No. 14-355

IN THE

# Supreme Court of the United States

ANGELA AMES,

*Petitioner,*

v.

NATIONWIDE MUTUAL INSURANCE CO., ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION


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## RESTATEMENT OF QUESTIONS PRESENTED

Whether the Eighth Circuit correctly rejected Petitioner's claim of constructive discharge in violation of Title VII, where:

(a) The Eighth Circuit, like the other Circuits that Petitioner claims to have conflicting rules, did not require proof of an employer's subjective intent to force the plaintiff to resign, but instead "[a]ssum[ed] for the sake of analysis" that such intent could be established [Pet. App. 11a];

(b) The Eighth Circuit, like the other Circuits that Petitioner claims to have conflicting rules, merely used the plaintiff's failure to pursue internal company remedies as one factor in determining whether the plaintiff acted reasonably in choosing to resign her position.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent makes the following disclosures:

Respondent Nationwide Mutual Insurance Company is a mutual insurance company incorporated in the state of Ohio. It has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Nationwide Advantage Mortgage Company is a stock company incorporated in the state of Iowa. It is an indirect subsidiary of Nationwide Mutual Insurance Company.

Respondent Karla Neel is a natural person.

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## RESPONDENTS' BRIEF IN OPPOSITION

Despite Petitioner's claims of circuit splits and conflict with Supreme Court decisions, this case simply concerns whether the Eighth Circuit properly affirmed the District Court in concluding that the plaintiff, Angela Ames, was not "constructively discharged" when she decided to resign from her position at Nationwide Mutual Insurance Company only three hours after returning from maternity leave. [Pet. App. 2a-16a.] Ames asks this Court to review whether the Eighth Circuit improperly added two allegedly erroneous elements to the constructive discharge inquiry by supposedly requiring her to prove (1) that her employer subjectively intended to force her to resign and (2) that she had exhausted internal remedies before quitting. [Pet. 11-12.] But the flaw in the Petition is that the two questions Ames presents to this Court are not at issue in this case, because the Eighth Circuit imposed neither a subjective intent nor an exhaustion requirement. Rather, this case is merely a fact-bound resolution of a single constructive discharge claim that does not present the circuit splits or conflicts that Ames alleges.

The Petition stems from Ames's contention that her employer, Nationwide Mutual Insurance Company and Nationwide Advantage Mortgage Company, along with her supervisor, Karla Neel (collectively, "Nationwide"), engaged in sex and pregnancy-based discrimination when it allegedly "constructively discharged" her in violation of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.*, and the Iowa Civil Rights Act, Iowa Code § 216.6. [Pet. App. 2a.] Her claim

primarily focuses on Nationwide's alleged failure to provide her with immediate unscheduled access to a lactation room and its allegedly unrealistic work expectations. Both the District Court and the Eighth Circuit rejected Ames's claim of constructive discharge, reasoning that a reasonable employee would not have quit so hastily. [*Id.* at 11a-12a, 44a-60a.] Instead of quitting her position only three hours into her first day back from maternity leave, the Eighth Circuit concluded that a reasonable employee would have either accepted Nationwide's offer of alternative temporary arrangements or pursued other available avenues to resolve her grievance. [*Id.* at 11a-12a.]

Ames, however, misconstrues the Eighth Circuit's decision as requiring additional elements to establish constructive discharge, and asks that this Court consider whether such additional elements are necessary under Title VII. But neither proposed question merits certiorari review.

*First*, Ames claims that—in contrast to other Circuits—the Eighth Circuit requires a plaintiff to prove that her employer subjectively intended to force her to quit. [Pet. 12-24.] The crucial flaw in Ames's request for review of this issue is that the Eighth Circuit in this case *assumed* that any such requirement was met. [Pet. App. 11a.] Thus, even if Ames prevailed in demonstrating that such an element is erroneous, it would have no impact on her case. Indeed, contrary to Ames's truncated description of the Eighth Circuit's constructive discharge law, the Eighth Circuit *does not* require a plaintiff to prove an employer's subjective intent to force an employee to quit in order to prevail. *See*

*Hukkanen v. Int'l Union of Operating Eng'rs, Hoisting & Portable Local No. 101*, 3 F.3d 281, 285 (8th Cir. 1993). Thus, this case provides a particularly poor vehicle for this Court to explore whether there is such a specific intent requirement for constructive discharge claims.

*Second*, Ames alleges that the Eighth Circuit—unlike any other Circuit—applies a strict "exhaustion requirement" that bars all constructive discharge claims unless the employee has exhausted internal channels within her company to resolve her grievance. [Pet. 26-30.] Other Circuits, she states, consider whether an employee explored internal avenues of redress as part of their inquiry into whether an employee acted reasonably under the circumstances. [*Id.* at 30-33.] Again, the flaw with Ames's request for review over this issue in this case is that the Eighth Circuit applies no such "exhaustion requirement," *see Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 574 (8th Cir. 1997), and did not do so in her case, [Pet. App. 11a-12a]. Like the Circuits that she claims are conflicting, the Eighth Circuit (including her panel) merely considers whether a plaintiff pursued available avenues of relief in the context of discerning whether a reasonable employee would have felt no choice but to quit. [*Id.*] This inquiry is, indeed, the precise standard that Ames suggests should be applied; Ames simply failed to meet it in this case.

By misconstruing the Eighth Circuit's decision and precedents, Ames attempts to concoct circuit splits that are simply not presented by this case. Accordingly, the Court should deny the petition for a writ of certiorari.

## RESTATEMENT OF THE CASE

In this case, both the District Court and the Eighth Circuit concluded that Ames's decision to resign only three hours after returning from maternity leave was not a constructive discharge under Title VII. [Pet. App. 12a.] Because the lower courts dismissed Ames's claims at summary judgment, the facts below—which are derived from the Eighth Circuit's opinion—are recited in the light most favorable to Petitioner, without reference to Nationwide's factual disputes with them. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

1. Nationwide hired Ames as a loss-mitigation specialist in October 2008. Brian Brinks served as Ames's immediate supervisor and Karla Neel was the head of Ames's department, as well as an associate vice president. [Pet. App. 2a.]

In April 2010, when pregnant with her second child, Ames's doctor ordered Ames to go on bed rest. [*Id.* at 3a.] Neel allegedly told Ames that Neel never had to go on bed rest when she was pregnant, and had previously expressed her belief that pregnant women should not have baby showers in case the baby dies in utero. [*Id.*] Brinks allegedly stated to others in the office that he was "teasing [Ames] about only taking a week's worth of maternity leave" because the Department was "too busy." [*Id.*]

After Ames gave birth to her second child on May 18, 2010, Nationwide informed Ames that her Family and Medical Leave Act ("FMLA") maternity leave would expire on August 2, 2010. [*Id.*] However, Neel called Ames on June 16, 2012 and explained that there had been a mistake in calculating her

FMLA leave and that her maternity leave would actually expire on July 12, 2010. [*Id.*] During this call, Neel also informed Ames that she could take additional unpaid leave until August 2010, but that doing so would "cause red flags," and she "didn't want there to be any problems like that." [*Id.*] Additionally, Neel offered to extend Ames's maternity leave for an additional week beyond the FMLA period—an offer that Ames accepted. [*Id.* at 4a.]

The crux of Ames's constructive discharge claim hinges on the three hours immediately following her return to work from maternity leave, particularly with respect to her access to a lactation room. [*Id.* at 5a.] Before returning to work, Ames asked a Nationwide disability case manager where she could express milk when she returned. The disability case manager told her that she could use rooms that Nationwide provides for nursing mothers. [*Id.* at 4a.]

When Ames arrived back at work the morning of July 19, 2010, she wanted to express milk immediately. [*Id.*] Ames alleged that Neel told Ames it was not her responsibility to provide Ames with a lactation room. Ames then inquired about lactation rooms at the security desk, and was directed to see Sara Hallberg, the company nurse, who attempted to accommodate Ames's needs. [*Id.*]

According to Ames, Hallberg informed her that, according to Nationwide's lactation policy—available to all its employees on the company intranet and explained at quarterly maternity meetings—employees who want access to a lactation room need to fill out some paperwork to gain badge access to an otherwise locked and secure private room, and that

processing of this paperwork takes three days. [*Id.*] According to Ames, this was the first that she had ever heard of this policy. [*Id.*] Though Ames had not followed the policy, Hallberg attempted to help Ames: First, she requested that security "grant Angela Ames access to the lactation rooms as soon as possible." [*Id.*] Second, she suggested that, if Ames needed to express milk immediately, Ames could use a wellness room, though Hallberg allegedly said that it "might expose her breast milk to germs." [*Id.* at 5a.] Ames asserts that Hallberg told her that the wellness room was occupied at that time, so Hallberg suggested that Ames return in fifteen or twenty minutes. [*Id.*] Ames admittedly never returned to check whether the room was available. [*Id.* at 12a.]

After speaking with Hallberg, Ames met with Brinks to discuss the status of her work. [*Id.* at 5a.] According to Ames, Brinks said that none of her work had been completed while she was on leave, that she had two weeks to complete it, and that if she failed to do so, she would be disciplined. [*Id.*]

After this meeting with Brinks, Ames allegedly again asked Neel to find a place for her to lactate, and Neel explained that she was unable to help. [*Id.*] By Ames's account, Neel then told her: "You know, I think it's best that you go home to be with your babies." [*Id.*] Neel allegedly next told Ames what to write to effectuate a resignation. [*Id.*] Only three hours after returning to work—and without checking to see whether the wellness room was available, going home for the day, or lodging an internal complaint—Ames quit. [*Id.* at 12a, 19a.]

2. Based on these allegations, Ames brought a complaint against Nationwide for sex and pregnancy-

based discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.*, and the Iowa Civil Rights Act, Iowa Code § 216.6. [Pet. App. 2a.] Specifically, Ames alleged that the unavailability of a lactation room, given her "urgent need to express milk," along with Nationwide's "unrealistic and unreasonable expectations about her work production," forced her to resign and amounted to a constructive discharge. [*Id.* at 5a-6a.] Ames did not allege that Nationwide had actually discharged her. [*Id.* at 6a.]

a. Ames first brought her complaint on August 13, 2010, before the Equal Employment Opportunity Commission and the Iowa Civil Rights Commission. On June 14, 2011, after receiving "right to sue" letters from both agencies, Ames commenced this action. Nationwide subsequently moved for summary judgment arguing that Ames had not created a material factual dispute as to whether she was constructively charged. [*Id.* at 28a.]

Ames's opposition focused on the pressures that a woman returning from maternity leave often faces. She asked the District Court to evaluate her resignation from the perspective of an employee "battling [an] array of hormones," feeling sad to leave her newborn in someone else's care, and experiencing "increasing physical pain in her breasts." [Pet'r D. Ct. Br. 24-25.]

After considering all the specific facts and circumstances of this case, the District Court concluded that Ames's allegations, even assuming they were true, did not amount to constructive discharge. [Pet. App. 47a.] *First*, it held that a reasonable person in Ames's position would not have

found her working conditions at Nationwide intolerable. [*Id.*] *Second*, the District Court concluded in the alternative that there was insufficient evidence to demonstrate that Nationwide either intended for Ames to quit or "that it was reasonably foreseeable" that she would resign. [*Id.* at 56a-57a.] *Third*, the District Court found that Ames acted unreasonably in "assuming the worst" and resigning before giving Nationwide an opportunity to address her grievances. [*Id.* at 58a-60a.]

b. The Eighth Circuit affirmed the District Court's decision. Having failed in the District Court, Ames added new arguments on appeal. She asserted for the first time: (1) that she was "actually" discharged [Pet'r App. Br. 37]; and (2) in the alternative, that she was constructively discharged because Neel was going to fire her if she did not quit [*id.* at 51], a test for constructive discharge that she claimed was recognized in the Seventh Circuit (but not previously applied in the Eighth Circuit) [*id.* at 50-51]. Ames further contended that the District Court erred in concluding that Ames's working conditions would not have been intolerable to a reasonable employee in her position. [*Id.* at 38.]

The Eighth Circuit rejected all of these arguments. Unlike the District Court, the Eighth Circuit "[a]ssum[ed] for the sake of analysis" that Ames had created a material factual dispute as to whether Nationwide *intended* to force Ames to resign. [Pet. App. 11a.] The Eighth Circuit instead concluded—as had the District Court—that a reasonable employee in Ames's position would not have found the working conditions so intolerable as to make quitting

necessary. [*Id.* at 11a-12a.] It reasoned that Nationwide had treated Ames as it treats all other employees: Every nursing mother was required to gain badge access before using the lactation rooms. [*Id.* at 10a.] Similarly, Brinks "expected all of his employees to keep their work current, given the high priority that timely work-completion is accorded within the loss-mitigation department." [*Id.*] Most importantly, Nationwide made "several attempts" to "accommodate Ames's needs." [*Id.* at 9a-10a.]

In particular, the Eighth Circuit emphasized that Nationwide attempted to accommodate Ames by offering a wellness room, expediting badge access to the lactation rooms, and providing an extra week of maternity leave. [*Id.*] Rather than utilize Nationwide's temporary solutions, the Eighth Circuit observed that Ames "acted unreasonably" and "jumped to the conclusion . . . that her only reasonable option was to resign." [*Id.* at 11a-12a.] Additionally, the court noted that Ames could have reasonably pursued other internal grievance procedures to give Nationwide an opportunity to remedy the situation; but she did not. [*Id.* at 12a.] Accordingly, it held that Ames could not sustain a constructive discharge claim because a reasonable employee in her position would not have felt forced to quit. [*Id.*]

c. In petitioning for rehearing and rehearing en banc, Ames raised yet another new argument. [*Id.* at 74a.] This time she contended that the panel's opinion conflicted with this Court's decision in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), which—by her reading—held that a plaintiff alleging constructive discharge based on an "official

act" of a supervisor need not give the employer a reasonable opportunity to ameliorate the problem. [Pet. App. 74a.] On review, the panel expressed skepticism of this claim, noting that *Suders* did not set forth such a rule for all constructive discharge cases. [*Id.* at 75a.] But it found that the claim was waived, noting that Ames never previously had "suggested that *Suders* superseded prior circuit precedent." [*Id.* at 74a-75a.]

The panel, however, issued a revised opinion to respond to Ames's concern about "certain dicta" in its opinion concerning the Seventh Circuit's standard for constructive discharge. [*Id.* at 76a.] In its revised opinion, the panel acknowledged that the Seventh Circuit recognizes constructive discharge claims when "an employer acts in a manner so as to have communicated to a reasonable employee that she will be terminated." *EEOC v. Univ of Chi. Hosp.*, 276 F.3d 326, 332 (7th Cir. 2002). The panel explained that the Eighth Circuit had not yet recognized such a test for constructive discharge, but even if it had, Ames would not prevail. [Pet. App. 12a-13a.] The panel held that, despite Neel's comments, a reasonable employee in Ames's position would not have believed that she would have been fired immediately. [*Id.* at 13a.] Moreover, the panel added that, even under the Seventh Circuit's alternative theory, Ames still would have to prove that her working conditions were intolerable—which Ames had failed to do. [*Id.* at 11a-13a, citing *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 679 (7th Cir. 2010).]

## REASONS FOR DENYING THE PETITION

Shifting gears again, Ames now contends that the Eighth Circuit's decision erroneously required her to demonstrate (1) that Nationwide subjectively intended to force Ames to quit, and (2) that Ames exhausted internal complaint avenues in her workplace. [Pet. 11-12.] Ames asks this Court to review whether each of these elements is necessary for a constructive discharge claim under Title VII. Ames argues that these two supposed requirements conflict with the standard for constructive discharge set forth in *Suders* and by other Circuits. [*Id.*]

As an initial matter, *Suders* itself did not establish a standard for constructive discharge claims. The issue in that case was whether, in the context of sexual harassment cases, constructive discharge constitutes a "tangible employment action" for which an employer is strictly liable under the *Faragher* and *Ellerth* "hostile work environment" cases. *Suders*, 542 U.S. at 139 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998)). *Suders* did not purport to set the standard for constructive discharge in all Title VII cases. *See Stremple v. Nicholson*, 289 F. App'x 571, 573 (3d Cir. 2008) ("[I]n *Suders*, the Court did not set forth a rule for all constructive discharge claims."). Indeed, had this Court established such a standard for constructive discharge in *Suders*, Ames could have argued from the outset that Eighth Circuit precedent was superseded by *Suders*. She did not do so, and for good reason; *Suders* addressed a wholly separate issue.

*Suders* aside, the critical flaw in Ames's petition is that neither question presented is raised by the decision in this case.

**I.** Ames first asks this Court to determine whether a plaintiff in a Title VII constructive discharge case has the burden of proving that the employer subjectively intended to force the employee to quit. [Pet. 12-13.] In this case, however, the Eighth Circuit *assumed* that any such intent requirement was met. [Pet. App. 11a.] Moreover, while subjective intent is one way to prove constructive discharge, the Eighth Circuit has made clear that it is not a necessary element. [*Id.* at 56a.] Accordingly, this case is a particularly poor vehicle for considering any alleged circuit split on the question whether subjective intent to force an employee to quit is a necessary element of a constructive discharge claim.

**II.** Ames also asks this Court to resolve a purported circuit split as to whether a plaintiff, to prevail on her constructive discharge claim, must "exhaust" internal workplace remedies before resigning. [Pet. 25-26.] But the Eighth Circuit's decision here did not rest on Ames's failure to fulfill a so-called "exhaustion requirement." Rather, like the Circuits that Ames claims "conflict," the Eighth Circuit merely considers whether a plaintiff pursued internal remedies as part of its analysis of whether the plaintiff acted as a reasonable employee in deciding that she had no choice but to resign. Thus, the alleged circuit split on this issue is illusory.

## I. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR CONSIDERING WHETHER AN EMPLOYER'S INTENT TO FORCE AN EMPLOYEE TO RESIGN IS A NECESSARY ELEMENT OF A CONSTRUCTIVE DISCHARGE CLAIM.

Irrespective of any alleged circuit split, this case does not present the question whether a plaintiff in a constructive discharge case must prove that her employer subjectively intended to force her to quit, because (1) the Eighth Circuit *assumed* any intent element was satisfied; and (2) the Eighth Circuit's standard, accurately portrayed, does not require proof of such subjective intent by the employer.

### A. The Eighth Circuit Assumed that Nationwide Intended to Force Ames to Resign, Rendering Resolution of this Question Irrelevant in this Case.

The Court disfavors granting certiorari over any question that is "irrelevant to the ultimate outcome of the case." Gressman et al., *Supreme Court Practice*, 248 (9th Ed., 2007). Additionally, "[a] related reason for denying certiorari is that the case at hand does not fairly present the legal question over which there is a conflict." *Id.* This case presents precisely those two situations.

In its decision, the Eighth Circuit stated that, "'[t]o prove a constructive discharge, an employee must show that the employer deliberately created intolerable working conditions with the intention of forcing her to quit'" or "'could have reasonably foreseen that the employee would quit as a result of its actions.'" [Pet. App. 8a, quoting *Alvarez v. Des Moines Bold Supply, Inc.*, 626 F.3d 410, 418 (8th Cir.

2010) and *Sanders v. Lee Cnty. Sch. Dist. No. 1*, 669 F.3d 888, 893 (8th Cir. 2012).] The Eighth Circuit was dubious as to whether Ames's allegations created a material factual dispute regarding whether Nationwide deliberately intended to force her to quit. [*Id.* at 9a.] However, the court did not want to discount the import of Neel's alleged comment "that it was best that Ames go home [to be] with her babies." [*Id.* at 11a.] Accordingly, it decided to treat the case as if the intent element had been met, and it "[a]ssum[ed] for the sake of analysis" that Neel's comment "could support a finding of intent to force Ames to resign." [*Id.*]

Because the court assumed that any intent requirement was satisfied, there would be no dispositive impact of the Court granting certiorari to determine "whether the plaintiff in a constructive discharge case must prove that the employer specifically intended that its discriminatory actions would force the worker to resign." [Pet. 12.] For this reason, this case is an inappropriate vehicle through which to consider the subjective intent question.

### B. Because Eighth Circuit Law Does Not Require Subjective Intent to Force an Employee to Quit as an Element of Constructive Discharge, this Case Is a Poor Vehicle for Examining Any Alleged Split on the Issue.

In the Eighth Circuit, a plaintiff claiming that she was constructively discharged does not need to demonstrate that her employer subjectively intended to make her working conditions so intolerable that she would resign. For this additional reason, this

case is a poor vehicle for resolving the split that Ames posits.

To be sure—as Ames repeats in her Petition—many Eighth Circuit cases state that a plaintiff may prove constructive discharge by demonstrating subjective employer intent. [Pet. 14.] In *Johnson v. Bunny Bread Co.*, upon which Ames relies [*id.*], the Eighth Circuit stated that "[a] constructive discharge exists when an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job." 646 F.2d 1250, 1256 (8th Cir. 1981) (internal quotation marks and citation omitted).

The Eighth Circuit, however, also has stated that an employee can prove constructive discharge by demonstrating that the employer "'could have reasonably foreseen that she would [quit] as a result of its actions.'" *Trierweiler v. Wells Fargo Bank*, 639 F.3d 456, 459-60 (8th Cir. 2011) (quoting *Smith v. Fairview Ridges Hosp.*, 625 F.3d 1076, 1087 (8th Cir. 2010)). Indeed, contrary to the suggestion in the Petition, the Eighth Circuit has clarified that proof of an employer's subjective intent to force an employee to quit is *not* a necessary showing for constructive discharge. *See Hukkanen*, 3 F.3d at 285; *Trierweiler*, 639 F.3d at 460.

The Eighth Circuit's decision in *Hukkanen* is instructive. 3 F.3d 281. In that case, a chief executive officer subjected his secretary to "unwelcomed lewd talk and touch and a gun-enforced threat of rape." *Id.* at 283. The employer argued on appeal that the district court did not find that the executive's actions "were taken with the intention of forcing [the secretary] to quit" and hence did not

meet the standard for constructive discharge. *Id.* at 284. Instead of intending that the secretary quit, the employer argued that the executive "wanted her to stay on the job so he could continue to harass her sexually." *Id.* The Eighth Circuit expressly rejected this "bizarre contention" that proof of specific intent was always required to prove constructive discharge. *Id.*

Citing standards from the Tenth, Sixth, and D.C. Circuits, the *Hukkanen* court explained: "[o]ur language in *Bunny Bread* does not mean constructive discharge plaintiffs must prove their employers consciously meant to force them to quit." *Id.* Instead, it held that "[c]onstructive discharge plaintiffs . . . satisfy *Bunny Bread*'s intent requirement by showing their resignation was a reasonably foreseeable consequence of their employers' discriminatory actions." *Id.* at 285. Because the secretary's resignation was a reasonably foreseeable consequence of the executive's harassment, she prevailed on her constructive discharge claim. *Id.*

Indeed, this Court need not look past Ames's own case to confirm that the Eighth Circuit does not impose a specific intent requirement. The District Court reasoned that, though Ames "ha[d] not put forth any evidence, other than her self-serving and unsupported assertion, that the Nationwide Defendants intended for her to resign," she did not necessarily lose on proving constructive discharge. [Pet. App. 56a.] Instead, to evaluate constructive discharge, the "relevant inquiry [became] whether it was reasonably foreseeable to Defendants that Ames would resign." [*Id.*]

Ames conveniently omits a full description of the Eighth Circuit's so-called "intent" requirement in attempting to artificially manufacture a circuit split with the decision below. She acknowledges in a sole sentence that some Circuits allow "evidence that the employer could have foreseen the resignation of a worker [to] support a finding that the employer intended to bring about that result." [Pet. 17.] But she cites only a Sixth Circuit case for this proposition [*id.* at n. 31], and she does not explain how the Eighth Circuit's "reasonably foreseeable" standard impacts her proposed split. Any such explanation would unravel her argument for certiorari, because the Eighth Circuit does not impose the subjective intent requirement that she seeks to challenge.

## II. THIS CASE DOES NOT PRESENT THE QUESTION OF WHETHER A CONSTRUCTIVE DISCHARGE CLAIM REQUIRES AN EMPLOYEE TO EXHAUST INTERNAL REMEDIES BEFORE RESIGNING.

Ames further contends that the Eighth Circuit, in conflict with other Circuits, imposes an "exhaustion requirement," whereby an employee's failure to pursue "a sufficient number of internal complaints bars a constructive discharge claim." [Pet. 26.] Fatal to Ames's request for certiorari review over this issue, however, is: (1) that the Eighth Circuit panel did not rely on a so-called exhaustion requirement in her case; and (2) that Eighth Circuit precedent does not require exhaustion of internal complaints as a threshold requirement for establishing constructive discharge. Accordingly, this case is an inappropriate vehicle for considering

the second question that Ames presents for certiorari review.

### A. The Eighth Circuit's Decision Did Not Impose an Absolute Exhaustion Requirement.

Rather than applying a so-called "exhaustion" requirement, Ames failed her constructive discharge claim because the Eighth Circuit agreed with the District Court that a reasonable employee would not have felt the conditions so intolerable that she had no choice but to resign. [Pet. App. 11a-12a.] Specifically, the Eighth Circuit explained that a reasonable person in Ames's position would not have felt forced to quit because Nationwide made "several attempts to accommodate Ames." [*Id.* at 9a.] For example, "Hallberg suggested to Ames a temporary solution" of using the wellness room while Ames's badge access to the lactation rooms was expedited. [*Id.* at 11a.] But rather than "attempting to return to Hallberg's office to determine the availability of a wellness room," she "acted unreasonably" and "jump[ed] to the conclusion that the attempt would not work and that her only reasonable option was to resign." [*Id.* at 11a-12a.]

As part of its reasonableness analysis, the Eighth Circuit also considered whether Ames could have had her grievances remedied through other internal channels at Nationwide. [*Id.* at 11a.] It explained that Ames could have raised her concerns with her "local HR professional, the Office of Ethics, or the Office of Associate Relations." [*Id.* at 12a.] Rather, Ames attempted to resolve her problem only "on the morning that [she] resigned," ignoring a "temporary

solution" and hastily deciding that Nationwide could not fix the problem. [*Id.* at 11a.]

Accordingly, Ames's failure to try any of a number of employer-provided grievance procedures was merely one of several factors that contributed to the panel's conclusion that Ames failed to act reasonably. As the Eighth Circuit concluded: "By not attempting to return to Hallberg's office to determine the availability of a wellness room *or* to contact human resources, Ames acted unreasonably and failed to provide Nationwide with the necessary opportunity to remedy the problem she was experiencing." [*Id.* at 12a, emphasis added.] The listing of multiple ways in which Ames failed to act reasonably alone demonstrates that the panel was not applying an inflexible exhaustion requirement. Moreover, because Ames's actions fell short of the "reasonableness" standard in several different ways, any erroneous consideration of whether Ames pursued multiple remedies would have been immaterial to the outcome of the case.

Furthermore, it is clear from the District Court and Eighth Circuit opinions that it was entirely reasonable to ask Ames to pursue some internal remedies, given the facts and circumstances of her case, making this case a particularly poor vehicle to examine any supposed exhaustion requirement. Ames asks this Court to apply a reasonable employee standard for constructive discharge claims (which, in fact, it did); an exhaustion requirement, she notes, would place additional burdens on an employee by forcing her to pursue internal grievance procedures even when a reasonable employee would not do so. [Pet. 35-36.] But, in this case, neither the District

Court nor the Eighth Circuit found that contacting Nationwide's local HR personnel, the Office of Ethics, or the Office of Associates would have been too burdensome or futile. They both concluded that such actions would have been *reasonable* under the circumstances. [Pet. App. 11a-12a, 58a-60a.] Even if in some situations it may be unreasonable to ask an employee to pursue internal grievance procedures before resigning, that scenario is not this case. Hence, the panel's analysis does not raise the question of exhaustion that Ames would like this Court to review.

### B. The Alleged Conflict Is Illusory.

It is unsurprising that the panel did not rely upon an exhaustion requirement because Eighth Circuit precedent does not impose one. The Eighth Circuit treats an employee's pursuit of internal remedies only as part of the court's consideration of whether the employee acted reasonably—it is not an inflexible additional element. Rather than a conflict, there is consensus among the Circuits on this approach.

1. As Ames concedes, other Circuits (particularly the Third, Fifth, and Seventh) consider "whether a worker complained to other officials [as] one of several factors that bear on whether a reasonable person would have resigned when the plaintiff did." [Pet. 30.] She agrees, therefore, that it is permissible for a court to look to whether a plaintiff pursued internal grievance procedures because it "'relates to the inquiry of whether a reasonable person would have felt compelled to resign.'" [*Id.*; *quoting Suders v. Easton*, 325 F.3d 432, 445 (3d Cir. 2003), *vacated on other grounds sub nom. Suders*, 542 U.S. 129.] As Ames acknowledges, "in many cases, a reasonable

person will not react to minor harassment or workplace disturbances by heading straight for the exit." [*Id.* at 30-31, *quoting Suders*, 325 F.3d at 445-46.]

Therefore, even in the Circuits that Ames asks this Court to follow, courts have rejected constructive discharge claims because the plaintiff failed to pursue internal grievances as a reasonable employee would have under the circumstances. *See, e.g.*, *Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159, 1161 (3d Cir. 1993) (opinion by Alito, J.) (concluding that it was "highly significant" that plaintiff "did not file grievance [before quitting]," because "a reasonable employee will usually explore such alternative avenues"); *Boze v. Branstetter*, 912 F.2d 801, 805 (5th Cir. 1990) (per curiam) (same); *Brown v. Ameritech Corp.*, 128 F.3d 605, 608 (7th Cir. 1997) (same).

2. The Eighth Circuit's approach does not conflict with this consensus, but rather joins it. As the Eighth Circuit has explained, a constructive discharge plaintiff must "take steps short of resignation *that a reasonable person* would take to make her working conditions more tolerable." *Klein v. McGowan*, 198 F.3d 705, 710 (8th Cir. 1999) (plaintiff "did not establish that a reasonable person would have believed that filing a formal complaint in his circumstances would be fruitless"); *see also Tork v. St. Luke's Hosp.*, 181 F.3d 918, 920 (8th Cir. 1999) ("it would not have been reasonable for [plaintiff] to believe that she was without recourse" within company).

Thus, the Eighth Circuit—like the Third, Fifth, Seventh, and others—considers whether a plaintiff

pursued internal grievances as part of its analysis of whether a reasonable employee would have felt no choice but to resign. *See Knowles v. Citicorp Mortg. Inc.*, 142 F.3d 1082, 1086 (8th Cir. 1998) (quoting *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490, 494 (8th Cir. 1996) ("[W]e have repeatedly held [that] an employee's duty to act in a reasonable manner includes 'an obligation not to assume the worst and not to jump to conclusions too quickly' . . . . [t]hus 'an employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged.'")).

Crucially, the Eighth Circuit does not require an employee to complain "up the chain" or pursue internal remedies at her workplace when a reasonable employee would not have done so before resigning. In *Kimzey*, for example, the Eighth Circuit concluded that the plaintiff was constructively discharged despite the employer's contention that the plaintiff failed to give her employer a "reasonable opportunity to work out [the] problem before quitting." 107 F.3d at 574. The Eighth Circuit held: "If an employee quits because she reasonably believes there is no chance for fair treatment, there has been a constructive discharge." *Id.*; *see also Tork*, 181 F.3d at 920 (same).

3. None of the cases that Ames cites show that the Eighth Circuit imposes an inflexible exhaustion requirement. [Pet. 26-30.] Rather, these cases show only that, *under the circumstances of those cases*, the Eighth Circuit concluded that a reasonable employee would have pursued internal avenues before quitting.

For example, in *Tidwell*, 93 F.3d 490, the plaintiff claimed that his employer assigned a new shift schedule in a discriminatory manner. The same day the shift schedule was announced, the plaintiff "got up and walked out" without pursuing internal company remedies. *Id.* at 493. Under the circumstances, the court concluded that the plaintiff "*acted unreasonably* when he quit" because he could have communicated his concerns to his employer. *Id.* at 497 (emphasis added). Thus, *Tidwell*'s analysis does not prove, as Ames exaggerates, that the Eighth Circuit applies an "internal-complaint requirement" in contrast to the other Circuits [Pet. 26]; it was just evaluating whether there was a material dispute as to the plaintiff's reasonableness.

Similarly, Ames erroneously cites to *Knowles*, 142 F.3d 1082, as an example of the Eighth Circuit imposing an unbending exhaustion requirement. [Pet. 27.] But there too the court found that it would have been *reasonable* for an employee to pursue other channels prior to quitting. 142 F.3d at 1086. It emphasized, for example, that the plaintiff "made no attempt to apprise anyone in Citicorp's human resources department" and never told "anyone at Citicorp" about the harassing phone calls he received from his supervisor. *Id.* at 1085, 1086. Rather than "acting as a reasonable employee," the plaintiff "assume[d] the worst" and quit. *Id.* at 1086 (internal quotation marks and citation omitted).

As in *Tidwell* and *Knowles*, the Eighth Circuit did not require employees in the other cases cited by Ames to complain "up the chain" beyond what a reasonable employee would have done. [Pet. 27-30.] *See, e.g.*, *Coffman v. Tracker Marine, L.P.*, 141 F.3d

1241, 1247-48 (8th Cir. 1998) ("reasonable person in [plaintiff's] position" would not have felt as if "she had no place to turn" because there was "little reason to believe" that a complaint "would not lead to . . . corrective action"); *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 685-86 (8th Cir. 2001) (substantially similar); *Trierweiler*, 639 F.3d 456 (substantially similar). As in Ames's case, the Eighth Circuit followed its Sister Circuits in merely considering a plaintiff's pursuit of internal remedies as part of its reasonableness analysis. There is no conflict between the Circuits on this point, and thus no reason to grant certiorari.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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