

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT

No. 16-13003

City of Tuscaloosa, *Defendant - Appellant*

v.

Stephanie Hicks,
Plaintiff - Appellee.

On Appeal from the United States District Court for the Northern District of
Alabama, Hon. Terry Michael Putnam, U.S. Magistrate Judge

BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN
CIVIL LIBERTIES UNION OF ALABAMA, CENTER FOR WORKLIFE
LAW, ET AL. IN SUPPORT OF PLAINTIFF-APPELLEE AND IN
SUPPORT OF AFFIRMANCE

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**CORPORATE DISCLOSURE STATEMENT & RULE 29(C)(5)
STATEMENT**

No amici have parent corporations or are publicly held corporations.

No party's counsel authored the brief in whole or in part, contributed money intended to fund preparing or submitting the brief; and no person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

STATEMENT REGARDING ORAL ARGUMENT

Should this Court deem oral argument appropriate in this case, *Amici Curiae* respectfully seek leave to participate. *Amici*'s input may be helpful to the Court in addressing the correct interpretation of the Pregnancy Discrimination Act following the Supreme Court's recent decision in *Young v. United Parcel Service*, 135 S. Ct. 1338 (2015), an issue of first impression in this Circuit and on which *Amici* have expertise.

STATEMENT OF ISSUES

Whether the District Court's rulings upholding the jury's determination that Defendant demoted and constructively discharged Plaintiff in violation of Title VII should be overturned.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are 22 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.

SUMMARY OF ARGUMENT

There is no basis to disturb the jury's factual findings in this case, as they were amply supported by both the evidentiary record and the applicable law. The discriminatory treatment the jury found Hicks suffered falls squarely within the type of conduct Congress aimed to eradicate in enacting the Pregnancy Discrimination Act ("PDA") and the Family and Medical Leave Act ("FMLA"): women being pushed out of the workforce because of pregnancy and childbirth, and forced to sacrifice their livelihood for the sake of their families' wellbeing. Workplace accommodations like those sought by Hicks are both necessary for women's health and supported by the strong public health goals of enabling continuation of breastfeeding upon a new mother's return to work. Moreover, the standard Defendant urges this Court to apply misconstrues the applicable law as elucidated by the Supreme Court in *Young v. United Parcel Service*, 135 S. Ct. 1338 (2015), and runs contrary to the legislative purpose of the PDA. Because the jury's findings that Hicks's reassignment was discriminatory and that she was constructively discharged were amply supported by the record, and the District Court's instructions to the jury were free from material error, this Court should decline to disturb the jury's considered verdict.

FACTS

Stephanie Hicks was hired by the Tuscaloosa Police Department as a patrol officer and then promoted to investigator on the narcotics squad, where she served at the time she became pregnant. Tr.¹ 42-43, 56, 69-70. Despite prior positive performance reviews, Tr. 92:17-95:11, on her first day back at work after the birth of her baby she was written up, and then demoted to a patrol position only eight workdays later. Tr. 160:9-12. Hicks claimed, and the jury found, that she was demoted in retaliation for taking leave for childbirth and because she suffered from postpartum depression. The record shows that Hicks's supervisors referred to her as a "stupid cunt" and said they would "find any way" to "get rid of that bitch," Tr. 696:5-12, 429:1-6, 389:23-390:11; that they fabricated "performance issues" to support her demotion, Appellee Br. 18-21; and that her reassignment to patrol placed her in a position with less prestige, lower pay, and a more demanding schedule requiring night and weekend work, *id.* at 2, 9.

Going on patrol would have required Hicks to wear a ballistics vest, which had to be fitted snugly around the chest to protect her from injury and death. *Id.* at 11-12; Tr. 1186. Hicks's doctor explained that a restrictive vest would have limited Hicks's breast milk production and increased the risk of a painful breast infection,

¹ Transcript pages cited herein are attached as Exhibit 1.

and accordingly recommended that Hicks be temporarily given alternate duties so she could continue to breastfeed. Appellee Br. 12; Appellee App. vol. 3, tab 76.

Although undisputed testimony shows that Defendant maintained a policy and regular practice of providing alternate duty assignments to patrol officers for non-lactation-related medical conditions, Defendant refused to provide the same accommodation to Hicks. Tr. 1128-1141, 1154-57, 209-210; Appellee App. vol. 3, tab 136. Instead Defendant gave her the option of wearing a properly-fitting vest that would interfere with her ability to breastfeed, or going out in the field without a vest or with an ill-fitted vest—which posed an unacceptable risk to her life. Tr. 1151:16-1154:1; Appellee Br. 12. Unfairly pushed out of her investigator position after childbirth and then forced to choose between her physical safety on the job and the ability to continue breastfeeding her child, Hicks resigned from the police force. Tr. 220. This lawsuit followed.

ARGUMENT

I. Hicks’s Reassignment and Constructive Discharge Represent Precisely the Type of Discriminatory Conduct the PDA and FMLA Were Designed to Prevent.

The facts presented in this case represent the very evil that the PDA was enacted to prevent: women being forced out of the workforce during pregnancy or shortly after childbirth. *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634-35 (1974) (forcing pregnant teachers to take lengthy periods of unpaid leave

before and after birth with no guarantee of re-employment); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543-44 (1971) (hiring policy excluding women but not men with pre-school-age children). Congress explicitly recognized—and aimed to uproot—the pervasive sex stereotype that women are, “and should remain, ‘the center of home and family life.’” *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (quoting *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)). And because “the faultline between work and family [is] precisely where sex-based overgeneralization has been and remains strongest,” *id.* at 738, the PDA took particular aim at policies and practices that placed women in a position of having to choose between work and family. *See Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987) (PDA enacted to afford women “the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life” (quoting 123 Cong. Rec. 29658 (1977))); *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 204 (1991) (the PDA requires that “women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job”).

Like the PDA, the FMLA was intended “to protect the right to be free from gender-based discrimination in the workplace,” *Hibbs*, 538 U.S. at 728, and to address sex stereotypes that impeded women’s career advancement. Because

pregnancy, childbirth, and the resulting period of physical changes are conditions unique to women, a central purpose of the FMLA was to “ensure that new mothers don’t lose their jobs when they temporarily cannot work due to pregnancy—and childbirth—related disability.” S. Rep. 102-68, at 27 (1991). At the same time, Congress recognized that “denial or curtailment of women’s employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second,” which “has in turn justified discrimination against women when they are mothers or mothers-to-be.” *Hibbs*, 538 U.S. at 736 (quoting *The Parental and Medical Leave Act of 1986: J. Hearing before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor*, 99th Cong. 2d Sess. 100 (1986)). Congress attempted to attack these sex stereotypes head on, intentionally crafting the statute in gender-neutral terms to provide 12 weeks of job-protected leave to all eligible employees, both male and female, in order to care for a new baby or seriously ill family member, or to recover from childbirth or serious illness. *Hibbs*, 538 U.S. at 724, 728 n.2, 737; 29 U.S.C. § 2611-2615 (West). Thus, the FMLA was intended to combat sex stereotypes relegating women to domestic roles, while at the same time recognizing women’s unique needs for time off related to pregnancy and childbirth. *Hibbs*, 538 U.S. at 738.

II. Promoting Support for Continuation of Breastfeeding Upon Return to Work is Necessary for Women's Health and Supported by Strong Public Policy.

It is well established that breastfeeding has benefits for both mothers and their babies; accordingly, every relevant professional medical association recommends breastfeeding and has adopted policy statements in support. *See* Am. Acad. of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, 129 Pediatrics e827 (2016), <http://pediatrics.aappublications.org/content/pediatrics/early/2012/02/22/peds.2011-3552.full.pdf> (recommending exclusive breastfeeding for six months, and continuation of breastfeeding supplemented by complementary foods for at least first year²); Am. Acad. Family Physicians, *Breastfeeding* (2012), <http://www.aafp.org/about/policies/all/breastfeeding.html> (same); Am. Pub. Health Ass'n, *An Update to A Call to Action to Support Breastfeeding: A Fundamental Public Health Issue*, <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/09/15/26/an-update-to-a-call-to-action-to-support-breastfeeding-a-fundamental-public-health-issue> (last visited Oct. 11,

² Breastfeeding is correlated with a reduction in respiratory and gastrointestinal tract infections, allergies, celiac disease, obesity, diabetes, leukemia and lymphoma, and sudden infant death syndrome, and improved neurodevelopmental outcomes in infants, and with improved postpartum recovery and reduction in postpartum depression, rheumatoid arthritis, and breast and ovarian cancer in mothers. *See* Am. Acad. Pediatrics, *Breastfeeding and the Use of Human Milk*, *supra*.

2016) (“A growing body of research highlights significant effects of breastfeeding on maternal health. Evidence also continues to accumulate on the impact of breastfeeding (particularly exclusive breastfeeding) on the health of children.”).

These medical recommendations are unfortunately in tension with the reality of the lives of many women today. Although the overall breastfeeding initiation rate is 81.1% according to the latest available statistics, the number drops significantly in the months following birth, to 51.8% at six months and 30.7% at one year. *See* Div. of Nutrition, Physical Activity, & Obesity, Ctrs. for Disease Control & Prevention, *Breastfeeding Report Card 4* (2016), <http://www.cdc.gov/breastfeeding/pdf/2016breastfeedingreportcard.pdf>.³ Paid parental leave remains out of reach for the majority of families. *See* Nat’l P’ship for Women & Fams., *Paid Family and Medical Leave* (2015), <http://www.nationalpartnership.org/research-library/work-family/paid-leave/paid-family-and-medical-leave.pdf> (13 percent of workers have access to paid family leave); Kelsey R. Mirkovic et al., *Paid Maternity Leave and Breastfeeding*

³ The decline in breastfeeding rates following birth is steeper for women of color. *See* United States Dep’t of Health & Human Servs., Ctrs. for Disease Control & Prevention, *Progress in Increasing Breastfeeding and Reducing Racial/Ethnic Differences—United States, 2000-2008 Births*, 62 *Morbidity & Mortality Weekly Rep.* 78, 78 (2013), <http://www.cdc.gov/mmwr/pdf/wk/mm6205.pdf>.

Outcomes, 43 Birth 233, 235-39 (2016) [Attached as Exhibit 2]. At the same time, early return to work is associated with shorter duration of breastfeeding. Cynthia M. Visness & Kathy I. Kennedy, *Maternal Employment and Breastfeeding*, 87 Am. J. Pub. Health 945, 950 (1997) [attached as Exhibit 3]. The majority (58.1%) of women return to the labor force before their children are one year old. See News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, *Employment Characteristics of Families—2015*, at 2 (Apr. 23, 2015), <http://www.bls.gov/news.release/pdf/famee.pdf>. Indeed, data from 2005-2007 showed that 44.2% of women returned to work within three months of giving birth to their first child. See Lynda Laughlin, U.S. Census Bureau, *Maternity Leave and Employment Patterns of First-time Mothers: 1961-2008*, at 14 tbl. 8 (2011), <https://www.census.gov/prod/2011pubs/p70-128.pdf>; Katherine R. Shealy et al., U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, *The CDC Guide to Breastfeeding Interventions* 7 (2005), https://www.cdc.gov/breastfeeding/pdf/breastfeeding_interventions.pdf.

Potential conflict arises between the demands of returning to work and continuation of breastfeeding if adequate accommodations are not provided to employees who are nursing. Women who are breastfeeding and are away from their babies need to express milk from their breasts (typically by using a breast pump) on roughly the same schedule as their baby's feeding schedule, typically

every two to three hours for babies under six months old. *See* Office of Legal Counsel, U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* I.A.4.b., 2015 WL 4162723 (2015) [hereinafter "EEOC Pregnancy Guidance"] ("To continue producing an adequate milk supply and to avoid painful complications associated with delays in expressing milk, a nursing mother will typically need to breastfeed or express breast milk using a pump two or three times over the duration of an eight-hour workday."); Office on Women's Health, U.S. Dep't of Health & Hum. Servs., *Breastfeeding* (Aug. 10, 2010), <http://www.womenshealth.gov/breastfeeding/going-back-to-work/> (same); U.S. Dep't of Labor, Wage & Hour Div., *Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073, 80075 (Dec. 21, 2010) (same). Failure to express breast milk on schedule can lead to painful engorgement, fever, and even infection, as well as a reduction in the amount of breast milk produced. *EEOC Pregnancy Guidance*, *supra*, at I.A.4.b; Lisa H. Amir & Acad. of Breastfeeding Med. Protocol Comm., *ABM Clinical Protocol #4: Mastitis* 239 (2014), http://www.bfmed.org/Media/Files/Protocols/2014_Updated_Mastitis6.30.14.pdf. Workplace accommodations are therefore required to prevent painful and dangerous medical complications for breastfeeding women.⁴

⁴ Although the accommodations required will differ for each individual depending

Issues surrounding the ability to continue breastfeeding after resuming work are a concern for literally millions of women across the United States. In 2013, the latest year for which data on breastfeeding initiation rates are available, 3,932,181 women gave birth. U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, *Births: Final Data for 2013*, 64 Nat'l Vital Statistics Reps. 1, 2 (2015), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf. It may therefore be estimated that given the breastfeeding initiation rate of 81.1%, over three million women initiated breastfeeding. That same year, 62% of women who had given birth were in the labor force within 12 months. U.S. Dep't of Labor, Women's Bureau, *Fertility, Chart 1: Labor Force Status of Women with Births in the Last 12 Months*, <https://www.dol.gov/wb/stats/Fertility.htm#chart1> (last visited Oct. 11, 2016). The absence of adequate workplace lactation accommodations is associated with early weaning. Katy B. Kozhimannil et al., *Access to Workplace*

on her circumstances, they typically include provision of a private, secure location to express breast milk and regular breaks of a length adequate to express milk. Women may also need additional workplace accommodations, such as job reassignment, if their job requirements or workplace conditions pose risks specific to lactation, such as exposure to lead or other contaminants or, as in this case, require the use of necessary safety equipment that interferes with breastfeeding. *See Allen-Brown v. District of Columbia*, 2016 WL 1273176, at *1 (D.D.C. Mar. 31, 2016). *See also* Nat'l Ctr. For Environmental Health, Div. of Emergency and Environmental Health Servs., Ctrs. for Disease Control & Prevention, *Guidelines for the Identification and Management of Lead Exposure in Pregnant and Lactating Women* (2010), <http://www.cdc.gov/nceh/lead/publications/leadandpregnancy2010.pdf>.

Accommodations to Support Breastfeeding after Passage of the Affordable Care Act, 26 *Women's Health Issues* 6, 9 (2016); Chinelo Ogbuanu et al., *The Effect of Maternity Leave Length and Time of Return to Work on Breastfeeding*, 127 *Pediatrics* e1414, e1422-24 (2011). Viewed together, these data make clear that workplace accommodations for breastfeeding are critical to effectuating public health goals of improving breastfeeding continuation rates while enabling new mothers to return to work.

Consequently, strong public policies have been enacted at both the federal and state level to promote workplace accommodations related to breastfeeding. *See* U.S. Dep't of Health & Hum. Servs., *The Surgeon General's Call To Action To Support Breastfeeding* (2011), www.surgeongeneral.gov/topics/breastfeeding/calltoactiontosupportbreastfeeding.pdf (recognizing breastfeeding as “a key public health issue in the United States” and describing breastfeeding promotion efforts by numerous federal and international bodies). At the federal level, this public policy was recently strengthened by the enactment of the “Break Time for Nursing Mothers” provision of the Patient Protection and Affordable Care Act, 29 U.S.C § 207(r) (2010), which amended the Fair Labor Standards Act to require employers to provide covered employees unpaid breaks each time they need to pump and a private location other than a restroom, for up to one year after a child's birth. Similar provisions exist in

28 states. Nat'l Conf. of State Legs., *Breastfeeding State Laws* (Aug. 30, 2016), <http://www.ncsl.org/research/health/breastfeeding-state-laws.aspx>; *see also* U.S. Dep't of Labor, Women's Bureau, *State-Level Workplace Breastfeeding Rights*, <https://www.dol.gov/wb/maps/4.htm> (last visited Oct. 11, 2016) (listing 21 states plus Puerto Rico and the District of Columbia).

Despite these recent developments, numerous workplace barriers to continuation of breastfeeding remain. A recent study showed that 60% of working women reported that they were not provided with both adequate break time and private space to pump breast milk, nearly 50% reported that employment impacted their decisions related to breastfeeding, and 33% reported that their work was an obstacle to continuing to breastfeed. *Kozhimannil et al., supra, at 9-10*. Lower-income women were half as likely as higher-income women to have access to adequate pumping accommodations at work. *Id.* Robust enforcement of the PDA and the FMLA can play an important role in addressing the persistent barriers to continuation of breastfeeding, consistent with both the purpose of those laws and the strong public health policy in support of breastfeeding promotion.

III. Title VII as Amended by the PDA Protects Pregnant, Postpartum, and Breastfeeding Employees from Discrimination.

The PDA prohibits employers from discriminating on the basis of pregnancy, childbirth, and related medical conditions, and requires employers to treat women affected by pregnancy and related conditions the same as others “not

so affected but similar in their ability or inability to work.” 42 U.S.C. § 2000e(k) (1978). As the District Court correctly recognized, this protection extends to prohibit discrimination on the basis of postpartum depression as well as breastfeeding and lactation.⁵ *Reilly v. Revlon, Inc.*, 620 F. Supp. 2d 524, 544

⁵ Defendant disputes in a footnote that lactation is a medical condition related to pregnancy and childbirth within the meaning of the PDA because it is purportedly “non-symptomatic” and “medically unnecessary.” See Appellant Br. 11 n.5. Defendant should be considered to have waived this issue on appeal. Not only was it addressed in a footnote, but it was also not included in the statement of issues on appeal, and was rejected by the District Court at summary judgment, a ruling from which Defendant has not appealed. See *Wetherbee v. S. Co.*, 423 F. App’x 933, 934 (11th Cir. 2011).

Nonetheless, should this Court decide to take up this issue, it should reject the position advanced by the Defendant, as it is contrary to intent of the PDA, to the Supreme Court’s reasoning, and to the weight of recent authority. See *Equal Emp’t Opportunity Comm’n v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) (“Lactation is the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth.” (citing Jeremy Butterfield, *Collins English Dictionary: Complete and Unabridged* (6th ed. 2003)); *Allen-Brown*, 2016 WL 1273176, at *11 (“[A]s a matter of plain language, the PDA applies to lactation.”); *Mayer v. Prof’l Ambulance, LLC*, 2016 WL 5678306, at *1-2 (D.R.I. Sept. 30, 2016) (“[T]he trend post-*Houston Funding* ... has been to follow the Fifth Circuit’s reasoning and hold that lactation is a ‘condition related to pregnancy’ under the PDA.”). Moreover, Defendant’s reasoning on “medical necessity” was expressly repudiated by Congress in enacting the PDA, as *Gilbert* was based in part on the reasoning that pregnancy was “often a voluntarily undertaken and desired condition.” *Gen. Electric Co. v. Gilbert*, 429 U.S. 125, 136 (1976). See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-679, 679 n.17 (1983); *Guerra*, 479 U.S. at 277 n.6. Thus, there can no longer be any dispute that *all* medical conditions related to pregnancy are protected under Title VII, no matter whether they are, like lactation, voluntarily chosen or continued. See *Young*, 135 S. Ct. at 1348; *Houston Funding*, 717 F.3d at 430; *Allen-Brown*, 2016 WL 1273176, at * 12; *Martin v. Canon Bus. Sols., Inc.*, No. 11-CV-02565-WJM-KMT, 2013 WL

(S.D.N.Y. 2009) (“Postpartum depression is a condition related to pregnancy and accordingly falls within the PDA’s protections.”); *Equal Emp’t Opportunity Comm’n v. Houston Funding II, Ltd.*, 717 F.3d 425, 426, 430 (5th Cir. 2013) (holding that Title VII prohibits discrimination on the basis of lactation because lactation is sex-linked and is a condition related to pregnancy and childbirth); *EEOC Pregnancy Guidance*, *supra*, at § I.A.4.b.

Accordingly, employers are prohibited from taking adverse action, such as transferring someone to a less desirable position, due to pregnancy, the fact of childbirth leave, or the related medical condition of postpartum depression. Similarly, employers are obligated to address requests for accommodations from employees with pregnancy-related conditions on the same terms as requests from employees with medical conditions unrelated to pregnancy. *See Young*, 135 S. Ct. at 1354 (denial of accommodation to employee with pregnancy-related condition raises inference of unlawful discrimination where other workers with similar inability to work are accommodated); *Legg v. Ulster Cty.*, 820 F.3d 67, 74 (2d Cir. 2016) (existence of policy providing light duty to workers with on-the-job injuries is enough, if not adequately justified, for reasonable jury to find discriminatory intent behind failure to accommodate pregnant workers).

4838913, at *8 n.4 (D. Colo. Sept. 10, 2013); *Notter v. North Hand Protection*, No. 95-1087, 1996 WL 342008, at *5 (4th Cir. June 21, 1996) (abrogating *Barrash v. Bowen*, 846 F.2d 927 (4th Cir. 1988)).

Courts are increasingly recognizing that the obligation to address requests for pregnancy-related accommodations on non-discriminatory terms applies to requests related to lactation and breastfeeding. *See Allen-Brown v. District of Columbia*, 2016 WL 1273176, at *1 (D.D.C. Mar. 31, 2016); *Gonzales v. Marriott International, Inc.*, 142 F. Supp. 3d 961, 978, 978n. 47 (C.D. Cal. 2015); *Equal Emp't Opportunity Comm'n v. Vamco Sheet Metals, Inc.*, No. 13 Civ. 6088, 2014 WL 2619812, at *6 (S.D.N.Y. June 5, 2014); *Martin v. Canon Business Solutions, Inc.*, 2013 WL 4838913, at *8 n.4 (D. Colo. Sept. 10, 2013); *EEOC Pregnancy Guidance, supra*, at § I.A.4.b (“[L]ess favorable treatment of a lactating employee may raise an inference of unlawful discrimination.”). Although a series of earlier decisions had found to the contrary, *see, e.g., Falk v. City of Glendale*, No. 12-cv-00925, 2012 WL 2390556, at *4 (D. Colo. June 25, 2012), those cases do not survive *Young*. *See Gonzales*, 142 F. Supp. 3d at 978 n.47.

As these cases illustrate, the times when women return to work following maternity leave and when they make requests for lactation accommodations are frequently flashpoints for discrimination and retaliation. *See, e.g., Houston Funding*, 717 F.3d at 427 (employee fired immediately upon disclosing breastfeeding needs to supervisor); *Lico v. TD Bank*, No. 14-cv-4729, 2015 WL 3467159, at *1 (E.D.N.Y. June 1, 2015) (employer refused adequate accommodations and then terminated employee); *Vamco Sheet Metals*, 2014 WL

2619812, at *2-3 (allegations that employee was harassed for taking lactation breaks and not provided proper accommodations); *Mayer v. Prof'l Ambulance, LLC*, No. 15-462 S, 2016 WL 5678306, at *1-2, *4 (D.R.I. Sept. 30, 2016) (new employee terminated after making not-well-received request for lactation accommodation); *Rotrigo v. Azz, Inc.*, No. 5:12-cv-120, 2013 WL 524648, at *1 (N.D. W. Va. Feb. 11, 2013) (employee with no prior performance issues placed on probation first day back at work after pregnancy leave, and terminated thirty days later); *Leone v. Naperville Prof'ls, Inc.*, No. 1:14-cv-09583, 2015 WL 1810321, at *1-2 (N.D. Ill. Apr. 17, 2015) (administrative assistant with exemplary work history terminated on first day back from maternity leave). The scenario that confronted Ms. Hicks, which the jury found was unlawful, is therefore all too common.

IV. The Verdict on Hicks's Discriminatory Reassignment and Constructive Discharge Claims Should Stand.

Defendant's brief focuses chiefly on rearguing the evidence on which the jury concluded that Defendant discriminated against Hicks in violation of the PDA when it demoted her to a less desirable position, and then failed to provide the desk job she needed to continue breastfeeding her baby once she was in that position. But Defendant already had its opportunity to convince a trier of fact that its actions were not in fact motivated by Plaintiff's childbirth or pregnancy-related conditions, and the jury reasonably found that Defendant was motivated by discriminatory

intent. Because the evidence in the trial record reasonably supports this conclusion, the court below properly refused to grant Defendant's motions, and it is plain that under the applicable standards the jury verdict should stand. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 135 (2000) (Court reviewing motion for JMOL must draw all reasonable inferences in favor of nonmoving party, may not make credibility determinations or weigh evidence, and "must disregard all evidence favorable to the moving party that the jury is not required to believe"); *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001) (denial of motion for new trial reviewed for abuse of discretion on question of whether verdict was against the clear weight of the evidence or would have resulted in miscarriage of justice). Moreover, in employment discrimination cases, "after a trial on the merits, [courts] should not revisit whether the plaintiff established a prima facie case." *Holland v. Gee*, 677 F.3d 1047, 1056 (11th Cir. 2012).

Although Defendant focuses primarily on the sufficiency of the evidence, Defendant's articulation of the governing Eleventh Circuit law contains several significant legal errors on which the remainder of this amicus brief will focus.

A. Plaintiff Adduced Sufficient Evidence that Her Demotion to Patrol Was Discriminatory.

Defendant argues Hicks's reassignment claim fails because she did not provide evidence of comparators—"similarly situated Task Force agents [who] failed to take over and begin working informants as instructed and were not subjected to adverse action." Appellant Br. 19. But the existence of comparators is not an ultimate question in Hicks's demotion claim. Under Title VII, a plaintiff must show at trial only that her pregnancy was "a motivating factor" for the adverse action—a finding that the jury made and that should not now be disturbed. *Holland*, 677 F.3d at 1055. Further, even if this Court were reviewing a summary judgment order rather than a jury verdict, comparator evidence is not required to make a *prima facie* showing of disparate treatment in the Eleventh Circuit where other circumstantial evidence of discrimination exists. *Hamilton v. Southland Christian Sch. Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012); *Hunter v. Mobis Alabama, LLC*, 559 F. Supp. 2d 1247, 1255-58 (M.D. Ala. 2008).

Hicks met her burden of producing sufficient circumstantial evidence that Defendant's decision to transfer her was motivated by her pregnancy, childbirth, or a related medical condition. This evidence includes, for example, the timing of her first negative performance evaluation on her first day back at work following leave and her demotion just 8 days later, Tr. 160:9-12; the comment that she was a "stupid cunt" for taking 12 weeks of leave, Tr. 696:5-12; a conversation between

Richardson and Robertson in which she overheard them calling her a “bitch” and agreeing to find “any way they can” to “get rid of” her, Tr. 429:1-6, 389:23-390:11; Anderson’s response to her request for an explanation for her demotion that “I don’t have children, I don’t know, I can’t relate to you,” Tr.160:13-14; and his comment that he was returning her to patrol because “it was best for [her] family,” Tr. 176:9-15. There was further evidence that Hicks’s supervisors demoted her because of pregnancy and their shared belief that her changed behavior was due to postpartum depression. Sergeant Richardson admitted that Hicks’s reassignment was a result of the modification of her job duties during pregnancy, Tr. 529:4-8; the memo Richardson prepared to justify Hicks’s demotion explained, “Hicks [sic] motivation in this Unit has changed. She shows no initiative or motivation. . . .” Appellee App. vol. 3, tab 60; and Richardson admitted that she suspected that the change in Hicks was due to postpartum depression, Tr. 528:1-529:3. Robertson similarly testified that he suspected Hicks was suffering from postpartum depression and suggested that she seek counseling, yet he swiftly sought her demotion. Tr. 791:1-792:9.

Plaintiff also adduced evidence that was more than sufficient to cast doubt on Defendant’s proffered nondiscriminatory reasons, such that a reasonable

factfinder could conclude that the employer's explanation was pretextual.⁶ *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997). Defendant argues Hicks was actually transferred because (1) she failed to take over informants from another agent, and (2) told Anderson during her demotion meeting that she wanted less demanding work. Appellee Br. 14-15, 17-19. As discussed in Appellee's Brief, Plaintiff adduced credible evidence that she was not properly trained on informants, and did in fact take meaningful steps to complete her assignment. Appellee Br. 2-3, 6-7, 19. Additionally, although not required, Hicks showed that she was treated less favorably than other officers who had similar "performance" issues, but were not reassigned. *See id.* at 19-20. And Plaintiff provided evidence that Chief Anderson had already decided to demote her at the time of the meeting, based on Richardson's recommendation; thus anything she said in that meeting was irrelevant to the decision. *Id.* at 8-9, 20-21; Tr. 160-62.

⁶ Defendant's argument that the trial court improperly instructed the jury on pretext because it did not use the word "each" to qualify "reason," Appellant Br. 30, is without merit. Jury instructions are reviewed *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party, and will not be disturbed so long as "the instructions, taken together, properly express the law applicable to the case." *Holland*, 677 F. 3d at 1067. The instructions here clearly directed the jury to consider whether they believed all of "the reasons" Defendant proffered. Jury Instructions, *Hicks v. City of Tuscaloosa*, No. 7:13-cv-02063-TMP (N.D. Ala. Mar. 14, 2016), ECF No. 83, at 8.

B. Plaintiff Satisfied the Elements of Constructive Discharge Under the PDA.

“[W]hen ‘an employee involuntarily resigns in order to escape intolerable and illegal employment requirements’ to which he or she is subjected because of race, color, religion, sex, or national origin, the employer has committed a constructive discharge in violation of Title VII.” *Henson v. City of Dundee*, 682 F.2d 897, 907 (11th Cir.1982) (quoting *Young v. Southwestern Sav. & Loan Ass’n*, 509 F.2d 140, 144 (5th Cir.1975)). “[C]onstructive discharge is a claim distinct from the underlying discriminatory act.” *Green v. Brennan*, 136 S. Ct. 1769, 1779 (2016) (citing *Pa. State Police v. Suders*, 542 U.S. 129, 149 (2004)). Contrary to Defendant’s position, *see* Appellant Br. 15-16, the Supreme Court recently affirmed the longstanding position of the 11th Circuit that a plaintiff in a constructive discharge claim need not prove the employer intended to force the employee to resign. *Id.* at 1779–80. Thus, the ultimate issue in Ms. Hicks’s constructive discharge claim is whether, following her reassignment, “working conditions [had] become so intolerable that a reasonable person in [her] position would have felt compelled to resign.” *Suders*, 542 U.S. at 141. *Accord Brennan*, 136 S. Ct. at 1776; *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993). Because this inquiry is to be assessed based on the reasonable reaction of a person *in the individual’s position*, the relevant inquiry here is whether the circumstances would

have been considered intolerable by a reasonable woman who was breastfeeding. *See Suders*, 542 U.S. at 141.

The jury found that Hicks’s unlawful transfer to patrol, where she was required to wear a restrictive ballistics vest on a daily basis, coupled with Defendant’s refusal to provide an alternate assignment in accordance with her doctor’s instruction that wearing a vest could cause harmful consequences, were objectively intolerable. This finding is well supported by the trial record. Hicks’s physician’s note (echoed by his trial testimony and that of Hicks’s lactation consultant, Tr. 444-46) clearly stated that wearing a restrictive vest “is not conducive” to breastfeeding because it would “limit her milk production” and could “result in painful breast infection.” Tr. 70-72, 1126-28; Appellee App. vol. 3, tab 76. There was also undisputed evidence that failing to wear the vest, or wearing an improperly fitted vest, would have put Hicks at serious—and potentially life-threatening—risk on the job. Tr. 203-04, 370-71, 692, 1145, 1186. As the District Court explained in denying Defendant’s motion for summary judgment:

A reasonable jury could conclude that, given the dangers of patrolling without a vest and the TPD’s unwillingness to give her a temporary desk assignment while breastfeeding, plaintiff was left with no choice but to resign. She could not reasonably do her patrol duties safely, as other patrol officers could, without wearing a properly fitting vest, but she could not wear the vest while lactating.

Hicks v. City of Tuscaloosa, No. 7:13-cv-02063, 2015 WL 6123209, at *21, Mem. Op. at 49 (N.D. Ala. Oct. 19, 2015). Indeed, Hicks testified that the choice between

suffering loss of milk production and risk of painful infection and patrolling without a properly-fitting vest amounted to being forced to decide whether to “breastfeed our child or work.” Tr. 220.

The jury reasonably found that being put in this position created a fundamentally intolerable situation—a finding supported by case law recognizing constructive discharge in cases where, as here, the employer’s actions created a risk to the employee’s health or safety. *See, e.g., Deleon v. Kalamazoo Cty. Rd. Comm’n*, 739 F.3d 914, 919 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 783 (2015) (plaintiff claimed job transfer exposed him “to toxic and hazardous diesel fumes on a daily basis”); *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1108 (6th Cir. 2008) (employer failed to provide “an accommodation that would have allowed her to work her shift without pain”); *Patton v. Keystone R.V. Co.*, 455 F.3d 812, 818 (7th Cir. 2006) (“When it becomes reasonable to fear serious physical harm, it becomes reasonable to quit immediately rather than seek redress while on the job.”).

C. Plaintiff Introduced Sufficient Evidence to Support Her Constructive Discharge Claim Based on a “Failure to Accommodate” Theory.

The jury’s constructive discharge verdict is additionally and distinctly supported by Defendant’s unlawful failure to grant Plaintiff’s request for a lactation accommodation, in violation of the first and second clauses of the PDA.

The PDA does not require employers to make unique accommodations for pregnant employees, but it does “make[] clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.” *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983). The first clause of the PDA, providing “that the terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions,” 42 U.S.C. § 2000e(k), makes clear that Title VII’s standard prohibition against sex discrimination applies to discrimination based on pregnancy and related conditions. *Young*, 135 S. Ct. at 1343. The second clause of the PDA goes a step further to require employers to treat “women affected by pregnancy, childbirth, and related medical conditions . . . 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). The second clause provides a comparative right to be treated at least as well as other employees who have a similar ability or inability to work, but who are not members of the protected class. *Young*, 135 S. Ct. at 1344.

An employee whose request for a pregnancy or childbirth-related accommodation has been denied may attempt to prove a discrimination claim under either the first or the second clause of the PDA, or both, depending on the nature of the violation and the theory of liability she chooses to pursue. Here,

Plaintiff adduced sufficient evidence under either clause to support the jury's verdict that Defendant violated the PDA in constructively discharging her, because (a) there was evidence that Defendant treated her less favorably than non-breastfeeding employees with a similar ability to work, and (b) there was other circumstantial evidence that the refusal to assign her to a desk job was because she was breastfeeding.

In *Young*, the Court clarified that in analyzing claims for failure to accommodate under the PDA's second clause, courts should "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." *Young*, 135 S. Ct. at 1344. "[A]s in all cases in which an individual plaintiff seeks to show disparate treatment through indirect evidence [the second clause of the PDA] requires courts to consider any legitimate, non-discriminatory, nonpretextual justification for these differences in treatment." *Id.*

Hicks presented sufficient evidence for the jury to reasonably conclude she was treated less favorably than other similar non-breastfeeding employees when she was denied an alternate duty assignment. *See id.* at 1344, 1354. Defendant does not deny that it maintains a policy of providing alternate duty assignments to officers with medical conditions, or that it in fact has provided many non-lactating officers with alternate duty. Nor does it assert that providing an alternate

assignment to Hicks would have been impossible. Defendant does not even deny that its refusal to accommodate was because the request was related to lactation. Instead, Defendant complains that Plaintiff did not provide evidence of employees “who had any issue with wearing a vest and [were] given a desk job” or “evidence of the regular positions held by officers who were assigned to a desk job or the level of their ability to perform the duties of those regular positions.” Appellant Br. 25.

Defendant overstates Plaintiff’s burden, which was only to prove that Defendant treated more favorably “at least some employees whose situation cannot reasonably be distinguished from [Plaintiff’s].” *Young*, 135 S. Ct. at 1355. Defendant was free to offer alternative justifications for the admittedly disparate treatment in its defense. But it was decidedly not Plaintiff’s burden “to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways.” *Id.*

The Supreme Court’s application of this test in *Young* illustrates this principle. In evaluating whether others similar in ability or inability to work had been accommodated, the Court looked to the employer’s policy that provided light duty assignments to drivers who were injured on the job, lost their licenses, or had ADA-qualifying disabilities. *Young*, 135 S. Ct. at 1347. In determining the individuals who were accommodated under this policy were proper comparators,

the Court gave no weight to the reasons particular individuals needed light duty, focusing solely on the fact that they required—and had been granted—the same form of accommodation sought by and denied to *Young*. *Id.* at 1344; *see also Legg*, 820 F. 3d at 67, 74 (existence of policy accommodating employees injured on the job per se sufficient to permit jury to conclude policy was motivated by discriminatory intent if left unexplained).⁷

As was true in *Young*, Defendant maintains a policy to “provide suitable alternate duty work for city employees who, as a result of a job-related injury . . . or qualifying medically related event, are temporarily disabled from performing all the essential functions of their regular job classification.” Appellee App. vol. 3, tab 136. At trial, Chief Anderson claimed that he did not consider Hicks to be covered by the policy because she did not have “an illness or an injury, which was consistent with placing her on alternate duty.” Tr. 1131:4-8. But the terms of Defendant’s alternate duty policy itself do not require “illness or injury.” More importantly, Chief Anderson’s differentiation is exactly the type of facially-neutral, yet discriminatory distinction Congress intended to prevent when it passed the PDA. *See Young*, 135 S. Ct. at 1353 (PDA passed to overturn *Gilbert*, which upheld as non-discriminatory a policy that excluded pregnant employees because it

⁷ The cases cited by Defendant (Appellant Br. 25-26) are distinguishable on their facts, and also because they do not apply the standard articulated by the Supreme Court in *Young*, 135 S. Ct.

“accommodated only sicknesses and accidents, and pregnancy was neither of those”). As in *Young and Legg*, Defendant’s failure to extend its policy to accommodate Hicks’s lactation-related limitations is enough to support a finding of discrimination in the absence of a legitimate, non-discriminatory, non-pretextual justification that the jury found credible. *See Castle v. Sangamo Weston, Inc.*, 837 F. 2d 1550, 1559 (11th Cir. 1988) (determinations of pretext are questions of credibility that should not be disturbed on appeal).

Defendant nonetheless argues that Anderson refused to accommodate Hicks because it was his personal belief that she could wear a vest if it were properly tailored. Appellant Br. 23. But at trial Anderson actually testified that he did not provide the accommodation because he believed Hicks’s doctor did not truly believe it was necessary—despite the doctor’s letter to the contrary. Tr. 1135-39, 1155-57, 1182-83. He also admitted that a loose-fitting vest could expose vital organs, Tr. 1186, that he did not know whether the vest could be tailored to prevent restriction of breast milk supply, Tr. 1180-81, and that if Hicks had gone out on patrol “she would have to wear a vest which would affect her ability to breastfeed her child,” Tr. 1131-32. Finally, Anderson repeatedly admitted that he did not “consider breastfeeding a condition that would warrant alternate duty.” Tr. 1154, 1156, 1184. The jury was more than reasonable to conclude that Defendant’s

justification was pretext, and that its real motivation was discriminatory—a finding that should not be disturbed. *See Combs*, 106 F.3d at 1529-38.

Finally, the same evidence was sufficient under a PDA first clause evidentiary theory to show that Defendant’s refusal to assign her to a desk job was related to lactation. *Holland*, 677 F.3d at 1055 (plaintiff required to show that membership in protected class was “a motivating factor” for employment decision). Chief Anderson’s repeated admission that he refused to consider her request for a desk assignment because he did not “consider breastfeeding a condition that would warrant alternate duty,” Tr. 1154, 1156, 1184, with no credible, non-discriminatory explanation for his belief, proves that Hicks’s accommodation request was denied because of her pregnancy-related condition of lactation.

Defendant’s assertion that Hicks’s claim fails for lack of evidence of “discriminatory animus,” Appellant Br. 23, misconstrues the PDA, which requires no showing of “animus” or “ill will.” *Holland*, 677 F.3d at 1059, n. 5. Rather, a showing that the decision was motivated by a condition related to pregnancy is enough.⁸ Anderson’s own testimony as to his reasons for denying her request is

⁸ Defendant’s argument that Plaintiff didn’t meet her burden on the discriminatory transfer claim fails for the same reason, as does Defendant’s complaint that the jury was not instructed to focus on the decision maker’s animus. Appellant Br. 21, 30.

thus more than sufficient to sustain a claim of discrimination “because of sex” as defined under the PDA.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

Dated: October 14, 2016

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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 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), 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: October 14, 2016

/s/ Randall Marshall
RANDALL MARSHALL

CERTIFICATE OF SERVICE

I, Randall Marshall, do hereby certify that I have filed the foregoing *Amicus Curiae* Brief along with Appendix A and Exhibits 1-3 electronically with the Court's CM/ECF system with a resulting electronic notice to all counsel of record on October 14, 2016.

Dated: October 14, 2016

/s/ Randall Marshall
RANDALL MARSHALL

APPENDIX A

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty, equality, and justice embodied in this nation's Constitution and civil rights laws. The ACLU Women's Rights Project (WRP) is a leader in the legal effort to ensure women's full equality in American society, including in the workforce. Because economic opportunity is the bedrock of personal autonomy, WRP seeks to ensure that women have equal access to employment and fair treatment in the workplace, with a particular emphasis on issues affecting new mothers and pregnant women at work, including breastfeeding.

The **American Civil Liberties Union of Alabama, Inc.**, is an affiliate of the national American Civil Liberties Union, Inc. ("ACLU"). The ACLU of Alabama has a longstanding interest in protecting the rights of women in the workplace and has significant knowledge and expertise in this area. The ALCU of Alabama takes a particular interest in the importance of the fair treatment of pregnant and nursing women in employment.

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.

9to5 is a 43 year old national membership organization of women in low-wage jobs dedicated to achieving economic justice and ending discrimination. Our members and constituents are directly affected by all forms of workplace discrimination, including pregnancy discrimination and failure to accommodate pregnancy and breastfeeding, among other issues. The outcome of this case will directly affect 9to5 members' and constituents' rights at work and economic well-being, and that of their families.

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 actively involved 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.

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 breastfeeding accommodations in the workplace.

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.

The **Feminist Majority Foundation** (FMF), founded in 1987, is a cutting-edge organization devoted to women's equality, reproductive health, and non-violence. FMF uses research and action to empower women economically, socially, and politically through public policy development, public education programs, grassroots organizing, and leadership development. Through all of its programs, FMF works to end sex discrimination and achieve civil rights for all people, including people of color and LGBTQ individuals.

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 1979.

Legal Aid Society – Employment Law Center (Legal Aid) 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 Voice is a non-profit public interest organization that works to advance the legal rights of women in the Pacific Northwest through public impact litigation, legislation, and legal rights education. Since its founding in 1978, Legal Voice has been dedicated to protecting and expanding women's legal rights. Toward that end, Legal Voice has pursued legislation and has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country, advocating for robust interpretation and enforcement of anti-discrimination and other laws protecting working women. Legal Voice serves a regional expert on the laws and policies impacting women in the workplace, including sex discrimination in the workplace, pregnancy discrimination, caregiver discrimination, and family leave policies.

The **National Association of Women Lawyers'** mission 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 women because they are pregnant, have given birth, or are breast-feeding. 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 Organization for Women** (NOW) Foundation is a 501 (c) (3) entity affiliated with the National Organization for Women, the largest grassroots feminist organization in the U.S. with hundreds of chapters in every state and the District of Columbia. NOW Foundation's mission is to advance women's equal rights through education and litigation. We believe that when working women become pregnant, give birth and nurture an infant they deserve the full protections of Title VII's Pregnancy Discrimination Act, the Family and Medical Leave Act, and the "Reasonable Break Time for Nursing Mothers" provision of the Affordable Care Act. 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 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 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.

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 *Hicks v. City of Tuscaloosa*.

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Women Employed promotes fair employment practices and helps increase access to training and education. 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. Women Employed is committed to protecting fair treatment of all working women, including workers who are pregnant or are new mothers who need an accommodation to allow them to keep working and have healthy pregnancies and allow them to express breast milk. When an employer does not follow the law on this issue a woman can no longer continue working and has been constructively discharged.

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 *Hicks v. City of Tuscaloosa* 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 women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, WLP's mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, we engage in high impact litigation, policy advocacy, and public education. For over forty years, WLP has challenged discrimination rooted in gender stereotyping and based on sex.

The **United States Breastfeeding Committee (USBC)** is a multi-sectoral, nonprofit coalition of more than 50 national organizations and federal government agencies that support its mission "to drive collaborative efforts for policy and

practices that create a landscape of breastfeeding support across the United States.”

As the national breastfeeding coalition and primary implementation partner of *The Surgeon General’s Call to Action to Support Breastfeeding*, the USBC serves as the leader in the coordination of breastfeeding activities in the United States to ensure all families who want to breastfeed have the support they need to be successful. The issues of this case are directly related to the USBC’s efforts to advance support and security for working breastfeeding families. The outcome of this case will directly affect the rights of breastfeeding employees, their long-term economic well-being, and that of their families.