicus* brief in the U.S. Court of Appeals for the Fifth Circuit addressing similar questions about the proper application of *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015).

The **Washington Lawyers' Committee for Civil Rights and Urban Affairs** ("WLC") is a non-profit organization founded in 1968 to address issues of racial discrimination and entrenched poverty in the greater Washington D.C. area. The WLC is committed to ending all forms of discrimination. The Committee has an active employment discrimination docket and a record of representing women who have been subjected to discrimination due to pregnancy.

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed is committed to protecting fair treatment of all working women, including workers who are pregnant and need an accommodation to allow them to keep working and have healthy pregnancies.

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* because this brief is in line with the Women's Law Center's mission to eradicate pregnancy discrimination and family leave related discrimination.

The **Women's Law Project** ("WLP") is a non-profit legal advocacy organization 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 in 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.