No. 03-95

IN THE
SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA STATE POLICE,
Petitioner,

v.

NANCY DREW SUDERS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; AARP; THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION; THE LEGAL AID SOCIETY — EMPLOYMENT LAW CENTER; THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; THE NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; THE NATIONAL WOMEN'S LAW CENTER; AND NOW LEGAL DEFENSE AND EDUCATION FUND; AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a constructive discharge that is caused by a supervisor's sexual harassment is a tangible employment action?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATUTES

OTHER AUTHORITIES

No. 03-95

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STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties,[1] in support of Respondent's argument that the Third Circuit properly held that a constructive

[1] Petitioner and Respondent filed a joint consent to the filing of *amici* briefs with the Clerk of this Court. Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae,* its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

discharge is a tangible employment action. *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003).

This case, involving the question of whether a constructive discharge caused by a supervisor's discrimination is a tangible employment action, is a matter of significant concern to the Lawyers' Committee for Civil Rights Under Law and the organizations joining this *amici* brief. This case could determine whether the long-established doctrine of constructive discharge will effectively protect victims of harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*.[2] The Court's decision here will directly affect the rights of employees who are forced out of employment on the basis of race, sex, religion, national origin, or ethnicity. As such, this case directly impacts the constituencies served by the undersigned organizations.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently

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[2] Some *amici* also serve constituencies that will be affected by the Court's decision because Title VII is the model for other employment discrimination statutes. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 584 ("the prohibitions of the [Age Discrimination in Employment Act] were derived in *haec verba* from Title VII"); *see also, e.g., Acrey v. American Sheep Indus. Ass'n,* 981 F.2d 1569, 1574-75 (10th Cir. 1992) (affirming constructive discharge verdict for plaintiff under ADEA, and applying same legal analysis to Title VII and ADEA constructive discharge claims).

includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee, through its Employment Discrimination Project, has been continually involved in cases before the Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting employment discrimination. The Lawyers' Committee has handled cases involving both racial and sexual harassment, including filing an *amicus* brief in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Pursuant to a continuing interest in the appropriate scope of Title VII, and most recently, the Lawyers' Committee filed briefs in *Desert Palace v. Costa*, 539 U.S. 90 (2003); *Swierkiewicz v. Sorema*, 534 U.S. 506 (2001); *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 1 (2001); and *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133 (2000).

AARP is a nonpartisan, nonprofit membership organization serving over thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. Almost half of AARP members are employed, and all of these have a strong interest in the outcome of this case, which will affect their rights under the Age Discrimination in Employment Act (ADEA), due to similarities in judicial interpretation of comparable provisions of the ADEA and Title VII. In addition, more than half of AARP's working members are women, and a disproportionate share of them (and of AARP members of color, including African-American and Hispanic members) work full- or part-time. Thus, AARP members have a strong interest in vigorous enforcement of Title VII with regard to sexual (and racial) harassment. Finally, many AARP

members have disabilities, and rely on federal laws including the Americans with Disabilities Act – whose employment discrimination provisions also are based on Title VII – to create workplaces free from discriminatory harassment.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, non-partisan organization of more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU Women's Rights Project ("WRP"), founded in 1972 by Ruth Bader Ginsburg, has been a leader in the efforts to eliminate barriers to women's full equality in American society. As part of that work, the ACLU WRP has dedicated its efforts to ensuring women's equal treatment in the workplace through the vigorous enforcement of the protections of Title VII. The ACLU has appeared before the Court in numerous cases involving the proper interpretation of civil rights laws and has fought to ensure that all individuals, regardless of race, gender, or other protected characteristics, have equal opportunities in the workplace. The ACLU has participated as *amicus* before the Court in several cases interpreting Title VII of the Civil Rights Act, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). More recent Title VII cases in which the ACLU has appeared as *amicus* include *Desert Palace v. Costa*, 539 U.S. 90 (2003); *Pollard v. E.I. Dupont Nemours Co.*, 532 U.S. 843 (2001); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); and *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

The Legal Aid Society – Employment Law Center ("LAS-ELC") is a non-profit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally under-represented communities. Since 1970, the LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to

communities of color, women, recent immigrants, individuals with disabilities, and the working poor, and specializes in, among other areas of the law, sex discrimination and sexual harassment.

The LAS-ELC has appeared before this Court on numerous occasions both as counsel for plaintiffs, *see National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); and *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an *amicus curiae* capacity. *See, e.g.*, *U.S. v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). The LAS-ELC's interest in preserving the protections afforded employees by this country's antidiscrimination laws is longstanding.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of age, racial, religious, and ethnic bias.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California have over 50 years of experience in providing legal, public

policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing commitment in addressing matters of discrimination that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of *amicus* briefs before the courts.

The National Employment Lawyers Association ("NELA") is the country's only professional membership organization of lawyers who regularly represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys, and NELA regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed *amicus curiae* briefs before this Court and numerous courts of appeals regarding the proper interpretation and application of Title VII in order to guarantee that the rights of workers are fully protected. For example, NELA filed *amicus curiae* briefs with this Court in *Desert Palace v. Costa,* 539 U.S. 90 (2003); *Edelman v. Lynchburg College*, 535 U.S. 106 (2002); and *West v. Gibson*, 527 U.S. 212 (1999).

NELA members represent thousands of individuals in this country who are victims of unlawful sex discrimination, including sexual harassment. The interest of NELA in this case is to protect the rights of its members' clients, by ensuring that the goals of Title VII of the Civil Rights Act of 1964, as amended, to eradicate employment discrimination are fully realized.

The National Partnership for Women & Families ("National Partnership") is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in

1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal employment opportunities by monitoring agencies' EEO enforcement, challenging employment discrimination in the courts, and leading efforts to promote employment policies such as the Family and Medical Leave Act and the Pregnancy Discrimination Act.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of 1964, as amended. NWLC has prepared or participated in several *amicus* briefs in Title VII cases, including *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998).

NOW Legal Defense and Education Fund is a leading national non-profit civil rights organization that for over thirty years has used the power of the law to define and defend women's rights. A major goal of NOW Legal Defense and Education Fund is the elimination of barriers that deny women economic opportunity, such as sexual harassment. NOW Legal Defense and Education Fund has litigated cases to secure full enforcement of laws prohibiting sexual harassment, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), and has filed briefs in this Court as amicus curiae on leading sexual harassment cases, 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). NOW Legal Defense and Education Fund believes that employers must be liable when

supervisors engage in discriminatory harassment that results in constructive discharge. Accordingly, NOW Legal Defense and Education Fund strongly supports affirming the decision of the Third Circuit below.

SUMMARY OF ARGUMENT

This is a constructive discharge case. Nancy Suders did not choose to leave her job. She was forced to resign because a combination of workplace conditions gave her no other choice.[3] Such forced resignation is the hallmark of constructive discharge. This Court and all of the federal circuit courts of appeals have recognized constructive discharge claims, holding employers liable for wrongful discharge when intolerable work conditions force an employee to resign.[4] In Suders' case, harassment by her direct supervisors[5] laid the groundwork for conditions that ultimately became so unbearable that she resigned to escape them. Other factors that placed her in this impossible situation included the ineffectiveness of procedures that should have remedied the harassment, along with events and conditions that contributed to Suders' reasonable belief that further efforts to resolve the matter internally would be futile.

In *Faragher v. City of Boca Raton,* 524 U.S. 775

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[3] All reasonable inferences must be drawn in favor of Suders, the party opposing the motion for summary judgment. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 747 (1998), *citing United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962). At this stage in the proceedings, Suders' testimony that she had no choice in this matter must be taken as true. Ultimately, this question would be put to the fact-finder.

[4] *See infra* argument I.

[5] Because the Court granted certiorari on the question of a constructive discharge caused by *supervisors'* actions, rather than *coworkers'* actions, and because the facts of this case involve supervisor harassment, this brief does not address the issue of a constructive discharge caused by coworker harassment.

(1998), and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998), this Court crafted a methodology for deciding harassment cases. That methodology distinguishes between (1) hostile work environment cases with no tangible employment action, in which defendants may invoke an affirmative defense, and (2) tangible employment action cases, in which no defense is available. Under *Faragher/Ellerth*, employers are strictly liable if a supervisor's harassment of a subordinate culminates in a tangible employment action. *Faragher,* 524 U.S. at 807; *Ellerth,* 524 U.S. at 765. The Court described "tangible employment action" as a "significant change in employment status" and provided a non-exhaustive list of examples, "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Faragher,* 524 U.S. at 790, 808; *Ellerth,* 524 U.S. at 761-62.

Because courts have for decades recognized that a constructive discharge—when proven—is the legal equivalent of an actual discharge, and because *Faragher/Ellerth* defined "tangible employment actions" to include discharges, constructive discharges necessarily constitute tangible employment actions. As a tangible employment action, constructive discharge precludes invoking the affirmative defense that *Faragher/Ellerth* made available in hostile environment cases. This conclusion is required by the *Faragher/Ellerth* description of tangible employment action as "a significant change in employment status," with all that change entails. The conclusion is rendered inescapable by the reality that proof of the facts underlying a successful constructive discharge claim, as a practical matter, disproves the facts that would necessarily underlie the affirmative defense.

The State Police and its *amici* ignore the doctrine of constructive discharge that is at the core of this case. In their

view, the fact that Suders was forced to leave her job because of her supervisors' actions should not even factor into the liability equation. Describing what happened to Suders as "mere" hostile work environment harassment, Petitioner asks the Court to absolve the employer of responsibility for "[t]he fact that an employee feels compelled to quit his or her job in response to intolerable sexual harassment." Brief for Petitioner at 12. From this truncated analysis of the facts, Petitioner then argues that it should be permitted to invoke the *Faragher/Ellerth* affirmative defense. Petitioner's disaggregation of the facts directly contravenes the Court's mandate to consider the totality of circumstances in harassment cases. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 69 (1986).

ARGUMENT

I. When Proven, a Constructive Discharge is the Legal Equivalent of an Actual Discharge, Which *Faragher/Ellerth* Defined as a Tangible Employment Action.

For decades, courts have recognized that a constructive discharge—when proven—is the legal equivalent of an actual discharge. The *Faragher/Ellerth* Court expressly cited actual discharge as an example of a tangible employment action.[6] Because discharges fall squarely within the tangible employment action category, and because constructive discharge operates as the legal equivalent of actual discharge, constructive discharge necessarily constitutes a tangible employment action.[7] In

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[6] The Court provided a non-exhaustive list of examples of tangible employment actions, which included "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Faragher,* 524 U.S. at 790; *Ellerth,* 524 U.S. at 761.

[7] *See Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003); *Jaros v. LodgeNet Entm't Corp*., 294 F.3d 960, 966 (8th Cir. 2002) (constructive discharge constitutes a tangible employment action); *Durham Life Ins. Co. v. Evans,* 166 F.3d 139, 144 (3d Cir. 1999). The First and Seventh Circuits have held that a constructive discharge caused by a supervisor's "official act" is a tangible employment action. *Reed v. MBNA Mktg. Sys., Inc*., 333 F.3d 27, 33 (1st Cir. 2003) (constructive discharge is a tangible employment action if it is caused by a supervisor's "official" act); *accord Robinson v. Sappington*, 351 F.3d 317, 336 (7th Cir. 2003). A significant number of federal district courts have ruled that constructive discharge is a tangible employment action. *Vasquez v. Atrium Door & Window Co. of Ariz., Inc.*, 218 F. Supp. 2d 1139, 1142 (D. Ariz. 2002); *Rousselle v. GTE Directories Corp*., 85 F. Supp. 2d 1286, 1292 (M.D. Fla. 2000); *Bevilacqua v. Cubby Bear, Ltd.*, No. 98 C 7568, 2000 WL 152135, at *22 (N.D. Ill. Feb. 4, 2000); *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160 (N.D. Iowa 2000); *Watson v. Lucent Techs.*, 92 F. Supp. 2d 1129, 1135 (D. Kan. 2000); *Price v. Delaware Dep't of Corrections,* 40 F. Supp. 2d 544, 553 (D. Del. 1999); *Lintz v. Am. Gen. Fin., Inc.*, 50 F. Supp. 2d 1074, 1084 (D. Kan. 1999); *Galloway v. Matagorda County, Tex*., 35 F.

litigation, the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcing Title VII, has also taken the position that a constructive discharge is a tangible employment action.[8] EEOC interpretive guidance issued after *Faragher/Ellerth* provides:

> Liability standards under the anti-discrimination statutes . . . generally make employers responsible for the discriminatory acts of their supervisors. If for example, a supervisor rejects a candidate for promotion because of national origin-based bias, the employer will be liable regardless of

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Supp. 2d 952, 957 (S.D. Tex. 1999); *Leslie v. United Tech. Corp.*, 51 F. Supp. 2d 1332, 1345-46 (S.D. Fla. 1998); *Miller v. D.F. Zee's, Inc*., 31 F. Supp. 2d 792, 803-04 (D. Or. 1998); *Delazaro v. Lehigh Univ*., No. 98-CV432, 1999 U.S. Dist. LEXIS 1214, at *479 (E.D. Pa. Jan. 29, 1999); *Jones v. USA Petroleum Corp*., 20 F. Supp. 2d 1379, 1383 (S.D. Ga. 1998). The Second and Eleventh Circuits have held that constructive discharge is not a tangible employment action, and therefore, employers may assert the *Ellerth/Faragher* affirmative defense. *Caridad v. Metro-North Commuter R.R*., 191 F.3d 283, 294 (2d Cir. 1999) *accord Reynolds v. Golden Corral Corp*., 106 F. Supp. 2d 1243, 1249 (M.D. Ala. 1999), *aff'd* 213 F.3d 1344 (11th Cir. 2000) (*per curiam*); *see also Desmarteau v. City of Wichita, Kan*., 64 F. Supp. 2d 1067, 1078 (D. Kan. 1999); *Dunegan v. City of Council Grove, Kan. Water Dep't,* 77 F. Supp. 2d 1192, 1200 (D. Kan. 1999); *Scott v. Ameritex Yarn*, 72 F. Supp. 2d 587, 594 (D.S.C. 1999); *Alberter v. McDonald's Corp.*, 70 F. Supp. 2d 1138, 1147 (D. Nev. 1999); *Powell v. Morris*, 37 F. Supp. 2d 1011, 1019 (S.D. Ohio 1999).

[8] *See* Brief for EEOC at 3, *EEOC v. Crowder Construction Co.,* No. 3:00CV186-V, 2001 WL 1750843 (W.D.N.C. Oct. 26, 2001) ("[C]onstructive discharge constitutes a tangible job action because it results in a 'significant' change in employment status."); *accord* Amended Memorandum in Support of EEOC's Opposition to Motion for Summary Judgment at 15-19, *EEOC v. Barton Protective Services, Inc*., 47 F. Supp. 2d 57 (D.D.C. 1999) (No. 98-1536/JR) ("Defendant, while recognizing EEOC's allegation that '[the plaintiff] was constructively discharged' . . . obtusely maintains that she did not suffer a 'tangible employment action' . . . . Not surprisingly, courts have recognized that constructive discharge can be a tangible employment action.").

> whether the employee complained to higher management and regardless of whether higher management had any knowledge about the supervisor's motivation. Harassment is the only type of discrimination carried out by a supervisor for which an employer can avoid liability and that limitation must be construed narrowly.

EEOC Enforcement Guidance: Vicarious Employer Responsibility for Unlawful Harassment by Supervisors, Part (V)(B) (June 18, 1999). Indeed, an employer should not be able to avoid liability where an employee has no reasonable option but to resign.

Courts and federal enforcement agencies have consistently treated constructive discharge as actual discharge. In fact, the doctrine developed precisely for the purpose of holding employers responsible for unlawful conditions that force employees to resign. The Supreme Court first held that a constructive discharge functions as the legal equivalent of an actual discharge in the case of *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894 (1984).[9] In that National Labor Relations Act case, the Court expressly recognized the equivalence between directly dismissing an employee and creating "working conditions so intolerable that the employee has no option but to resign -- a so-called 'constructive discharge.'" *Id.* The Court's *Sure-Tan* decision continued a tradition under the National Labor Relations Act, 29 U.S.C. 151 *et seq*., of recognizing constructive discharge as the legal equivalent of actual discharge. *See The*

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[9] *See also Rutan v. Republican Party of Illinois*, 497 U.S. 62, 68, 76 (1990) (First Amendment patronage case recognizing that constructive discharge is the "substantial equivalent of a dismissal," explaining that "an employment decision is equivalent to a dismissal when it is one that would lead a reasonable person to resign").

Coachman's Inn, 147 NLRB 278, 303 (1964) (" '[R]esignation,' under pressure and scare . . . [must be] treated for legal purposes the same as an actual discharge. . . ."); *In Matter of Sterling Corset Co*., 9 N.L.R.B. 858 (1938) (first use of the term "constructive discharge").

Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e *et seq*., which was modeled on the NLRA, adopted the doctrine of constructive discharge in whole cloth. *See, e.g*., 110 CONG. REC. 3086, 7210-11, 8453 (1964) (Title VII was patterned after labor laws including NLRA); *English v. Powell* 592 F.2d 727, 731 n.4 (4th Cir. 1979) (holding "doctrine of constructive discharge 'had its genesis in the labor relations area but has been extended and held applicable to civil rights claims' "). Today, constructive discharge is universally recognized to provide redress to employees who are forced out of employment through discriminatory means.[10] Consistent with this universally accepted principle, the EEOC explains that an employer "is responsible for a constructive discharge in the same manner that it is responsible for the outright discriminatory discharge of a charging party." EEOC Interpretive Manual, § 612.9(a).[11]

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[10] *Fitz v. Pugmire Lincoln-Mercury, Inc.***,** 348 F.3d 974, 977 (11th Cir. 2003); *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629, 635 (6th Cir. 2003); *EEOC v. Univ. of Chicago Hosps*, 276 F.3d 326, 331 (7th Cir. 2002); *Fitzgerald v. Henderson*, 251 F.3d 345, 357-58 (2d Cir. 2001); *Jordan v. Clark*, 847 F.2d 1368, 1377 n.10 (9th Cir. 1988); *Sheridan v. E.I. DuPont de Nemours & Co*., 100 F.3d 1061, 1075 (3d Cir. 1996); *Vega v. Kodak Caribbean, Ltd.,* 3 F.3d 476 (1st Cir. 1993); *Landgraf v. USI Film Prods.*, 968 F.2d 427, 430 (5th Cir. 1992); *Paroline v. Unisys Corp*., 900 F.2d 27 (4th Cir. 1990); *Watson v. Nationwide Ins. Co.*, 823 F.2d 360 (9th Cir. 1987); *Derr v. Gulf Oil Corp*., 796 F.2d 340 (10th Cir. 1986); *Johnson v. Bunny Bread Co*., 646 F.2d 1250 (8th Cir. 1981); *see also* A. Larson & L. Larson, EMPLOYMENT DISCRIMINATION, § 87.20 at 17-102 to 17-105 (1987).

[11] Indeed, contrary to the heavily conditioned position articulated in the Solicitor General's brief, to which the EEOC is a signatory, the EEOC has taken the straightforward position in its litigation that a constructive

Appropriately, in *Suders*, the Third Circuit recognized that a constructive discharge is the equivalent of an actual discharge:

> [It is a] fundamental principle of our jurisprudence that a constructive discharge, when proved, operates as the functional equivalent of an actual termination. This principle recognizes that when a plaintiff-employee successfully demonstrates that the work environment created by an employer was so intolerable that he or she had no choice but to resign, the constructive discharge becomes, for all intents and purposes, the act of the employer.

Suders, 325 F.3d at 458 (*citations omitted*).[12]

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discharge is necessarily a tangible employment action and categorized the arguments to the contrary as "obtuse." *See supra* note 8.

[12] *See also, e.g., Fitz v. Pugmire Lincoln-Mercury, Inc.***,** 348 F.3d 974, 977 (11th Cir. 2003) ("[C]onstructive discharge occurs when a discriminatory employer imposes working conditions that are 'so intolerable that a reasonable person in [the employee's] position would have been compelled to resign.' "); *Manatt v. Bank of Am., NA***,** 339 F.3d 792, 803 (9th Cir. 2003) (constructive discharge requires "conditions so intolerable that a reasonable person would leave the job"); *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629, 635 (6th Cir. 2003) (employer must create intolerable working conditions that would force a reasonable person to resign); *Suarez v. Pueblo Int'l, Inc.*, 229 F.3d 49, 54 (1st Cir. 2000) (finding constructive discharge where "the working conditions imposed by the employer had become so onerous, abusive, or unpleasant that a reasonable person in the employee's position would have felt compelled to resign"); *Kirsch v. Fleet Street, Ltd.,* 148 F.3d 149 (2d Cir. 1998) (working conditions must be so intolerable that employee is forced into involuntary resignation); *Brown v. Ameritech Corp*., 128 F.3d 605 (7th Cir. 1997) (rejecting claim of constructive discharge on the grounds that employee could have remained and the supervisor's comment was insufficiently forceful or coercive); *Landgraf v. USI Film Prods.*, 968 F.2d 427, 430 (5th Cir. 1992) (finding constructive discharge where the

In contrast to a constructive discharge claim, a hostile work environment claim does not require proof of conditions that would force a reasonable person to *resign*. Instead, a claim of environmental harassment requires proof of discriminatory behavior that is sufficiently severe or pervasive to alter the conditions of a victim's employment and to create an abusive working environment. *Meritor Savings Bank,* 477 U.S. at 64, 67. The Supreme Court has clarified that the hostile work environment "standard takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury . . . . Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21-22 (1993). The doctrine of constructive discharge applies in the most egregious cases in which the employee is forced to resign because the work environment has become patently intolerable, and a reasonable person would conclude that he or she has no real option but to resign.[13]

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plaintiff demonstrates "a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment"); *Amirmokri v. Baltimore Gas & Elec. Co.,* 60 F.3d 1126, 1132 (4th Cir. 1995) (constructive discharge requires proof that employer deliberately made working conditions intolerable in an effort to induce the employee to quit); *West v. Marion Merrell Dow, Inc.,* 54 F.3d 493, 497 (8th Cir. 1995) ("An employee is constructively discharged when an employer deliberately renders the employee's working conditions intolerable and thus forces [her] to quit [her] job."); *Clark v. Marsh,* 665 F.2d 1168 (D.C. Cir. 1981) (employee must establish that the employer "deliberately made . . . working conditions intelorable and drove [the employee] into an 'involuntary quit.' "; *Cartwright Hardware Co., Inc. v. NLRB,* 600 F.2d 268 (10th Cir. 1979) (rejecting claim of constructive discharge because record did not establish that the employees resigned because employer had created "impossible" conditions).

[13] This in no way suggests that the degree of harassment is the defining factor in a constructive discharge case. The standard for constructive discharge is that the employee is forced to resign because the work environment has become so intolerable, and a reasonable person would conclude that they have no real option but to resign. *See supra* note 12.

If Suders prevails on her claim of constructive discharge, that discharge constitutes a tangible employment action for which the *Faragher/Ellerth* affirmative defense is unavailable. Although Suders has not yet had the opportunity to present her claim of constructive discharge to a fact-finder, the Third Circuit suggests that her employment situation had reached a breaking point. *Suders,* 325 F.3d at 438 ("Suders reached a breaking point . . . . Any prospect of reconciliation was now lost."). At this point in the proceedings, we must take as true Suders' allegations that the hostile environment, combined with the lack of recourse, forced her resignation. If these facts are accepted by the fact-finder, Suders will prevail on her claim of constructive discharge.

If a fact-finder concludes that a constructive discharge occurred, this case cannot be characterized as Petitioner suggests—as a "mere" hostile work environment to which Suders responded by choosing to quit. Brief for Petitioner at 12. In a constructive discharge case, the employee does not "choose" to resign. Instead, workplace conditions leave the employee with no option but to leave. By definition, such a constructive discharge is the act of the employer, not of the terminated worker. Because a constructive discharge is the legal equivalent of an actual discharge, a constructive discharge constitutes a tangible employment action.

II. When Proven, Constructive Discharge Addresses the Core Policy Considerations Underlying the *Faragher/Ellerth* Defense, and Permitting the Defense in a Constructive Discharge Situation Makes No Sense.

The Supreme Court's purpose in allowing the *Faragher/Ellerth* defense is accomplished at the outset if the

plaintiff proves the elements of a constructive discharge. If employment circumstances are so onerous, abusive, or unpleasant that a reasonable person in the employee's position is compelled to resign,[14] then it will be impossible for the employer to prove that the employee acted *unreasonably* under the *Faragher/Ellerth* defense. Proof of a constructive discharge and proof of the *Faragher/Ellerth* defense are mutually exclusive and cannot be established on the same factual base.

The *Faragher/Ellerth* defense allows an employer to avoid liability when the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and the plaintiff-employee *unreasonably* failed to take advantage of any preventative or corrective opportunities provided by the employer. *Faragher,* 524 U.S. at 807. Before a jury would reach the question of whether the employee acted unreasonably under the affirmative defense, however, the jury would have first had to find a constructive discharge—i.e., that working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. *See supra* note 12. These two findings cannot exist in tandem. The employer cannot prove the second prong of the affirmative defense—that the employee acted unreasonably—if the plaintiff proves at the outset that she acted reasonably pursuant to her constructive discharge claim.

A plaintiff alleging a constructive discharge in violation of Title VII must establish that he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign, given the totality of the circumstances. *See supra* note 12. In every jurisdiction, a claim of constructive

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[14] *See supra* note 12.

discharge requires proof that the employee reasonably believed that she had no recourse but to resign. *Id.* As the Third Circuit observed in this case, "it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning, [but] *a failure to do so will not defeat a claim of constructive discharge* where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign."[15] *Suders*, 325 F.3d at 445-46 (emphasis added). In sum, if there is an avenue short of resignation *reasonably* available to the employee to remedy the situation, and she fails to pursue that avenue, her failure will defeat the constructive discharge claim.

Petitioner and the Solicitor General have acknowledged the overlap between elements of constructive discharge and of the *Faragher/Ellerth* defense. Brief for Petitioner at 11; Brief for Solicitor General at 17-18. The Solicitor General admits that "[i]f an employer makes the showing necessary to establish the *Ellerth/Faragher* affirmative defense, it is difficult to understand how an employee would be able to establish a constructive discharge in the first place." Brief for Solicitor General at 17-18. Although the briefs of the Petitioner and its *amici* admit this overlap, they fail to address its ramifications. The Solicitor General's brief suggests that the instant "case does not raise the question of the precise relationship between the standard for proving a constructive discharge and the

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[15] The Chamber of Commerce argues that harassment victims will deliberately deprive employers of information about harassment so that victims can bring constructive discharge cases and cut off any affirmative defenses by quitting rather than notifying the employer, who could then correct the harassment. This argument ignores the fact that the plaintiff who manipulates the system in this way would not be able to meet the "reasonableness" test required to prove a constructive discharge. It also ignores the facts that resigning from a job is not easy for an employee who is dependent on a salary, and that bringing a harassment case is a stressful, expensive undertaking.

Ellerth/Faragher affirmative defense."[16] *Id*. On the contrary, this case raises precisely that issue. This case cannot be decided without accounting for the mutual exclusivity of the doctrines of constructive discharge and the *Faragher/Ellerth* affirmative defense. The Court should address this concern and provide a coherent doctrine to guide the lower courts, recognizing that a constructive discharge occurs when intolerable employment circumstances leave an employee with no option but to resign. When a constructive discharge occurs, the affirmative defense has no application.

III. Constructive Discharge Exhibits the Attributes of a Tangible Employment Action

In *Faragher/Ellerth*, the Court noted attributes typical of tangible employment actions. Generally, the Court explained that a tangible employment action may fundamentally change the worker's status at the firm, impose direct financial harm, and constitute an official company act.[17] Under the Court's reasoning, these attributes verify that the action is aided by the agency relationship.[18] The

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[16] By its own admission, the Solicitor General's proposed analysis could only apply to a narrow set of circumstances where the evidence supporting the constructive discharge does not overlap with the affirmative defense. Brief for Solicitor General at 17-18.

[17] These are examples of the attributes of a tangible employment action, rather than an exclusive or mandatory list. The totality of facts must be examined in each harassment case. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 69 (1986); *see also Holly D. v. Ca. Inst. of Tech.*, 339 F.3d 1158 (9th Cir. 2003) (submission to sexual abuse by a supervisor constitutes a tangible employment action); *Jin v. Metro. Life Ins. Co*., 310 F.3d 84 (2d Cir. 2002) (same).

[18] In *Faragher*, the Court recognized:

> [T]here is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship . . . . When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who

Court discussed these attributes in general terms and used qualifying language:

> A tangible employment action *in most cases* inflicts direct economic harm. *As a general proposition*, only a supervisor, or other person acting with the authority of the company can cause this sort of injury. . . . A tangible employment decision . . . *in most cases* is documented in official company records . . . .

Ellerth, 524 U.S. at 761-62 (emphasis added). Clearly the Court intended to provide a flexible framework of general guidance. The Court did not suggest that each of these attributes would apply to every tangible employment action. Nevertheless, a constructive discharge possesses each of the attributes characteristic of the tangible employment action, as described in *Faragher/Ellerth*.

Ellerth characterized a "tangible employment action" as "a significant change in employment status . . . ." *Ellerth,* 524 U.S. at 761. In its effect on the worker's employment status, a constructive discharge is unassailably a discharge with identical changes in employment status. "[C]onstructive

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> report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a coworker.

Faragher, 524 U.S. at 802-03. Accordingly, an employer can be liable for the actions of a supervisor, even when the supervisor acts outside of expressly and affirmatively delegated authority. *Faragher* at 805; *see also* Susan Grover, *After* Ellerth*: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J.L. REFORM 809, 839 (2002) ("The key, then, is . . . the source of the power the supervisor uses to take that action. If that power is derived from the authority the supervisor derives from his relationship with the employer, the action taken is a [tangible employment action], regardless of whether it alters the subordinate's status in an ultimate sense.").

discharge constitutes precisely the same sort of 'significant change in employment status' and inflicts precisely the same sort of 'economic harm' as any other 'firing.' " *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160, 1173 (N.D. Iowa 2000); *see also Vasquez v. Atrium Door & Window Co. of Ariz., Inc*., 218 F. Supp. 2d 1139, 1142-43 (D. Ariz. 2002).

Petitioner actually agrees that constructive discharge "effects a significant change in employment status," but would discount that change by claiming that the change is "a result of the employee's own decision." Brief for Petitioner at 21. This argument has two shortcomings. For one, the change in employment status results regardless of whether the discharge is actual or constructive. The "significant change in employment status" criterion of *Faragher/Ellerth* assesses the results of the act, not the causative act itself. More importantly, Petitioner's characterization of the underlying act is inaccurate; the causative act is not that of the employee, but of the employer, through the actions of its supervisors combined with the unavailability of internal remedies to rectify the situation. By definition, constructive discharge does not involve a *true choice* on the part of the employee. When a constructive discharge occurs, the responsible actor is the employer, not the employee. The discharge is forced on the employee by the employer's actions—the employee has no choice but to resign. As a matter of law, a constructive discharge is identical to an actual discharge in its effect on the employee's employment status.

The Court also provided that a "tangible employment action in most cases inflicts direct economic harm." *Ellerth,* 524 U.S. at 762. Like any other type of discharge, constructive discharge falls squarely within the category of employment actions that cause economic harm. As the Third Circuit recognized in this case, "when a plaintiff-employee meets the stringent test of showing a constructive discharge,

the direct economic harm suffered is identical to that of a formally discharged employee." *Suders,* 325 F.3d at 458. Because direct economic harm results regardless of whether the discharge is actual or constructive, *Ellerth*'s definition renders constructive discharge a tangible employment action.

The Court also advised that a tangible employment action in most cases involves an "official company act." *Ellerth,* 524 U.S. at 762. Where intolerable work conditions force an employee to resign, that constructive discharge is treated as an act of the employer, just as an actual discharge would be. The official nature of the discharge is reinforced by the employer's receipt, acceptance, processing and recording of the employee's letter or other notice of resignation. As found by the court below, "when a supervisor creates a hostile work environment so severe that an employee has no alternative but to resign, the official power of the enterprise is brought to bear on the constructive discharge." *Suders,* 325 F.3d at 459. The official action is allowing the workplace to become so hostile and so unresponsive to the employee's injuries that the harassed employee reasonably believes that immediate resignation is her only choice. For decades, the law has recognized that a constructive discharge is an official company act for which the employer must be liable. *See supra* argument I. Under the doctrine of constructive discharge, the official act is the creation of workplace conditions so intolerable that the harassed employee has no choice but to resign.

Because a constructive discharge constitutes an official act in and of itself, the Court must reject the Solicitor General's argument that a constructive discharge constitutes a tangible employment action only if it is effected through an intermediate "official act." Brief for Solicitor General at 8. Moreover, the distinction between official and unofficial acts suggested by the Solicitor General ignores the reality of the workplace. The Court has recognized that "a supervisor's

power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation." *Ellerth*, 524 U.S. at 763. Where, as here, a supervisor's actions culminate in a discharge, the Court recognized in *Ellerth* that those actions are aided by the agency relation. *Ellerth,* 524 U.S. at 761.

Additionally, the Court explained that an official company act "in most cases is documented in official company records, and may be subject to review by higher level supervisors." *Ellerth,* 524 U.S. at 762. Indeed, a constructive discharge involves a forced resignation that will be documented in company records and subject to review by higher level supervisors. The company must take official actions to ensure that the person is no longer on the payroll. The Third Circuit recognized that "a constructive discharge will necessarily involve the termination of an employment relationship, [therefore] the employer will be on notice and have the opportunity to determine the cause of separation from employment." *Suders,* 325 F.3d at 460. The added element of a forced resignation distinguishes constructive discharge from a hostile environment, where there is no official company act.

In summary, *Faragher/Ellerth* created an exception to the general rule of employer liability. This exception applies only to claims of hostile work environment. The exception does not apply to tangible employment actions, such as the constructive discharge that occurred in this case.

CONCLUSION

For the above reasons, the *amici* respectfully suggest

that the Third Circuit's holding that constructive discharge constitutes a tangible employment action, and therefore, the *Faragher/Ellerth* affirmative defense does not apply, should be

AFFIRMED.

Respectfully submitted,

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