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Amicus Brief in Support of EEOC in EEOC v. Houston Funding, II LTD.

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF, APPELLANT**

v.

**HOUSTON FUNDING, II LTD.,
DEFENDANT, APPELLEE**

**ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS**

**BRIEF FOR THE WOMEN'S LAW FORUM
OF SETON HALL UNIVERSITY SCHOOL OF LAW
IN SUPPORT OF APPELLANT**

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QUESTION PRESENTED

Whether the district court erred in granting summary judgment for the Defendants by concluding that Title VII of the Civil Rights Act of 1964 (Title VII),¹ as amended by the Pregnancy Discrimination Act ("PDA"),² does not include discrimination because of the sex-specific trait of lactation (i.e., producing and/or expressing breast milk)?

INTEREST OF THE WOMEN'S LAW FORUM

The Women's Law Forum (WLF) is a student organization at Seton Hall University School of Law dedicated to providing a forum for awareness of women's issues in the legal profession and society.³ Interpretation of the Pregnancy Discrimination Act and Title VII are integral to women's rights in the work force and protection from disparate treatment. Women in all professions are continually faced with balancing their careers with their family life. The WLF has an interest in upholding the interpretation of Title VII and the PDA, as well as the Fair Labor Standards Act, which has been amended to safeguard nursing mothers in the workplace.⁴

STATEMENT OF THE CASE

On June 29, 2011, the Equal Employment Opportunity Commission (EEOC) filed suit against Houston Funding, claiming that the termination of Donnicia Venters violated Title VII because it discriminated against her based on pregnancy and her desire to express breast milk at work.⁵

¹ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982).

² Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1982).

³ Seton Hall Law, Women's Law Forum (WLF), http://law.shu.edu/student_organizations/Womens_Law_Forum.cfl (last visited October 4, 2012).

⁴ The Fair Labor Standards Act of 1983, 29 U.S.C. § 201, *et seq.* (2011).

⁵ Brief for Appellee-Respondent at 3 EEOC v. Houston Funding II, Ltd., No. 12-20220 (5th Cir. May 30, 2012).

Venters began working at Houston Funding in March 2006 as an account representative.⁶ During her employment, Venters met and exceeded Houston Funding's expectations.⁷ Due to her pregnancy, Venters was put on bed rest and took a leave of absence from Houston Funding between the dates of June 28, 2008 and August 4, 2008.⁸ In December 2008, Venters took a maternity leave of absence to give birth, with no set return date.⁹ Houston Funding did not have a maternity leave policy in place, but her direct supervisor Robert Fleming, assured her that her position would be waiting for her whenever she returned.¹⁰

Shortly after Venters gave birth, she spoke directly to Harry Cagle, the Vice President of Houston Funding, about her maternity leave.¹¹ She informed Cagle that she had delivered through a Cesarean section and she would return as soon as her doctor would "release" her.¹² Cagle did not object to her ambiguous timeframe.¹³ Throughout her leave, Venters kept in contact with Fleming and others at Houston Funding.¹⁴ She spoke to Fleming at least once a week while on leave, which he reported to Cagle.¹⁵ Fleming testified that during Venters maternity leave he spoke with Cagle, and Cagle "agreed to save a spot for Donnicia Venters."¹⁶ Venters left items on her desk at Houston Funding, which she was assured were fine and never moved.¹⁷ When the Human Resource department contacted Fleming in December to inquire about Venters, he assured them that she had not quit but was out on maternity leave.¹⁸

⁶ Brief for Appellant-Petitioner at 2 EEOC v. Houston Funding II, Ltd., No. 12-20220 (5th Cir. May 21, 2012).

⁷ *Id.*

⁸ Brief for Appellee-Respondent, *supra* note 5, at 3.

⁹ Brief for Appellant-Petitioner, *supra* note 6, at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Brief for Appellant-Petitioner, *supra* note 6, at 3.

¹⁵ Brief for Appellant-Petitioner, *supra* note 6, at 2.

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 2.

Throughout her leave, Venters also paid and received insurance compensation for her absence from work from the date of her Cesarean section delivery until February 5, 2009.¹⁹

In early January, Venters contacted her supervisor Fleming to let him know that she was having complications from a cesarean section, and assumed that she would be able to return to work in February.²⁰ Venters asked Fleming to speak with Cagle about her impending return and the possibility of expressing breast milk at work.²¹ Fleming testified that he inquired about the possibility of Venters using a break room to express breast milk and that Cagle responded with a resounding no.²² Cagle further stated that “maybe she needs to stay home longer.”²³ Fleming left Houston Funding on January 9, 2009.²⁴ Phone records show that Venters spoke to personnel at Houston Funding for 115 minutes between January 7, 2009 and February 6, 2009.²⁵

On February 16, 2009, Venters’ doctor gave her clearance to return to work, so she contacted Cagle.²⁶ During their conversation, Venters informed Cagle that she was cleared to return to work and that she would like to use a back room to breast pump, if possible.²⁷ After what was described as a lengthy pause, where Venters was unsure if Cagle was still on the phone, Cagle replied that her position had been filled since they had not heard from Venters.²⁸ In response, Venters stated that she had been speaking to Fleming and others at Houston Funding

¹⁹ *Id.* at 3.

²⁰ *Id.*

²¹ Brief for Appellant-Petitioner, *supra* note 6, at 3.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *EEOC v. Houston Funding II, Ltd.*, No. H-11-2442, 2012 U.S. Dist. LEXIS 13644, at *2-3, (S.D. Tex. Feb. 2, 2012).

²⁶ Brief for Appellant-Petitioner, *supra* note 7, at 3.

²⁷ Brief for Appellant-Petitioner, *supra* note 7, at 3.

²⁸ *Id.*

throughout her maternity leave.²⁹ According to Venters, Cagle then informed her that his wife had returned to work six weeks after giving birth.³⁰

When asked what her termination date was, Cagle told Venters he would have to get back to her on that.³¹ Venters again contacted Cagle to find out her termination date, to which he replied, “I guess (it was) the 13th.”³² Cagle and Houston Funding insist that several employees met on February 10th and decided to fire Venters, but there is no written record or any other information about such a meeting.³³ On February 26th, Venters received a letter of termination due to her abandonment, dated February 16th, the day she spoke with Cagle.³⁴

On February 2, 2012, the district court granted summary judgment for Houston Funding, holding that firing an employee because of lactation or breast pumping after childbirth is not sex discrimination under Title VII and the Pregnancy Discrimination Act, therefore even if it could be proven that Venters was terminated because of her request to use a breast pump at work, she had no claim.³⁵ The case has been appealed to the U.S. Court of Appeals for the Fifth Circuit.

ARGUMENT

The district court erred when it concluded that lactation is not a related medical condition of pregnancy and childbirth protected under Title VII and the PDA. It is clear from the statutes that the intent of Congress is to provide protections to nursing mothers who face disparate treatment in the workforce. Lactation is a biological condition that occurs in women who are pregnant and have recently given birth, which allows them the ability to nourish their offspring

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id. at 4.*

³³ EEOC v. Houston Funding II, Ltd., *supra* note 25, at *2.

³⁴ *Id.*

³⁵ EEOC v. Houston Funding II, Ltd., *supra* note 25, at *3.

through nursing. The physiological function of lactating is clearly a medical condition of pregnancy and childbirth. Lactation is triggered by those very circumstances of pregnancy and childbirth. Public policy implores the Court to afford lactation and breastfeeding the required protection or else women will face severe hardships in the workforce. Therefore, summary judgment was improper and this case needs to be remanded for further proceedings.

I. Lactation Is A Sex-Specific Characteristic Protected Under Title VII

A. Lactation Is Within The Scope Of Discrimination On The Basis Of Sex

Title VII of the Civil rights Act of 1964 (Title VII), prohibits employers from discriminating against employees or potential employees on the basis of race, religion, color, national origin, or sex.³⁶ Employers cannot make hiring, firing, or promotional decisions based on these characteristics of an employee, unless they can prove a bona fide occupational qualification (BFOQ).³⁷ A BFOQ is a very narrow circumstance where the employer may try to demonstrate that discrimination on the basis of a protected trait is reasonably necessary to their business operations.³⁸ Discrimination on the basis of sex occurs when an employer treats a female employee less favorably than a male counterpart based on her sex, including because of pregnancy, childbirth, or a related medical condition.

Since the enactment of Title VII, the interpretation of pregnancy discrimination by courts has called for numerous amendments and clarifications. The Supreme Court held that it was not discrimination on the basis of sex to refuse to provide employees with pregnancy related

³⁶ 42 U.S.C. § 2000e (1964).

³⁷ *Id.*

³⁸ *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

benefits, under Title VII.³⁹ This holding that pregnancy discrimination was not sex discrimination, limited the reach of future actions brought under Title VII.⁴⁰

In 1978, Congress reacted to the precedent set by the Supreme Court with the enactment of the PDA.⁴¹ The PDA amended Title VII's meaning of discrimination on the basis of sex, to explicitly include "pregnancy, childbirth, or related medical conditions."⁴² Congress also included that discrimination because of sex is "not limited to" these express situations.⁴³ The PDA explained that pregnant women and mothers have more protections than previously interpreted by courts. Through the PDA, Congress effectively overruled the Supreme Court's ruling in *Gilbert*.

The move away from the Court's holding in *Gilbert* is further recognized by looking to a 1977 Senate Report, which detailed that the PDA "defines sex discrimination, as proscribed in the existing statute, to include these physiological occurrences peculiar to women."⁴⁴ The PDA was enacted to explicitly "change the definition of sex discrimination in title VII to reflect the 'commonsense' view and to insure that working women are protected against all forms of employment discrimination based on sex."⁴⁵ In a floor debate on the issue, members of the House of Representatives stated that the PDA was intended to give a woman "the right to choose both, to be financially and legally protected before, during, and after her pregnancy."⁴⁶ The House of Representatives also discussed the range of the PDA, by saying that "using the broad phrase 'women affected by pregnancy, childbirth and related medical conditions,' the bill makes

³⁹ *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 381 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976). (Supreme Court reversed the holding that pregnancy discrimination was "self evident" to be discrimination of the basis of sex, because only women, and not men, are affected.)

⁴⁰ 429 U.S. 125.

⁴¹ 42 U.S.C. § 2000e(k).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ S. REP. NO. 95-331, at 3-4 (1977).

⁴⁵ *Id.* at 3.

⁴⁶ 124 CONG. REC. 38,574 (1978) (statement of Rep Ronald Sarasin).

clear that its protection extends to the whole range of matters concerning the childbearing process.”⁴⁷ Accordingly, when Congress enacted the PDA, it not only included pregnancy, childbirth, and related medical conditions into the express terms of Title VII, but also explained its intent to have Title VII broadly interpreted to protect working mothers from all forms of discrimination on the basis of sex.⁴⁸

Based on the legislative history of Title VII and the PDA, it is necessary to conclude that related medical conditions include all those that occur in women from the physiological state of being pregnant. This is true even if the condition persists after the pregnancy, and childbirth has concluded. The district court’s finding that lactation is not a condition of pregnancy and childbirth is clearly flawed.

The district court pronounced that under the PDA, “related conditions may include cramping, dizziness, and nausea while pregnant.”⁴⁹ But the cited support for this conclusion was a case brought under the Americans with Disabilities Act, with no analysis regarding Title VII and the PDA.⁵⁰ The district court also cited *Puente v. Ridge*, which held that breastfeeding was not within the scope of the PDA.⁵¹ On appeal, this Court affirmed on other grounds, but stated that without deciding, it would assume that a plaintiff who was lactating “would fall within the class of person protected by the PDA.”⁵² This Court chose not to support the lower court’s finding that lactation discrimination was not recognized under Title VII and the PDA. Therefore, the district court erred when it relied on the lower court’s ruling in *Puente*.

⁴⁷ H.R. REP. NO. 95-948, at 5 (1978).

⁴⁸ See Nicole Kennedy Orozco, *Pumping at Work: Protection from Lactation Discrimination in the Workplace*, 71 OHIO ST. L.J. 1281, 1302 (2010). (Discusses Congress’ response to the Supreme Court in *Gilbert* and the enactment of the PDA as overruling the majority in *Gilbert*.)

⁴⁹ EEOC v. Houston Funding II, Ltd., *supra* note 25, at *3.

⁵⁰ Cerrato v. Durham, 941 F. Supp. 388, 393 (S.D.N.Y. 1996).

⁵¹ *Puente v. Ridge*, No.M-04-267, 2005 U.S. Dist. LEXIS 46624, at *4 (S.D. Tex. July 6,2005).

⁵² *Puente v. Ridge*, No. 08-40282, 2009 WL 1311504, at *4 (5th Cir. May 12, 2009). See Brief for Appellant-Petitioner, *supra* note 7, at 9.

The Supreme Court also endorsed a broad analysis of the PDA, when it held that classifying female employees because of gender and their capacity to bear children, was sex-based discrimination.⁵³ The Supreme Court found that regardless of actual pregnancy, creating a policy that restricted female employees based on their potential fertility, was discrimination on the basis of sex and a violation of the PDA.⁵⁴ Under this established reasoning, actual pregnancy is not a determinative factor. The district court's conclusion that lactation is not a condition of pregnancy because it occurs after childbirth has concluded is clearly erroneous.

For a plaintiff to prove discrimination under Title VII, he or she must show that they are part of a protected class, that they were terminated, that they were doing satisfactory work, and that they were replaced by someone not in their protected class.⁵⁵ If these facts can be shown, there is a presumption of discrimination on the basis of sex, absent a BFOQ.⁵⁶ Venters was part of the protected class of women who are undergoing pregnancy, childbirth, or a related medical condition, which is protected by the PDA. At the time immediate to her termination, she was no longer pregnant but was lactating and breastfeeding her newborn.

It was clearly erroneous of the district court to conclude that Title VII and the PDA did not protect Venters because she was no longer pregnant and that lactation is not a medical condition of pregnancy. As demonstrated above, lactation is directly medically related to pregnancy. The district court inaccurately granted summary judgment to the Defendant on the basis that lactation and breast pumping is not a pregnancy related medical condition. The district court's determination must be overruled.

⁵³ UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

⁵⁴ *Id.*

⁵⁵ California Fed. Sav. & Loan Ass'n v. Guerra, *supra* note 38, at 272.

⁵⁶ See 42 U.S.C. § 703(e)(1) (providing for an affirmative defense if sex is a bona fide occupational qualification (BFOQ)).

B. Lactation Is A “Related Medical Condition” To Pregnancy And Childbirth

Lactation refers to the period after childbirth in which milk is produced and secreted from the mammary glands of a woman who has recently given birth.⁵⁷ In the early stages of pregnancy the mammary glands begin to prepare for the child’s arrival and the production of milk.⁵⁸ By the sixth month of pregnancy, a woman’s breasts are prepared to secrete milk to nourish her child.⁵⁹ Immediately following childbirth, the placenta is delivered and triggers the release of the hormone prolactin.⁶⁰ This hormone activates the milk-producing glands and the woman’s breasts begin to fill with milk.⁶¹ Once a woman begins nursing her child, the suckling continues milk production by stimulating nerve endings that signal the mother’s pituitary gland to release oxytocin, the hormone that tells the mammary glands to release the milk.⁶² Typically, lactation only occurs during this timeframe; therefore lactation is specifically a condition of pregnancy and childbirth, because those who have not given birth do not undergo lactation.⁶³

Characteristically, lactation only occurs in women, specifically women who are or have recently been pregnant.⁶⁴ While there are medical anomalies where cases of lactation have occurred in non-pregnant women or men, called galactorrhea, it is not the conventional form of lactation that is required to breastfeed a newborn.⁶⁵ Lactating is a natural, biological response to pregnancy. When a woman becomes pregnant her body automatically begins to prepare for

⁵⁷ Medscape Reference, Human Milk and Lactation, <http://emedicine.medscape.com/article/1835675-overview#showall> (October 10, 2012).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ American Academy of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, *supra* note at 496.

⁶⁴ *Id.*

⁶⁵ Kristen S. Pena, M.D., Jo Ann Rosenfeld, M.D., *Evaluation and Treatment of Galactorrhea*, *AM. FAM. PHYSICIAN*, 63(9),1763-1771 (2001).

childbirth and for rearing a child. An essential part of that process is lactating breast milk, which can be used to nurse the child.

In a concurring opinion before the Ohio Supreme Court, Justice O'Connor came to the conclusion that lactation is logically a medical condition related to pregnancy and childbirth.⁶⁶ Justice O'Connor opined that the language of the PDA is broad and that there is "little trouble concluding that lactation also has a clear, undeniable nexus with pregnancy and with childbirth."⁶⁷

Lactation is a natural effect of pregnancy and childbirth. The female body automatically begins to lactate and produce milk to feed its offspring. Since it only occurs in females, it is a characteristic of the female sex, which cannot be a basis for discrimination. As a physiological response to pregnancy, lactation is most certainly a related medical condition that is protected under the PDA.

C. If The Law Did Not Provide Protections To Nursing Mothers, Women Would Face Injustice In The Workforce

If the law does not protect nursing mothers, most working mothers will be forced to make a choice between breastfeeding and returning to their job. In the tough economic times that we are facing right now, it is more than likely that ensuring employment will win out. This constructively revokes women's rights to equality in the workforce because male employees will not have to make the same sacrifices. A female employee cannot have the equal opportunity to choose how to feed her child and the many benefits associated with breastfeeding, if she is concerned it will harm her employment. In order to increase the number of breast-fed babies, accommodations must be made for women who need to express breast milk while at work.

⁶⁶ Allen v. Totes/Isotoner Corp., 915 N.E.2d 622, 630 (Ohio 2009) (O'Connor, J., Concurring in judgment only).

⁶⁷ *Id.*

Breast-fed babies are proven to benefit society and employers in many ways; women will miss less work, healthcare costs will be reduced, and retention of employees will increase.

A healthier mother is beneficial to not only her and her child's well being, but to employers.⁶⁸ Healthier employees miss less work because their infants are sick less often and because they themselves are less likely to develop certain illnesses.⁶⁹ Having a healthy infant will encourage women to return to the workforce sooner, continue working and give them a greater peace of mind when doing so.⁷⁰ Happy employees have been proven to be more dedicated employees.⁷¹ Title VII and the PDA must be read to protect lactation and breastfeeding so that infants and future generations will be provided with healthy and productive futures. A healthier generation will lessen the strain on our healthcare system. Total medical care costs for the nation are lower for fully breast-fed infants than never breast-fed infants, since breast-fed infants typically need fewer sick care visits, prescriptions, and hospitalizations.

If expressing breast milk is not considered a medical condition of pregnancy, it will be extremely detrimental to women in the work force and in society as a whole. Employers will be able to control employees' return from maternity leave dependent upon if they are nursing or not. The hardship to return to work while still providing for a nursing infant would put working mothers and families at a great disadvantage. Mothers would be discouraged from breastfeeding because they could not balance their work and family life. If they chose to breastfeed, they would have to prolong their leave and lose out on the (most likely needed) income. The only alternative

⁶⁹ U.S. DEP'T OF HUMAN HEALTH & SERVICES, BUSINESS CASE FOR BREASTFEEDING: FOR BUSINESS MANAGERS, *supra* note 105.

⁷⁰ Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER SOC. POL'Y & L. 471, 479 (2001).

⁷¹ Joanne H. Gavin & Richard O. Mason, *The Virtuous Organization: The Value of Happiness in the Workplace*, 33 ORGANIZATIONAL DYNAMICS 379, 381 (2004). ("Healthy and happy employees tend to be more productive over the long run, generating better goods and more fulfilling services for their customers and the others with whom they interact and do business.")

would be to formula feed their children so that they could be left in another's care while the mother returns to work.

While relatives and hired caregivers can perform other aspects of childcare, breastfeeding is solely a function of the mother. Because lactation is a physiological response to pregnancy, only a mother can secrete breast milk through breastfeeding or breast pumping to nourish an infant. If a mother is not able to pump breast milk when she returns to the work force, she will be required to discontinue breastfeeding or risk her employment. Unlike other facets of the work-life balance, breastfeeding is not one that can be distributed among multiple caregivers.

It is not feasible for women to continue to be productive in the work force and breastfeed, unless they are permitted to express breast milk at work. Breastfeeding requires 8-10 feedings a day.⁷² If a woman wishes to continue to work, she cannot always be there when her child is in need of nourishment. Therefore, expressing breast milk and storing it is a necessity for working mothers. A working mother cannot perform the function of breastfeeding and her job duties if she is not allowed to use her work breaks to express breast milk. Lactation and breast feeding is a function that most naturally performed by a child's birth mother. While many working mothers are able to get help with childcare so they can continue to work, breastfeeding is not commonly or easily transferred to another.⁷³

The discontinuance of breastfeeding would greatly disadvantage the mother and child, as well as our society. As we discussed in detail above, breastfeeding has numerous advantages to health and development, as well as to our environment. By continually enacting laws protecting nursing mothers, our legislature acknowledges that breastfeeding is the preferred method of

⁷² American Academy of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, *supra* note at 496.

⁷³ Sarah E. Waldeck, *Encouraging A Market In Human Milk*, 11 COLUM. J. GENDER & L. 361, 361 (2002). (Describes the existing milk banking system in the United States and argues that the American legal system should encourage a market in human milk, which would increase the number of children exposed to the benefits of breast milk.)

feeding for babies. Employers must be held accountable for providing employees with the protected opportunity to nurse.

II. Legislature Continues Its Intent To Protect Nursing Mothers In The Workplace

A. The Patient Protection and Affordable Care Act

In 2010, the legislature recognized that Title VII was not being interpreted to protect nursing mothers who needed to express breast milk when they returned to the workforce. The Patient Protection and Affordable Care Act (PPACA) became effective on March 23, 2010, and mandates that nursing mothers be given adequate breaks and a proper environment to express breast milk.⁷⁴ PPACA, which amends the Fair Labor Standards Act (FLSA), has granted explicit rights to mothers who need to lactate and express breast milk in the workplace.⁷⁵ This statute requires many employers to provide accommodations for nursing mothers. The Department of Labor (DOL), published “Fact Sheet #73 Break Time for Nursing Mothers under the FLSA,” which explains that employers who meet certain criteria are mandated to allow women who are breastfeeding to pump breast milk at work for one year after the child’s birth.⁷⁶ Employers are also required to provide a private place for mothers to express breast milk, other than a

⁷⁴ Patient Protection and Affordable Care Act, 29 U.S.C. §§ 207(r)(1)-(4) (2010).

⁷⁵ Fair Labor Standards Act of 1938, 29 U.S.C. § 207 (2011). Section 7 of the Fair Labor Standards Act of 1938 is amended by adding at the end the following:

(r)(1) An employer shall provide—

reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk; and
a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

(3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.

(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

⁷⁶ U.S. DEP’T OF LABOR, WAGE AND HOUR DIVISION, FACT SHEET #73, BREAK TIME FOR NURSING MOTHERS UNDER THE FLSA (2010).

bathroom.⁷⁷ The factsheet provided by the DOL goes on to explain that the frequency and duration of the breaks is dependent upon each employee's needs.⁷⁸ The breaks for nursing mothers under the FLSA are not required to be paid breaks, but if an employee already receives paid breaks they may use those to express breast milk without penalty.⁷⁹ This federal requirement is meant to be a floor of protections to nursing mothers, not a ceiling.⁸⁰ State law is not preempted and can further mandate employers to provide for accommodations longer than one year.⁸¹

States can implement more protective regulations in regards to pregnancy discrimination and breastfeeding. State laws in Texas provide protection to nursing mothers because the legislature there has found it an "important and basic act of nurture that must be encouraged in the interests of maternal and child health and family values."⁸² The Texas legislature further endorsed breastfeeding as the best method of infant nutrition.⁸³ In Texas, a mother is allowed to breastfeed her child in any location that the mother herself is authorized to be.⁸⁴ Texas law also specifies that businesses that implement policies which support worksite breastfeeding, have a special public designation of being "mother-friendly."⁸⁵

There are two exceptions under the FLSA, where employers are not mandated to provide breaks for nursing mothers.⁸⁶ The Defendant does not meet the requirement to be an excluded

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ California Federal Sav. & Loan Ass'n v. Guerra, *supra* note 38, at 280.

⁸¹ U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, FACT SHEET #73, BREAK TIME FOR NURSING MOTHERS UNDER THE FLSA, *supra* note 69.

⁸² Tex. Health & Safety Code Ann. § 165.001 (1995).

⁸³ *Id.*

⁸⁴ Tex. Health & Safety Code Ann. § 165.002 (1995).

⁸⁵ Tex. Health & Safety Code Ann. § 165.003 (1995).

⁸⁶ See 29 U.S.C. § 207. Section 7(i) applies to breaks for nursing mothers, and exempts employees of the retail and service industry who are paid in part or in whole on commission. To be a "retail or service establishment," the employer must meet two requirements; (1) 75% of their annual dollar volume of sales or service are not from resale, and (2) the sale of goods or services are recognized in that industry as retail sales. In order for that exemption to be

employer under the FLSA. Since Defendant cannot seek exclusion from the FLSA, they are now explicitly required by federal law to provide accommodations for their employees who wish to express breast milk at work. This includes allowing their employees to take adequate breaks to express breast milk as needed, and to provide an appropriate private space for it to occur. Even though these requirements did not become effective until the enactment of PPACA in 2010, it is further proof that Congress has always intended that anti-discrimination laws encompass nursing mothers in the workforce.

B. The Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act (PWFA) is a proposed piece of legislation that would require employers to make similar accommodations for pregnancy, childbirth, and related conditions that they do for those with disabilities.⁸⁷ The PWFA mandates employers to make reasonable job modifications for employees who have limitations because of pregnancy, childbirth, or a related medical condition.⁸⁸ Examples of accommodations under the PWFA would be to allow employees who typically stand at a counter to use a stool or to reassign an employee to light duty for a portion of their pregnancy.⁸⁹ Employers are also prohibited from retaliating against employees who request accommodations under the PWFA.⁹⁰ Protections under the PWFA will also prohibit employers from forcing pregnant employees to accept modifications to their job duties when none are needed and from being compelled to take a leave of absence from employment when modifications would be sufficient.

applicable, the following three conditions must all be met. First, the employee must be employed by a retail or service establishment. Second, the employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek. And finally, more than half the employee's total earnings in a representative period must consist of commission on goods and services.

⁸⁷ H.R. Doc. No. 5647 (2012).

⁸⁸ NATIONAL WOMEN'S LAW CENTER, THE PREGNANT WORKERS FAIRNESS ACT: MAKING ROOM FOR PREGNANCY ON THE JOB (2012).

⁸⁹ *Id.*

⁹⁰ *Id.*

Congress' continuous actions of introducing legislature that protects working mothers makes it unambiguous that pregnancy discrimination is derived from the basis of sex. Only women are affected by pregnancy, childbirth, and related medical conditions. Therefore, female employees will always be treated differently than their male counterparts, because males are not equipped to experience pregnancy or childbirth.

III. Breastfeeding Is Legally Protected Because It Provides Consummate Benefits To Society

A. Benefits To The Child

Colostrum is produced when lactation begins during pregnancy and immediately after giving birth.⁹¹ Colostrum is known as “liquid gold,” because it is a thick yellow milk that is extremely rich in antibodies and nutrients.⁹² Feeding newborns with this breast milk will strengthen their immune systems and provide them with the necessary nutrients to develop at a healthy rate.⁹³ A few days after birth, the “liquid gold” milk naturally adapts to include the perfect amount of fat, sugar, water, and protein that will help the baby grow.⁹⁴ The protein in store bought formula, the alternative to breast milk, is made from cow's milk, which is harder for babies' young stomachs to digest.⁹⁵

There is no way for formula to replicate the chemical make-up of breast milk.⁹⁶ Because of the prevalence of antibodies in breast milk, nursing offers a unique opportunity to protect babies

⁹¹ Medscape Reference, Human Milk and Lactation, <http://emedicine.medscape.com/article/1835675-overview#showall> (October 10, 2012).

⁹² DEP'T OF HEALTH & HUMAN SERVICES, WOMEN'S HEALTH, BREASTFEEDING, <http://www.womenshealth.gov/breastfeeding/why-breastfeeding-is-important/#a>, (last updated August 4, 2011).

⁹³ *Id.*

⁹⁴ U.S. BREASTFEEDING COMMITTEE, WORKPLACE BREASTFEEDING SUPPORT (2002), *available at* <http://www.usbreastfeeding.org/Portals/0/Publications/Workplace-2002-USBC.pdf>.

⁹⁵ *Id.*

⁹⁶ *Id.*

from a plethora of illnesses.⁹⁷ Babies who are breast-fed are less prone to ear infections and diarrhea.⁹⁸ They also have lower risks of contracting respiratory infection, asthma, gastrointestinal diseases, obesity, and type 2 diabetes.⁹⁹ There has also been some research showing that breastfeeding can help prevent the risk of children developing type 1 diabetes, leukemia, certain skin rashes, and lower the risk of Sudden Infant Death Syndrome (SIDS).¹⁰⁰ Children who are breast-fed also develop fewer food or environmental allergies.¹⁰¹ Studies show that breast-fed infants have on average a 3.18 higher intelligence quotient (IQ) than formula fed infants.¹⁰² The cognitive benefits of breast milk on babies will increase their educational potential and can lessen the burden on society's educational system.¹⁰³

Formula fed babies have more doctor appointments, spend more time in the hospital, and require more prescriptions than babies who are fed breast milk.¹⁰⁴ A study found that for every 1,000 babies who are formula fed, there are 2,033 extra physician visits, 212 extra hospital stays, and 609 extra prescriptions, all for only three specific sicknesses; ear infection, respiratory infections, and gastrointestinal infections.¹⁰⁵ In addition, there are also many other sicknesses that infants can develop with their more susceptible immune systems.

The American Academy of Pediatrics recommends that infants be breast-fed for six months and then slowly transitioned to a mixture of breastfeeding and other forms of nutrition,

⁹⁷ *Id.*

⁹⁸ NATURAL RESOURCES DEFENSE COUNCIL, HEALTHY MILK, HEALTHY BABY, CHEMICAL POLLUTION AND MOTHER'S MILK (2005), available at <http://www.nrdc.org/breastmilk/>.

⁹⁹ *Id.*

¹⁰⁰ U.S. BREASTFEEDING COMMITTEE, WORKPLACE BREASTFEEDING SUPPORT, *supra* note 87.

¹⁰¹ *Id.*

¹⁰² THE COUPLE TO COUPLE LEAGUE FOR NATURAL FAMILY PLANNING, BREASTFEEDING: GOOD FOR BABY AND FOR YOU, BENEFITS TO SOCIETY, <http://ccli.org/breastfeeding/bf-benefits/benefits-society.php> (last visited November 26, 2012).

¹⁰³ *Id.*

¹⁰⁴ NATURAL RESOURCES DEFENSE COUNCIL, HEALTHY MILK, HEALTHY BABY, CHEMICAL POLLUTION AND MOTHER'S MILK (2005), available at <http://www.nrdc.org/breastmilk/>.

¹⁰⁵ Thomas M. Ball and Anne L. Wright, *Health care costs of formula feeding in the first year of life*, 103(4) PEDIATRICS 871, 876 (1999).

for an additional six-month period.¹⁰⁶ Exclusively breastfeeding for at least 6 months provides the most health benefits to both mothers and babies.¹⁰⁷ By requiring employers to provide adequate breaks and a functional environment for employees to express breast milk, the government is able to ensure a higher rate of children receive the optimal nutrition recommended by the American Academy of Pediatrics.

B. Benefits To The Mother

Breastfeeding saves money! Typically, formula and feeding supplies can cost over \$1,500 each year.¹⁰⁸ Formula alone can cost the average family \$750 to \$1,000 a year to purchase.¹⁰⁹ The government spends hundreds of millions of dollars each year supplying formula to the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC).¹¹⁰ Breastfeeding does not require that constant purchase of formula, bottles, and nipples that formula feeding does. Breastfeeding has no initial expenses at all. Mothers who breastfeed only need what is naturally provided to them through lactation. The mother's breast milk is always the appropriate temperature and the perfect combination of nutrients for her child. There is never the need to buy different formulas. Mothers who return to work while breastfeeding have only the expense of investing in a breast pump, but this still pales in comparison to the cost of formula. Breastfeeding also offers more convenience to the mother and baby. When the

¹⁰⁶ American Academy of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, *supra* note at 496.

¹⁰⁷ K.R. Shealy, R. Li, S. Benton-Davis & L.M. Grummer-Strawn, U.S. DEPT OF HEALTH & HUMAN SERVICES, THE CDC GUIDE TO BREASTFEEDING INTERVENTIONS (2005), *available at* http://www.cdc.gov/breastfeeding/pdf/breastfeeding_interventions.pdf.

¹⁰⁸ *Id.*

¹⁰⁹ *Advantages of Breastfeeding to Society*, FAMILY EDUCATION, (November 26, 2012), <http://life.familyeducation.com/breastfeeding/35904.html>.

¹¹⁰ Thomas M. Ball & Anne L. Wright, *Healthcare Costs of Formula Feeding in the First Year of Life*, 103 PEDIATRICS 870, 875 (1999).

child is hungry, the mother has the immediate ability to nurse. There is no need to wait to mix formula, heat the formula, and find an adequate area where all of this can be done.

Not only is it less expensive than formula, but there is a tax deduction for breastfeeding expenses.¹¹¹ This tax break for breastfeeding equipment as a medical expense, further proves that it is the intent of the government to protect lactation and breastfeeding as a medical condition of pregnancy. The ability and the right to breastfeed extend beyond health benefits, and also improve the financial stability of women. The benefits of breastfeeding for both the child and the mother overlap onto private sector employers and society.¹¹²

The protection of nursing mothers will also lessen the financial burden on the government in providing formula to low-income families. Women with lower incomes will not have to rely on government supplies and subsidies to feed their infants. Instead, they will be free to use their work breaks to express breast milk.

Mothers benefit emotionally from breastfeeding; they develop a poignant connection with their baby, which allows the baby to feel secure and comforted.¹¹³ The skin-to-skin contact that occurs during breastfeeding can boost oxytocin in mothers.¹¹⁴ Oxytocin, the hormone that helps with breast milk production, has been shown to have a calming effect on mothers.¹¹⁵ This calming effect can be felt by the child, and can help soothe colic and other infantile distresses.

The surge of hormones that occurs when breastfeeding can also help mothers ward off post-

¹¹¹ T.D. 9514, 2011-9 I.R.B. 527. (“The Internal Revenue Service has concluded that breast pumps and supplies that assist lactation are medical care under § 213(d) of the Internal Revenue Code because, like obstetric care, they are for the purpose of affecting a structure or function of the body of the lactating woman. Therefore, if the remaining requirements of § 213(a) are met (for example, the taxpayer’s total medical expenses exceed 7.5 percent of adjusted gross income), expenses paid for breast pumps and supplies that assist lactation are deductible medical expenses. Amounts reimbursed for these expenses under flexible spending arrangements, Archer medical savings accounts, health reimbursement arrangements, or health savings accounts are not income to the taxpayer.”)

¹¹² Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER SOC. POL’Y & L. 471, 477-478 (2001).

¹¹³ U.S. BREASTFEEDING COMMITTEE, WORKPLACE BREASTFEEDING SUPPORT, *supra* note 87.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

partum depression.¹¹⁶ Expressing breast milk also lowers a woman's risk of type 2 diabetes, breast cancer, and ovarian cancer.¹¹⁷ Breastfeeding helps mothers burn calories and keep their metabolism up, which helps with their overall health and fitness. By allowing for working mothers to choose what is healthiest for them and their infant, they will be able to recover from childbirth quicker and reduce the length of their maternity leave. Society has an interest in continuing to develop equality within the workforce, which will be perpetuated by protecting nursing mothers.

C. Benefits To Society

Today's workforce includes an expanding number of working mothers.¹¹⁸ They are the largest continually growing segment of the job market with 55% of women with children under the age of 3, being employed.¹¹⁹ Specifically, in the United States over 70% of new mothers choose to breastfeed their babies due to the important health and nutritional benefits.¹²⁰ The law must protect the rights of women to obtain equal opportunities in the workforce as their male counterparts. By mandating and supporting family-friendly programs, such as lactation rooms, the laws will provide women with the same opportunities to return to work post-childbirth, as males. Employers should support these laws because they strengthen the value of employee benefit packages and protect their investment in their employees by having higher retention rates.¹²¹

¹¹⁶ NATURAL RESOURCES DEFENSE COUNCIL, HEALTHY MILK, HEALTHY BABY, CHEMICAL POLLUTION AND MOTHER'S MILK, *supra* note 91.

¹¹⁷ American Academy of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496, 497 (2005).

¹¹⁸ DEP'T OF LABOR, HOUSEHOLD ANNUAL DATA AVERAGES, 9. EMPLOYED PERSONS BY OCCUPATION, SEX, AND AGE (2011), *available at* <ftp://ftp.bls.gov/pub/special.requests/lf/aa2010/pdf/cpsaat9.pdf>.

¹¹⁹ U.S. DEP'T OF HUMAN HEALTH & SERVICES, BUSINESS CASE FOR BREASTFEEDING: FOR BUSINESS MANAGERS (2008).

¹²⁰ *Id.*

¹²¹ Joanne H. Gavin & Richard O. Mason, *The Virtuous Organization: The Value of Happiness in the Workplace*, 33 ORGANIZATIONAL DYNAMICS 379, 381 (2004).

Breastfeeding also benefits society because of its low impact on the environment.¹²² Breast milk is readily available, always at the proper temperature, and does not put a strain on natural resources. Breast milk is manufactured naturally from the mother's body and does not require the use of water, oil or other resources.¹²³ Breast milk also does not require special packaging, storage, or refrigeration. Breastfeeding will cut down on the use of plastic bottles and generates little to no industrial waste. There is also less waste of formula.¹²⁴ In hospital's, infant formula is provided in one-time use bottles, which are filled and only a little more than an ounce is actually consumed.¹²⁵ The rest of the formula and the bottle are disposed.¹²⁶ Breastfeeding saves from adding waste to our environment. It is crucial that the Court protect a woman's right to express breast milk because it will also lessen the drain on our national resources.

i. Nursing in the Workplace Has Been Demonstrated As Advantageous

Many national health organizations provide information for employees and employers on establishing lactation support programs.¹²⁷ Companies that introduce these programs into their workforce experience many long-term benefits, including lower healthcare costs, higher retention rates, and greater productivity of their employees.¹²⁸ These programs embolden mothers to breastfeed and provide the highest form of nutrition to their infants. When companies include prenatal education they can experience even greater savings.¹²⁹ By requiring employers

¹²² American Academy of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, *supra* note at 497.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Advantages of Breastfeeding to Society*, FAMILY EDUCATION, (November 26, 2012), <http://life.familyeducation.com/breastfeeding/35904.html>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ U.S. DEP'T OF HUMAN HEALTH & SERVICES, BUSINESS CASE FOR BREASTFEEDING: FOR BUSINESS MANAGERS, *supra* note 105.

to support their nursing employees through education on breastfeeding and providing accessibility to express breast milk, more working mothers will be able to return to work while their child is still young.

The accessibility to breastfeed and express breast milk can save the employers money. As discussed, breast milk boosts infant's immune systems and helps prevent common childhood illnesses.¹³⁰ This strengthened immune system helps ward off common germs that infants pick up at home or at a daycare facility. Both mothers and fathers of breast-fed infants have been shown to take less time off from work to care for sick children.¹³¹ Statistically, absences to take care of sick children occur more than twice as often for mothers who formula feed their children compared to mothers that breastfeed.¹³²

Formula feeding culminates in higher medical costs for the working mother and for the businesses that employ them. It has been estimated that the medical and surgical costs to treat ear infections cost two to three million dollars a year.¹³³ CIGNA, a large insurance company, organized a two-year study of 343 of its employees who participated in a lactation support program they developed.¹³⁴ CIGNA found that the program resulted in an annual savings of \$240,000 in healthcare costs, with 62% fewer prescriptions, and a saving of \$60,000 due to absenteeism.¹³⁵

By requiring companies to implement lactation programs, the availability of long-term employment will be more attainable to mothers. Women will have the availability to maintain

¹³⁰ *See supra* III. A.

¹³¹ *Id.*

¹³² NATIONAL BUSINESS GROUP ON HEALTH, INVESTING IN WORKPLACE BREASTFEEDING PROGRAMS AND POLICIES: AN EMPLOYER'S TOOLKIT 1.2 (Wendy Slavit ed., 2009).

¹³³ *Advantages of Breastfeeding to Society*, FAMILY EDUCATION, (November 26, 2012), <http://life.familyeducation.com/breastfeeding/35904.html>.

¹³⁴ U.S. DEP'T OF HUMAN HEALTH & SERVICES, BUSINESS CASE FOR BREASTFEEDING: FOR BUSINESS MANAGERS, *supra* note 105.

¹³⁵ *Id.*

meaningful employment outside the home, while also being able to fulfill their duties to their infants. Companies who employ lactating mothers will retain more experienced employees and spend less time and money recruiting and training new employees. Companies who create an encouraging environment for expressing breast milk see a lower turnover rate than companies who do not.¹³⁶ Employees are much more likely to return to work after childbirth if they are returning to a supportive environment.¹³⁷ This saves companies from incurring costs to recruit, hire, and train new employees or temporary staff, when experienced employees return to work after maternity leave.¹³⁸ One study showed that companies with lactation support programs had a retention rate of 94.2% of their maternity workforce versus the national average of only 59%.¹³⁹ The insurance company, The Mutual of Omaha, documented that their lactation support program led to a retention rate of 83% of employees on maternity leave.¹⁴⁰

Employees whose companies provide breastfeeding support report that they feel better satisfaction with their jobs, an improved morale, and higher productivity.¹⁴¹ Employees feel their transition from maternity leave back to work is smoother and more welcomed. Having these programs in place also allows working mothers to return to work sooner, rather than later. When new mothers feel that they can still care for their newborn's health and nutrition, while returning to work at the same time, they will return quicker and be more committed.

¹³⁶ NATIONAL BUSINESS GROUP ON HEALTH, INVESTING IN WORKPLACE BREASTFEEDING PROGRAMS AND POLICIES: AN EMPLOYER'S TOOLKIT, *supra* note 113, at 3.8.

¹³⁷ NATURAL RESOURCES DEFENSE COUNCIL, HEALTHY MILK, HEALTHY BABY, CHEMICAL POLLUTION AND MOTHER'S MILK (2005), available at <http://www.nrdc.org/breastmilk/>.

¹³⁸ U.S. DEP'T OF HUMAN HEALTH & SERVICES, BUSINESS CASE FOR BREASTFEEDING: FOR BUSINESS MANAGERS, *supra* note 105.

¹³⁹ J. Ortiz, K. McGilligan & P. Kelly, *Duration of breast milk expression among working mothers enrolled in an employer-sponsored lactation program*, 30(2) PEDIATRIC NURS., 111, 119 (2004).

¹⁴⁰ U.S. DEP'T OF HUMAN HEALTH & SERVICES, BUSINESS CASE FOR BREASTFEEDING: FOR BUSINESS MANAGERS, *supra* note 105.

¹⁴¹ U.S. BREASTFEEDING COMMITTEE, WORKPLACE BREASTFEEDING SUPPORT, *supra* note 87.

When employees feel appreciated and supported it translates into better quality, long-term employees. Providing a supportive environment for breastfeeding employees also enriches the company's image in the community. Many companies who provide lactation programs or support breastfeeding employees receive positive attention from local media outlets, which can boost their goodwill in the community and their ability to recruit new employees. Despite the fact that 80% of its workforce is male, the Los Angeles Department of Water and Power, implemented a lactation support program for mothers, fathers, and partners of male employees.¹⁴² They found that this program decreased their absenteeism and employee turnover rates for both female and male employees.¹⁴³ A survey showed that 83% of their employees were more positive about the company because of this program and that 67% of their employees planned to make Los Angeles Department of Water and Power their long-term employer.¹⁴⁴

The increased health of both mothers and infants leads to substantial healthcare savings.¹⁴⁵ Another study of Mutual of Omaha employees found that healthcare costs were three times less for newborns whose mothers' breast-fed them and participated in the company's lactation program, than those who did not.¹⁴⁶ There was a yearly savings of \$115,881 in healthcare claims for breastfeeding mothers and babies.¹⁴⁷ This boils down to an additional \$2,146 spent per person for employees who did not participate in the Mutual of Omaha's lactation program or breastfeed their infants.¹⁴⁸

¹⁴² Rona Cohen, Linda Lange, & Wendy Slusser, *A Description of a Male-Focused Breastfeeding Promotion Corporate Lactation Program*, 19 J. HUM. LACT. 61, 65 (2002).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ American Academy of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, *supra* note at 497.

¹⁴⁶ U.S. BREASTFEEDING COMMITTEE, WORKPLACE BREASTFEEDING SUPPORT, *supra* note 87.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

The Court must mandate that lactation and breastfeeding are protected classes of discrimination under Title VII, to allow more women to breastfeed, and lessen the burdens of medical care and financial assistance programs on society. If programs for nursing mothers in the workforce are mandated, the effects seen in the various studies will become widespread. The societal interest in creating a strong private sector and equal employment opportunities for women, outweigh any burdens that lactation discrimination cases may bring to the courts.

It is a matter of public policy that women in the workforce are granted their Constitutional right to equal protections under the law. If discrimination based on lactation and breastfeeding is not concluded to fall within the scope of Title VII, equality in the open market will never be achieved since women bear the sole burden of lactation and breastfeeding.

CONCLUSION

Since breastfeeding has so many wonderful benefits to mothers, babies, and society, employers must be prohibited from discriminating against employees who wish to express breast milk. It is in society's best interest to reverse the district court's finding of Summary Judgment and remand this case for further review. We must produce case law that adequately reflects the intention of the Congress and its protections for the right to express breast milk at work.

For the forgoing reasons the Women's Law Forum of Seton Hall Law School, respectfully requests that this Court overturn the district court's finding of summary judgment and remand the case to trial.

Respectfully submitted,

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