Case No. 09-1446

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Lynette Harris,
Plaintiff-Appellant,

v.

Mayor and City Council of Baltimore,
City of Baltimore Department of Public Works, Bureau of Water and Waste Water,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

Brief of Amicus Curiae National Partnership for Women & Families, et al., In Support of Plaintiff-Appellant Lynette Harris and Reversal of the Decision Below

Judith L. Lichtman
Sharyn A. Tejani
Erin Hustings
National Partnership for Women & Families
1875 Connecticut Ave. NW, Suite 650
Washington, DC 20009
Telephone: (202) 986 2600
ehustings@nationalpartnership.org
Counsel for Amici

June 9, 2009

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 09-1446 Caption: Harris v. Mayor and City Council of Baltimore

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO
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CERTIFICATE OF SERVICE

****

I certify that on this date I served this document on all parties as follows:

Joyce Smithey
Rifkin, Livingston, Levitan & Silver
225 Duke of Gloucester St.
Annapolis, MD 21401

Cheryl Parker
Justin Conroy
City of Baltimore
100 N. Holliday St., Rm. 124
Baltimore, MD 21202

(signature)

6/9/09
(date)

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STATEMENT OF INTEREST AND AUTHORITY TO FILE

Amicus curiae the National Partnership for Women & Families is a national, non-partisan nonprofit advocacy organization committed to promoting equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance opportunities for women and people of color in employment. Additional *amici* share analogous professional interests in the present case. See Appendix A, Statements of Interest. *Amici* file the present brief pursuant to their concurrently-filed Motion for Leave to File.

ARGUMENT

This Court should reverse the district court's grant of summary judgment and allow this sexual harassment hostile work environment case to proceed to a jury. The lower court used a standard of "directed at" in determining whether the sexually-laden language Ms. Harris faced at her workplace on a regular basis met the requirements for a hostile work environment that does not comport with this Circuit's standards. The court compounded this error by failing to recognize that

the terms uttered around and at Ms. Harris—daily use of the word "b-tch", routine use of the word "c-nt", daily conversations regarding sex and male and female anatomy, references to women as "troublemakers" and clear statements that Ms. Harris's supervisor did not want her in the workplace—constituted sex-based discrimination against Ms. Harris. Finally, although the district court paid lip service to the notion that it must consider the totality of the circumstances to determine if a hostile work environment existed, repeated references throughout the opinion to isolated "incidents" of harassment, and the court's predilection for discounting incidents that it believed were not "directed specifically" at Ms. Harris, led the court to erroneously conclude that Ms. Harris did not meet the severe or pervasive standard.[1]

I. The District Court Erred in Finding that the Harassing Behavior Was Not "Directed" at Ms. Harris.

The district applied an impermissibly narrow construction when it concluded that much of the profanity and exposure to pornography experienced by Ms. Harris was not "directed" at her. In fact, Ms. Harris adduced evidence that a continual barrage of conversations about sex, the constant use of terms that disparage

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[1] The district court, without citation to 4th Circuit law, created a new requirement that the harassment in this case meet the standard of "extreme conduct"—rather than applying the correct, "severe or pervasive" standard. This brief, however, will not address that issue as it will be addressed by plaintiff's brief and by an *amicus* brief filed by the National Women's Law Center.

women, and forced exposure to demeaning images of women was directed at her by her co-workers and supervisor for years.

The Fourth Circuit deems hostile conduct "directed" at a plaintiff when it occurs purposely in her presence. *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 331–33 (4th Cir. 2003) (*en banc*), *cert. denied* 540 U.S. 117 (2004); *see also Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986) ("Sexual harassment occurs when the victim is *subjected* to sex-specific language used to humiliate, ridicule, or intimidate." (emphasis added)). In *Ocheltree*, this Court held that "sex-laden and sexist talk and conduct," including discussions of co-workers' sexual conquests, could be deemed by a jury to have been directed at the plaintiff when it occurred in her presence. *Id.* at 332; *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001) (including in analysis of racially hostile work environment racially hostile comments made by a supervisor to the supervisor's own wife in presence of plaintiff). The fact that the conduct "could have been heard [or seen] by anyone present" in the workplace was of no consequence because a jury could conclude that the conduct "was particularly offensive to women and was intended to provoke [the plaintiff's] reaction as a woman." *Ocheltree,* 335 F.3d at 332.

The district court, however, applied a standard that would require that a plaintiff be ***told*** by co-workers that ***she*** is a "b-tch" or a "c-nt" or that pornography

was posted specifically to make ***her*** uncomfortable in order to support a hostile work place claim. The district court's standard finds no support in the law and ignores the reality of workplaces such as the one experienced by Ms. Harris, where sexually vulgar language specifically targeted to demean women was used in the presence of a female employee with such regularity that one employee testified that the only way to avoid the language would be for a woman to hide in the locker room. App. at 436. As this Court has already found, such conduct is just as "directed" at the employee as name-calling done to her face.

As in *Ocheltree*, there is ample evidence that Ms. Harris's co-workers reveled in using language recognized by the district court as "derogatory" and "demeaning." For example, one worker testified that Ms. Harris's supervisor refused to stop referring to Ms. Harris as a "b-tch" in a meeting regarding Ms. Harris's complaints. App at 619. Based on these facts, a jury could (and should have been given the opportunity to) conclude that in choosing to employ such language in her presence, Ms. Harris's colleagues directed the language at her and to "humiliate, ridicule, or intimidate" her, thus creating a discriminatory work environment. *Meritor*, 477 U.S. at 65.

Similarly, contrary to the district court's conclusory assertion that Ms. Harris "offers no fact nor reason to believe that the [pornographic] photographs and pictures [posted in the workplace] were aimed at her to embarrass or humiliate

her," Ms. Harris offered ample evidence to conclude that pornographic images were "directed" at her. Indeed, the district court recognized that Ms. Harris was "required" to sit at a desk where "'provocative' photos were under the glass." Mem. Op. at 27. Remarkably, however, the district court simply dismissed this evidence—without explanation—as not "directed" at Ms. Harris. The dismissal of this evidence is especially troublesome given this Court's ruling in *Spriggs v. Diamond Auto Glass* where the Court specifically noted as one instance of racial harassment directed at the plaintiff that the plaintiff was handed a book in which his supervisor had placed a caricature of a monkey for the plaintiff to find. 242 F.3d at 186. The district court also ignored the fact that although the pictures were taken down after Ms. Harris complained, they were quickly replaced.

Instead, the district court appears to rely upon *Williams v. City of Chicago*, 325 F. Supp. 867, 876 (N.D. Ill. 2004), apparently for the suggestion that the photos were displayed for the "prurient gratification" of Ms. Harris's coworkers. *See* Mem. Op. at 26. However, the district court cites no evidence for this conclusion. Furthermore, the reasoning of *Williams* is antithetical to the proper adjudication of harassment claims: using this theory, the racist picture or cartoon will be defended on the grounds that it was posted for the "art" or "humor" it brings white employees, rather than the disparagement it shows towards African American workers. *See e.g. EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 317 (4th

Cir. 2008) (including in the evidence of religious harassment a cartoon regarding Muslims being terrorists).

Even if the defendants had claimed that the pornography was there for the enjoyment of the male workers, at summary judgment the district court was bound to accept Ms. Harris's view of the facts. In doing so, the district court would have properly concluded that Ms. Harris's co-workers, aware of her discomfort with their hostile, sexualized attitudes towards women, displayed sexually explicit photos of women in order to magnify Ms. Harris's discomfort and demonstrate their belief that women are sexually subordinate to men. They then required her to sit at a table on a regular basis that was covered with such pictures. *See, e.g.*, *Ensko v. Howard County*, 423 F. Supp.2d 502, 508 (D. Md. 2006) (finding the presence of pornography in the workplace as being one aspect of defendant's conduct having "the effect of demeaning and objectifying women"); *Glorioso v. Aireco Supply*, No. L-94-343, 1995 U.S. Dist. LEXIS 7071 at *5-6 (D. Md. April 18, 1995) (listing the presence of pornography in the workplace—even when not shown to the plaintiff—as a factor contributing to a hostile work environment).

II. The District Court's "Because of Sex" Analysis Fails to Consider the Meaning, Origin and Context of the Gender-Specific Slurs Used at DPW.

The district court's analysis of the sexual harassment and sex-specific language in this case is woefully inadequate. The district court's approach is contrary to that set forth by the Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) where the Court stated that actionable sexual harassment need not be motivated by sexual desire; instead, it is enough to show that the harasser is "motivated by general hostility to the presence of women in the workplace." *Id.* at 81.[2] The court's reasoning also minimizes the real world meaning and inherent hostility of the sex-specific slurs used, their deep roots in a history of sexual subjugation, and the continuing sexual vulnerability of women that intensifies the impact of verbal sexual aggression.

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[2] Vicki Schultz, a legal scholar who has written extensively about sexual harassment, offers additional insight by explaining:

> Research suggests most harassment is not designed to achieve sexual gratification. Instead, it is used to preserve the sex segregation of jobs by claiming the most highly rewarded forms of work as masculine in composition and content. Even when male workers engage in sexualized forms of harassment, the motive often is not to secure a sexual or romantic liaison, but rather to guard the masculine image of their work and identity.

Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 1, 22 (2006)

The district court attempted to minimize the sexual verbal abuse inherent in being referred to as a "b-tch" by implying that the term is innately ambiguous. Mem. Op. at 25. The district court's suggestion that "b-tch" is "not necessarily evidence of hostility based on sex" ignores the pervasive use of the epithet to demean and humiliate any woman whose behavior fails to conform to gender stereotypes. Merriam Webster's Collegiate Dictionary 117 (10th ed. 1993) (defining "b-tch" as a "malicious, spiteful or domineering woman" or a "lewd or immoral woman"); *see Gallagher v. C.H. Robinson Worldwide, Inc.*, No. 08-3337, 2009 U.S. App. LEXIS 10933 at *15-17 (6th Cir. May 22, 2009) (terms such as "b-tch" "c-nt" "whore" and "dyke" are "explicitly sexual" and "patently degrading to women"; the anti-woman bias in such conduct is "obvious"); *Reeves v. C.H. Robinson Worldwide, Inc.*, 525 F.3d 1139, 1143-44 (11th Cir. 2008) (sex-specific profanity meets the "based on" standard, in light of cases regarding racial discrimination); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) ("It is one thing to call a woman 'worthless,' and another to call her a 'worthless broad'"), *cert. denied*, 513 U.S. 1082 (1995); Robert Gregory, *You Can Call Me a "B-tch" Just Don't Use the "N-word": Some Thoughts on Galloway v. General Motors Service Parts Operations and Rodgers v. Western-Southern Life Insurance Co.*, 46 DEPAUL L. REV. 741, 762 (1997) (citations omitted) ("[I]t is hard to see how the term b-tch does not connote a sense that women are unworthy

of equal dignity and respect."); *see also Spriggs,* 242 F.3d at 184 (considering terms used by supervisor to refer to supervisor's wife, including "black b-tch" as contributing to establishment of plaintiff's racial hostile work environment harassment claim).

Another term used to refer to women at DPW, "c-nt" was used less frequently. However, it is difficult to overestimate the effect of this word in a workplace on a woman because of its vulgarity, its clearly sexual connotation, and its reduction of a woman to simply a source of sex. In its ability to change the dynamics of a workplace it is akin to certain racial epithets that this Court has been clear in condemning. *See Spriggs,* 242 F.3d at 185.

Furthermore, all of the uses of "b-tch" and "c-nt" happened in a work atmosphere where sexual intercourse was regularly discussed (App. at 617), male workers regularly grabbed their private parts and made obscene hand gestures (App. at 618), women were referred to as "troublemakers" (App. at 616) and Ms. Harris's supervisor stated that he did not want her on the job (App. at 619). This was a workplace that communicated to women, especially the very few women in its heavily male environment, that their "place" was in the bedroom, not the board room or shop floor.

There is no indication in this case that men employed by DPW were continually exposed to similar insinuations regarding their position as objects of

sexual aggression, or that the most important feature about them was their sexuality. There is also no indication that the terms used were of general disparagement—these were gendered terms chosen for their gendered impact.

The district court may have failed to give sufficient weight to these sexually aggressive terms in its analysis because it failed to appreciate the real world impact of these sexual insults on the conditions of women in the workplace. As one commentator has noted:

> American women have been raised in a society where rape and sex related violence have reached unprecedented levels, and a vast pornography industry creates continuous images of sexual coercion, objectification and violence...Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or setting of ostensible equality can be an anguishing experience.

Kathryn Abram, *Gender Discrimination and the Transformation of Workplace Norms,* 42 VAND. L. REV. 1183, 1205 (1989). The verbal sexual abuse that Ms. Harris endured on a daily basis was to "make women feel physically vulnerable and professionally undervalued in the workplace." *See Ocheltree v. Scollon Prods., Inc.*, 308 F.3d 351, 376 (Michaels, J., dissenting), *rev'd en banc*, 335 F.3d 325 (4th Cir. 2003). The deliberate use of such sex-specific slurs to demean, intimidate and humiliate women is precisely what the language of Title VII sought to prevent. *See Meritor Savings Bank,* 477 U.S. at 65 ("Sexual harassment occurs

when the victim is subjected to sex-specific language that is aimed to humiliate, ridicule, or intimidate.").

III. The District Court Failed to Consider the Totality of Circumstances When Determining Whether Ms. Harris Was Subjected to a Hostile Work Environment.

This Court has a clear record of requiring that analysis in harassment cases take into account the entire circumstances of the harassment. In *Spriggs*, this Court expressly rejected the contention that only conduct addressed to the plaintiff could be considered in evaluating a hostile work environment claim and specifically considered racially hostile language that the supervisor in question used concerning the supervisor's own wife. The Court explained:

> Although Diamond contends that conduct targeted at persons other than Spriggs cannot be considered, its position finds no support in the law. We are, after all, concerned with the "environment" of workplace hostility, and whatever the contours of one's environment, they surely may exceed the individual dynamic between the complainant and his supervisor.

242 F.3d at 184. Importantly, in *Spriggs* the Court did not indicate that harassment to which the plaintiff was exposed but that was addressed towards others should somehow count less than harassment addressed towards the plaintiff. In *E.E.O.C. v. Sunbelt Rentals, Inc.*, 521 F.3d 306 (4th Cir. 2008), this Court was careful to consider the context in which the religiously-motivated harassment took place (post-September 11th), and took into account not only abusive comments to the plaintiff directly, but also hostile remarks that co-workers made about Islam

generally and testimony of two customers who corroborated that "the workplace was permeated with anti-Muslim hostility." *Id.* at 316-17. Likewise, in *Jennings v. University of North Carolina*, 482 F.3d 686 (4th Cir. 2007) (*en banc*), this Court reversed the district court's grant of summary judgment in favor of defendants where a women's soccer coach's "sex-based verbal abuse permeated team settings" despite the fact that there were only arguably a couple of incidents addressed specifically at the plaintiff. *Id.* at 698. The Court, relying on Supreme Court and Circuit precedent, emphasized that "[e]vidence of a general atmosphere of hostility toward those of the plaintiff's gender is considered in the examination of all the circumstances." *Id.* at 696. Again, the Court did not discount the numerous comments made by the coach to other players.

Most recently, in *Ziskie v. Mineta*, 547 F.3d 220 (4th Cir. 2008), this Court reversed a grant of summary judgment where a district court refused to allow in evidence of harassment that had not been heard by the plaintiff.

> The district court's rejection of the affidavits submitted by Ziskie's co-workers regarding conduct not witnessed by Ziskie is inconsistent with the principles expressed in [various recent Fourth Circuit] cases. When examining all the circumstances of a plaintiff's workplace environment, evidence about how other employees were treated in that same workplace can be probative of whether the environment was indeed a sexually hostile one, even if the plaintiff did not witness the conduct herself. Hostile conduct directed toward a plaintiff that might of itself be interpreted as isolated or unrelated to gender might look different in light of evidence that a number of women experienced similar treatment.

Id. at 225.

In light of this Circuit's requirement that the totality of the circumstances be considered in a harassment case, the district court's analysis should be reversed. Rather than conduct a rigorous analysis of the full environment of the workplace, the district court engaged in a mere counting exercise. Mem. Opp. at 32. And that counting exercise, as shown *infra*, was fatally flawed because the court misapplied the standard of "directed at", discounted the effects of harassment that was not specifically addressed to the plaintiff, but did happen in her presence, and failed to see the gender motivated harassment for what it was

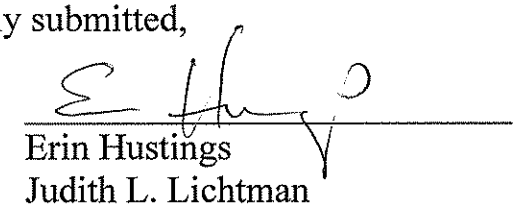
Thus, the district court here should have viewed Ms. Harris's evidence against the backdrop of other conduct that occurred in her workplace both in her presence and out of it. Using this as a standard, given the regularity of the comments that were made disparaging women specifically and making it clear that women were not welcome in this workplace, the district court should have denied summary judgment for the defendants.

CONCLUSION

For the reasons stated in the plaintiff's brief, the brief of the National Women's Law Center, and the arguments contained herein, this Court should reverse the district court's ruling. The district court failed to apply the correct approach to determine whether Ms. Harris was subjected to a hostile work

environment. Specifically, the court erred by applying too narrow a view toward what conduct actually was directed at Ms. Harris, failing to properly recognize the gendered nature of the slurs that permeated Ms. Harris's workplace, and failing to properly consider the sexual harassing environment that existed at DPW.

Respectfully submitted,



Erin Hustings
Judith L. Lichtman
Sharyn A. Tejani
Counsel for Amici
National Partnership for Women & Families
1875 Connecticut Ave. NW, Suite 650
Washington, DC 20009
(202) 986-2600
ehustings@nationalpartnership.org

APPENDIX A

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

For over 125 years, the *American Association of University Women (AAUW)* has been a catalyst for the advancement of women and their transformation of American society. AAUW's more than 100,000 members belong to a community that breaks through educational and economic barriers so all women have a fair chance. With more than 1,300 branches across the country, AAUW works to promote equity for all women and girls through education, research, and advocacy. AAUW opposes all forms of sexual discrimination, particularly in the workplace. Women subjected to gender harassment must have all remedies available to them to combat the effects of hostile work environments.

The *California Women's Law Center (CWLC)* is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: Gender Discrimination, Women's Health, Reproductive Justice and Violence Against Women.

Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination in employment. CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue. The Harris v. Mayor and City Council of Baltimore City case raises questions within the expertise and concern of the California Women's Law Center. Therefore, the California Women's Law Center has the requisite interest and expertise to join in the amicus brief in the Harris case.

The *Coalition of Labor Women (CLUW)* is an AFL-CIO affiliate with over 20,000 members, a majority of whom are women. Since 1974, CLUW has advocated to strengthen the role and impact of women in every aspect of their lives. CLUW focuses on key public policy issues such as equality in educational and employment opportunities, affirmative action, pay equity, national health care, labor law reform,

family and medical leave, reproductive freedom and increased participation of women in unions and in politics. Through its more than 80 chapters across the United States, CLUW members work to end discriminatory laws, and policies and practices adversely affecting women through a broad range of educational, political and advocacy activities. CLUW has frequently participated as amicus curiae in numerous legal cases involving issues of gender discrimination and pay equity. CLUW provides training and educational support to its members on issues relating to Title VII enforcement and prevention of workplace harassment and discrimination.

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girl through litigation and advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases, including Geduldig v. Aiello, 417 U.S. 484 (1974), Richmond Unified School District v. Berg, 434 U.S. 158 (1977), and Pallas v. Pacific Bell, 940 F.2d 1324 (9th Cir. 1991), and is co-counsel in the current sex discrimination case of Dukes v. Wal-Mart Stores, in the United States District Court, Northern District of California. ERA has appeared as amicus curiae in numerous Supreme Court cases involving the interpretation of Title VII including Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986); Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); Faragher v. Boca Raton, 522 U.S. 1105 (1998); and Burlington Industries v. Ellerth, 524 U.S. 742 (1998). ERA has represented plaintiffs in numerous sexual harassment cases, including the first case in the Ninth Circuit to find sexual harassment a violation of Title VII, Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979). In addition, ERA sponsors public policy initiatives, counsels hundreds of individual women each year on their legal right to be free from sexual harassment, and conducts sexual harassment workshops for schools and non-profit organizations.

The *National Council of Jewish Women (NCJW)* is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that the organization endorses and resolves to work

for "the elimination of, and protection from, all forms of harassment, violence, abuse, and exploitation against women." Consistent with our Principles and Resolutions, NCJW joins this brief.

Women Employed is a national organization based in Chicago whose mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that sexual harassment is one of the main barriers to achieving equal opportunity and economic equity for women in the workplace.

Certificate of Service

I hereby certify that I have served copies on all parties to the present case of the foregoing Brief of Amici Curiae by first class U.S. mail to the following addresses:

Joyce Smithey
Counsel for Plaintiff-Appellant
Rifkin, Livingston, Levitan & Silver
225 Duke of Gloucester St.
Annapolis, MD 21401

Cheryl Parker
Justin Conroy
Counsel for Defendants-Appellees
City of Baltimore
100 N. Holliday St., Rm. 124
Baltimore, MD 21202

I served these copies on June 9, 2009.

Erin Hustings
Counsel for Amici
National Partnership for Women & Families
1875 Connecticut Ave. NW, Suite 650
Washington, DC 20009
(202) 986-2600
ehustings@nationalpartnership.org