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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-2315

PEGUY DELVA,

Petitioner/Plaintiff,

vs.

THE CONTINENTAL GROUP, INC.,

Respondent/Defendant.

On Appeal from the District Court of Appeal of the State of Florida
Third District

DCA CASE NO. 3D11-2964

ANSWER BRIEF OF RESPONDENT/DEFENDANT

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PREFACE

The following symbols and designations will be used throughout this Answer Brief:

("Delva") – refers to Petitioner/Plaintiff Peguy Delva;

("Continental") – refers to Respondent/Defendant The Continental Group, Inc.

* Authorities designated with an asterisk (*) within the Table of Citations will be filed separately as part of an Appendix in Support of Respondent's Answer Brief.

ISSUE PRESENTED FOR REVIEW

Whether pregnancy discrimination is an "unlawful employment practice" under the Florida Civil Rights Act of 1992, where the term "pregnancy" is not expressly recited as a protected classification under the FCRA, and where, unlike Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act, the FCRA does not define "sex" as including "pregnancy."

STATEMENT OF THE CASE

This matter comes before the Court on Delva's appeal from an Order issued by the Third District Court of Appeal ("Third DCA") in *Delva v. The Continental Group, Inc.*, 96 So. 3d 956 (Fla. 3d DCA 2012).

A. The Circuit Court Order Giving Rise To The Third DCA Appeal.

On or about August 30, 2011, Delva, a former employee of The Continental Group, Inc. ("Continental"), filed a single count Complaint in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, purporting to state a cause of action for pregnancy discrimination under state law, the Florida Civil Rights Act of 1992, § 760.01, *et. seq.*, Fla. Stat. (2012) ("FCRA").[1]

[1] In her Initial Brief, Delva sets forth factual allegations underlying her pregnancy discrimination claim, as those allegations are recited in her Circuit Court Complaint. *See* Delva's Initial Brief at 1. Those allegations have not been established as facts, in that the Circuit Court dismissed Delva's Complaint on Continental's Motion to Dismiss. Continental denies the Complaint allegations.

On September 21, 2011, Continental filed a Motion to Dismiss Delva's Complaint, arguing that Delva failed to state a cause of action because pregnancy discrimination is not an unlawful employment practice under the FCRA.

During a hearing conducted before the Honorable Ronald C. Dresnick on November 9, 2011, the Circuit Court granted Continental's Motion to Dismiss with prejudice, holding that "a pregnancy discrimination claim is currently not cognizable under the Florida Civil Rights Act." On November 17, 2011, the Circuit Court issued a more detailed Order Dismissing Plaintiff's Complaint With Prejudice, citing therein the legal authorities underlying the Court's initial ruling.

Delva filed her Notice of Appeal to the Third DCA on November 15, 2011.

B. <u>The Related Federal Law Claim</u>.

On November 29, 2011 – two (2) weeks after Delva filed her Notice of Appeal of the Circuit Court's Order granting Continental's Motion to Dismiss – Delva filed another single count Complaint in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, again alleging pregnancy discrimination, but under federal law, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et. seq.* (2006) ("Title VII"). *See Delva v. The Continental Group, Inc.*, No. 11-39458CA30 (Fla. 11th Cir. Ct.).

Continental removed this second action to the United States District Court, Southern District of Florida, on December 23, 2011. *See Delva v. The Continental*

Group, Inc., No. 1:11-cv-24605-RNS (S.D. Fla.). On January 17, 2012, Delva filed with the District Court a Notice of Dismissal. *Id.* at D.E. 5. On January 20, 2012, the District Court entered an Order of Dismissal Without Prejudice on the Title VII pregnancy discrimination claim.[2] *Id.* at D.E. 8.

C. The Third DCA's Order Affirming The Circuit Court's Order.

On July 25, 2012, the Third DCA issued its Order affirming the Circuit Court's Order dismissing Delva's FCRA pregnancy discrimination claim with prejudice. *Delva v. The Continental Group, Inc.*, 96 So. 3d 956 (Fla. 3d DCA 2012). Relying in large part on *O'Loughlin v. Pinchback*, 579 So. 2d 788 (Fla. 1st DCA 1991), the Third DCA certified conflict with *Carsillo v. City of Lake Worth*, 995 So. 2d 1118 (Fla. 4th DCA 2008), *rev. denied*, 20 So. 3d 848 (Fla. 2009).

Delva filed her Notice of Appeal from the Third DCA's Order on or about October 12, 2012. This Court accepted jurisdiction on May 2, 2013. Delva filed her Initial Brief with this Court on May 28, 2013.

SUMMARY OF ARGUMENT

Employees alleging pregnancy discrimination undeniably have legal recourse against covered employers under *federal* civil rights legislation, Title VII, as amended by the Pregnancy Discrimination Act of 1978 ("PDA"). The question

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[2] In its Order of Dismissal, the District Court held that "if Delva reasserts the same claim made in this case in a future lawsuit against Continental Group, Delva shall pay to Continental Group its reasonable attorneys' fees and costs incurred in this case to the date of its dismissal." *Id.* at D.E. 8.

for this Court, however, is whether an employee alleging pregnancy discrimination *also* has recourse against a covered employer under *Florida* civil rights legislation, the FCRA. Continental respectfully submits that the answer is no.

This Court has not addressed this issue, but three (3) District Courts of Appeal have addressed this issue: the Third DCA in *Delva*, the Fourth DCA in *Carsillo*, and the First DCA in *O'Loughlin*. The *Delva* and *O'Loughlin* Courts held that pregnancy discrimination is *not* an unlawful employment practice under the FCRA (or its predecessor), and the *Carsillo* Court held that pregnancy discrimination *is* an unlawful employment practice under the FCRA. Lower state courts and federal courts have come out on both sides of this issue.[3,4]

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[3] The following courts have held that pregnancy discrimination is not an unlawful employment practice under the FCRA: *Whiteman v. Cingular Wireless,* No. 04-80389, 2006 WL 6937181 (S.D. Fla. May 4, 2006), *aff'd*, 273 Fed. Appx. 841 (11th Cir. 2008); *Ramjit v. Benco Dental Supply Co.*, No. 6:12-cv-528-Orl-28DAB, 2013 WL 140238 (M.D. Fla. Jan. 11, 2013); *Berrios v. Univ. of Miami*, No. 1:11-CIV-22586, 2012 WL 7006397 (S.D. Fla. Mar. 1, 2012); *DuChateau v. Camp Dresser & McKee, Inc.*, 822 F. Supp. 2d 1325 (S.D. Fla. 2011), *aff'd on other grounds*, 713 F.3d 1298 (11th Cir. 2013); *Boone v. Total Renal Lab.,* 565 F. Supp. 2d 1323 (M.D. Fla. 2008); *Sparks v. Southern Commm'n Servs.,* No. 3:08cv254 (N.D. Fla. July 8, 2008); *Westrich v. Diocese of St. Petersburg*, No. 8:06-cv-210-T-30TGW, 2006 U.S. Dist. Lexis 27624 (M.D. Fla. May 9, 2006); *Whiteman v. Cingular Wireless,* No. 04-80389, 2006 WL 6937181 (S.D. Fla. May 4, 2006); *Mullins v. Direct Wireless,* No. 6:05-cv-1779, 2006 U.S. Dist. Lexis 18194 (M.D. Fla. Apr. 10, 2006); *Fernandez v. Copperleaf Golf Club Cmty. Ass'n,* No. 05-286, 2005 WL 2277591 (M.D. Fla. Sept. 19, 2005); *Cosner v. Stearns Weaver Miller, et. al.*, No. 04-60662 (S.D. Fla. Mar. 14, 2005); *Dragotto v. Savings Oil Co.*, No. 8:04-cv-734-T-30TGW, 2004 U.S. Dist. Lexis 30069 (M.D. Fla. June 25, 2004); *Frazier v. T-Mobile USA, Inc.*, 495 F. Supp. 2d 1185 (M.D. Fla. 2003); *Orlando v. Bay Dermatology & Cosmetic Surgery, P.A.*, No. 8:03-cv-

The issue before this Court is a question of pure statutory interpretation. The analysis begins and ends with the plain, unambiguous, common and ordinary meaning of the term "sex." Delva ignores the statutory language and the common and ordinary meaning of the term "sex" for obvious reasons – the statute's plain language is not susceptible to an interpretation of "sex" that encompasses

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2203-T-26EAJ (M.D. Fla. Dec. 4, 2003); *Amos v. Martin L. Jacob, P.A.*, No. 02-6174 (S.D. Fla. May 2, 2003); *Zemetskus v. Eckerd Corp.*, No. 8:02-cv-1939-T-27TBM (M.D. Fla. Apr. 1, 2003); *Perrin v. Sterling Realty Mgt.,* No. 3:02-CV-804-J-20HTS (M.D. Fla. Nov. 4, 2002); *Monahan v. Moran Foods,* No. 8:02-cv-301-26MAP (M.D. Fla. Mar. 25, 2002); *Hammons v. Durango Steakhouse*, No. 8:01-CV-2165-T-23MAP (M.D. Fla. March 7, 2002); *Swiney v. Lazy Days R.V. Ctr.*, No. 00-1356, 2000 WL 1392101 (M.D. Fla. Aug. 1, 2000); *Granera v. Sedano's Supermarket*, #31, No. 11-40576CA25 (Fla. 11th Cir. Ct. Nov. 14, 2012).

[4] The following courts have held that pregnancy discrimination is an unlawful employment practice under the FCRA: *Wright v. Sandestin Inv., LLC*, No. 3:11cv256 (N.D. Fla. Dec. 12, 2012); *Wynn v. Florida Auto. Serv., LLC*, No. 3:12-cv-133 (M.D. Fla. Oct. 10, 2012); *Selkow v. 7-Eleven,* No. 8:11-cv-456, 2012 WL 2054872 (M.D. Fla. June 7, 2012); *Wims v. Dolgencorp, LLC*, No. 4:12cv199 (N.D. Fla. June 7, 2012); *Constable v. Agilysys, Inc.,* No. 8:10-cv-01778, 2011 WL 2446605 (M.D. Fla. June 15, 2011); *Valentine v. Legendary Marine FWB,* No. 3:09cv334, 2010 WL 1687738 (N.D. Fla. Apr. 26, 2010); *Rose v. Commercial Truck Term.,* No. 8:06-cv-901, 2007 U.S. Dist. Lexis 75409 (M.D. Fla. Mar. 30, 2007); *Martin v. Meadowbrook Gold Group,* No. 3:06-cv-00464 (N.D. Fla. Nov. 2, 2006); *Brewer v. LCM Med.,* No. 05-61741, 2006 U.S. Dist. Lexis 96865 (S.D. Fla. May 25, 2006); *Wesley-Parker v. The Keiser Sch.,* No. 3:05-cv-1068, 2006 U.S. Dist. Lexis 96870 (M.D. Fla. Aug. 21, 2006); *Murray v. Hilton Hotels*, No. 04-22059 (S.D. Fla. July 29, 2005); *Jolley v. Phillips Educ. Group of Cent. Fla.*, No. 95-147-civ-ORL-22, 1996 U.S. Dist. Lexis 19832 (M.D. Fla. July 3, 1996); *Paltridge v. Value Tech Realty Serv.,* No. 12-CA-000316 (Fla. 13th Cir. Ct. Dec. 18, 2012); *Savage v. Value Tech Realty Serv.,* No. 11-014454 (Fla. 13th Cir. Ct. Nov. 20, 2012); *McCole v. H&R Enterprises, LLC*, No. 2012-30853-CICI(31) (Fla. 7th Cir. Ct. Sept. 14, 2012).

"pregnancy," and, in common parlance, "sex" does not encompass "pregnancy." That should be the end of this Court's inquiry.

If, however, this Court finds ambiguity in the statutory language, then the relevant chronology of events between 1964 and the present – which includes legislative enactments, the Supreme Court's 1976 decision in *General Electric Co. v. Gilbert*, Congressional enactment of the PDA, the First DCA's decision in *O'Loughlin*, and the Third DCA's decision in *Delva*, all followed by the Florida Legislature's *inaction* – reflects the Florida Legislature's intent *not* to bring pregnancy discrimination within the scope of the FCRA's prohibitions.

To a large extent, Delva ignores the relevant chronology of events and the Florida Legislature's silence and, instead, focuses on a strained interpretation of *federal* cases interpreting *federal law* (particularly *Gilbert*) and state cases interpreting *other states'* statutes to advance a theory that, under the FCRA, "pregnancy" equals "sex." Of course, the issue before this Court concerns interpretation of *Florida* law and the intent of the *Florida* Legislature, so Delva's focus is misplaced.

The U.S. Supreme Court's decision in *Gilbert* does play a role in ascertaining the Florida Legislature's intent, but that role is limited to highlighting two important points: (i) that *Gilbert* held that "pregnancy" does not equal "sex"; and, more importantly, (ii) that the Florida Legislature remained silent and did not

amend the FCRA after Congress amended Title VII to overturn *Gilbert* by expressly defining "sex" as including "pregnancy." Neither liberal rules of statutory construction, nor the fact that the FCRA's predecessor may have been patterned after Title VII, have any impact on the Legislature's deafening silence in the thirty-five years that have elapsed since enactment of the PDA in 1978.

It is not this Court's role to do what the Florida Legislature so clearly has chosen *not* to do. Continental respectfully requests that this Court approve the Third DCA's ruling that pregnancy discrimination is not an unlawful employment practice under the FCRA.

ARGUMENT

A. The Applicable Standard Of Review.

The proper standard of review is *de novo*. *Florida Dept. of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954, 957 (Fla. 2005).

B. The Plain Language Of The FCRA And Common Usage Of The Term "Sex" Reflect Legislative Intent To Define "Sex" As Limited To One's Gender – Male Or Female.

1. The Rules Of Statutory Analysis.

Legislative intent dictates whether pregnancy discrimination is an unlawful employment practice under the FCRA. Here, inquiry into legislative intent begins and ends with the plain language of the statute. Delva, however, turns a blind eye to the FCRA's plain language, and instead endeavors to impute to the Florida Legislature, primarily through a strained analysis of *federal* cases interpreting a

federal statute (Title VII) and state cases interpreting *other states'* statutes, an intent that is at-odds with the FCRA's plain language. In doing so, Delva bypasses the first (and determinative) step in discerning whether the Florida Legislature intended the term "sex" to encompass "pregnancy" under the FCRA.

This Court has established "rules" governing statutory analysis:

> It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis. *See State v. Rife*, 789 So.2d 288, 292 (Fla. 2001); *McLaughlin v. State*, 721 So.2d 1170, 1172 (Fla. 1998). In determining that intent, we have explained that "we look first to the statute's plain meaning." *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So.2d 898, 900 (Fla. 1996). Normally, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984) (quoting *A.R. Douglass, Inc., v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (1931)).

Knowles v. Beverly Enterprises-Florida, Inc., 898 So. 2d 1, 5 (Fla. 2004); *see also Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000) ("When interpreting a statute and attempting to discern legislative intent, courts must first look at the actual language used in the statute.").

In *Donato v. American Telephone and Telegraph*, 767 So. 2d 1146 (Fla. 2000), this Court applied these fundamental rules to discern the meaning of the

term "marital status" under the FCRA.[5] In doing so, this Court rejected a broad interpretation of "marital status" and instead adopted a narrow, "common usage" interpretation (as should be done for the term "sex").[6] *Id.* at 1154-55 ("If we were to give the term a broader definition by requiring courts to consider the specific person to whom someone is married, we would be expanding the term beyond its common, ordinary use and would give meaning to the term that was not intended by the Legislature.").

Importantly, this Court recognized in *Donato* the concept of separation of powers and the appropriate roles for the judicial and legislative branches:

> Had the Legislature intended to include the identity of an individual's spouse or bias against a spouse within the meaning of marital status for the purpose of expanding the scope of discriminatory practices, it certainly could have done so, and, of course, is free to do so after this decision.

Id. at 1155.

2. The Statutory Scheme, Its Plain Language, And Common Usage Of The Term "Sex".

a. The statutory scheme and its plain language.

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[5] Like "sex," "marital status" is a protected classification under the FCRA, and like "sex," "marital status" is not defined in the FCRA. § 760.10(1), Fla. Stat. (2012). At issue in *Donato* was whether the term "marital status" should be broadly construed to include the identity and actions of one's spouse, or narrowly construed as limited to an individual's legal status as married, single, widowed, divorced, or separated. *Donato*, 767 So. 2d at 1148.

[6] Adopting a narrow, "common usage" interpretation, this Court rejected a construction supported by the Commission on Human Relations. *Id.* at 1153-54.

The FCRA expressly recites among its "general purposes" securing for individuals within the State of Florida "freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status . . . ." § 760.01(2), Fla. Stat. (2012). By its terms, the FCRA "shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this section [760.01] . . . and the special purposes of the particular provision involved." *Id.* at § 760.01(3). Consistent with the statutory purpose of securing "freedom from discrimination," it is an "unlawful employment practice" under the FCRA for an employer "[t]o discharge . . . or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status." *Id.* at § 760.10(1)(a). The statute provides administrative and civil remedies for individuals aggrieved by unlawful employment practices. *Id.* at § 760.11.

The FCRA is clear and unambiguous with respect to its scope of coverage. By its express terms, the FCRA extends to eight protected classes. Pregnancy is not among them. Enlargement of the FCRA's scope beyond the eight enumerated classes would amount to an "abrogation of legislative power." *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984); *Donato*, 767 So. 2d at 1155 (recognizing that expanding the definition of "marital status" beyond its common, ordinary purpose "would give meaning to the term that was not intended by the Legislature.").

The plain language of the FCRA does not support a reading of "sex" that encompasses "pregnancy." In fact, the FCRA contains a "definitions" section, but the Florida Legislature has chosen *not* to define the term "sex." § 760.02, Fla. Stat. (2012). In contrast, the Florida Legislature *has* defined the term "national origin" -- one of the eight enumerated classes -- as including "ancestry." *Id.* at § 760.01(2). If the Legislature had intended to include pregnancy discrimination among the FCRA's unlawful employment practices, then the Legislature would have defined the term "sex" as including "pregnancy," just as the Legislature defined the term "national origin" as including "ancestry" (and just as Congress has defined the term "sex" as including "pregnancy," as explained in § C(4) *infra*).

b. Protection afforded pregnant women by the Florida Legislature in *other* civil rights statutes.

Notably, the Florida Legislature has enacted *other* civil rights statutes that expressly prohibit pregnancy discrimination. The fact that the Legislature expressly references "pregnancy" in those other statutes reflects the Legislature's clear intent to exclude "pregnancy" from the meaning of "sex" under the FCRA.

Specifically, under Florida's Fair Housing Act, § 760.20, *et. seq.*, Fla. Stat. (2012) ("FFHA"), it is unlawful, among other things, to discriminate against any person because of race, color, national origin, sex, handicap, familial status, or

religion with respect to the sale or rental of housing.[7] *Id.* at § 760.23. Thus, the FFHA, like the FCRA, prohibits discrimination because of "sex." Unlike the FCRA, however, the FFHA expressly defines "familial status" as including "any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years." *Id.* at § 760.23(6). Clearly, then, the Florida Legislature did not intend for the term "sex" in the FFHA to encompass "pregnancy"; if the Legislature had intended as such, then the Legislature presumably would have defined the term "sex" -- not "familial status" -- as encompassing the definition "any person who is pregnant." Just as "sex" does not encompass "pregnancy" under the FFHA, "sex" does not encompass "pregnancy" under the FCRA.

Similarly, in 1979, the Legislature amended its statutory scheme for the State's General State Employment Provisions and Career Service System ("Career Service System"). § 110.105, *et. seq.,* Fla. Stat. (1979). Under that law, the Florida Legislature provided that "[a]ll appointments, terminations . . . and other terms and conditions of employment in state government shall be made without regard to . . . sex . . . ." § 110.105(2), Fla. Stat. (1979). Despite this express statutory protection for "sex," the Legislature added a separate section (titled

[7] The FCRA and FFHA are part of the same statutory scheme, with the FCRA ending at § 760.11 and the FFHA beginning at § 760.20, Fla. Stat.

Maternity Leave) within that same statutory scheme, expressly prohibiting the State from terminating "the employment of any *State employee* in the career service because of her *pregnancy*." § 110.221(1)(a), Fla. Stat. (1979) (emphasis added). Later, in 1991, the Legislature amended that provision to add protection against termination because of the pregnancy of "the employee's spouse or the adoption of a child by that employee." 1991 Fla. Laws Ch. 91-36, p. 285; § 110.221(2), Fla. Stat. (2012). Clearly, then, the Florida Legislature knows how to protect pregnant employees with express statutory language.

Importantly, the Career Service System statute's express prohibition against pregnancy-based terminations co-exists with a stated, statutory policy against "sex" discrimination in state government employment, and a statutory right to file a complaint with the Florida Commission on Human Relations for unlawful employment practices.[8] § 110.105(2)(a), § 110.112(4), § 110.112(5), Fla. Stat. (2012). In other words, unlike the FCRA, the Career Service System statute

[8] The statute provides that "[i]t is the policy of the state . . . [t]hat all appointments, terminations, assignments, and maintenance of status, compensation, privileges, and other terms and conditions of employment in state government shall be made without regard to . . . sex . . . ." *Id.* at § 110.105(2)(a). Further "[t]he state, its agencies and officers shall ensure freedom from discrimination in employment as provided by the Florida Civil Rights Act of 1992 . . . and by this chapter." *Id.* at § 110.112(4). "Any individual claiming to be aggrieved by an unlawful employment practice may file a complaint with the Florida Commission on Human Relations as provided by s. 760.11." *Id.* at § 110.112(5).

expressly references and protects *both* "sex" and "pregnancy," which would create a statutory redundancy if, as Delva contends, "sex" encompasses "pregnancy." *Clines v. State*, 912 So. 2d 550, 558 (Fla. 2005) ("We traditionally have sought to avoid a redundant interpretation unless the statute clearly demands it.").

c. A liberal construction must comport with the fair import and common and ordinary meaning of the term "sex."

The Florida Legislature's statutory directive to construe the FCRA liberally does not compel a reading of the term "sex" that would encompass "pregnancy" where, as here, that reading would conflict with the "fair import" and "common and ordinary meaning" of the term "sex." § 760.01(3), Fla. Stat. (2012); *Donato*, 767 So. 2d at 1154 (rejecting a broad interpretation of the term "marital status" under the FCRA, noting that "we have consistently held that words or phrases in a statute must be construed in accordance with their common and ordinary meaning."). The "common and ordinary meaning" of the term "sex" refers to one's gender – either male or female – not pregnancy. *General Electric Co. v. Gilbert*, 429 U.S. 125, 145 (1976) ("[w]hen Congress makes it unlawful for an employer to 'discriminate . . . because of . . . sex . . .,' without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant, ...").

Indeed, *Webster's New World Dictionary* (3d College ed. 1988) defines the term "sex" as "either of the two divisions, male or female, into which persons . . .

are divided," and "the character of being male or female."[9] *New Sea Escape Cruises*, 894 So. 2d at 961 (noting that plain and ordinary meaning can be ascertained by reference to a dictionary when necessary). And, in routine communication, when one is asked to identify his or her sex (whether in conversation, on an employment application, medical form, application for benefits, or otherwise), the answer sought is whether the individual is male or female. One would never expect the answer to be "pregnant." *Donato*, 767 So. 2d at 1154 (reasoning that "when one is asked for his or her marital status, the answer usually sought is whether that person is married, single, divorced, widowed, or separated.").

In short, even though the FCRA provides that its terms "shall be liberally construed," it also provides that the statute "is to be construed in accord with the fair import of its terms." § 760.01(3), Fla. Stat. (2012) So, even with a "liberal spin," the "fair import" of "sex" does not encompass "pregnancy," particularly when viewed in light of the statute's plain language, the Legislature's enactment of

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[9] *See also Merriam-Webster's Collegiate Dictionary* (11th ed. 2009) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male sep. on the basis of their reproductive organs and structures"); *The American Heritage Dictionary* (4th ed. 2001) ("The condition or character of being female or male."); *Webster's Third New International Dictionary* (1981) ("one of the two divisions of organic esp. human beings respectively designated male or female"); *The Random House Dictionary of the English Language* (1967) ("the fact or character of being either male or female").

other civil rights statutes referencing "pregnancy," and the common usage of the term. Therefore, no further analysis is warranted under the rules of statutory analysis. Pregnancy discrimination is not an unlawful employment practice under the FCRA.

C. Assuming, *Arguendo*, Ambiguity Exists In The FCRA's Plain Language, Legislative History And The Relevant Chronology Of Events Clearly Reflect The Florida Legislature's Intent To Exclude Coverage For Pregnancy Discrimination.

By ignoring the FCRA's plain language and the common and ordinary usage of the term "sex," Delva necessarily urges this Court to find ambiguity in the term "sex" and define "sex" as encompassing "pregnancy." Even assuming, *arguendo*, that the term "sex" is ambiguous, the term "sex" cannot reasonably be interpreted as encompassing "pregnancy" in light of the pertinent legislative history, and, more specifically, the Florida Legislature's silence in the face of legislative enactments and case law rejecting the precise interpretation that Delva advances.

1. The Florida Human Relations Act Was Enacted In 1969, And It Was Not Amended To Cover "Sex" Until 1972.

Congress enacted Title VII in 1964. Civil Rights Act of 1964, Pub. L. No. 88-352, T. 7, 78 Stat. 241, 253-266. As originally enacted, Title VII afforded protection from discrimination in employment because of race, color, religion, sex, and national origin. 42 U.S.C. § 2000e (1964); *DuChateau*, 822 F. Supp. 2d at

1334. So, in 1964, Title VII prohibited sex discrimination, but it did not expressly prohibit pregnancy discrimination. *DuChateau*, 822 F. Supp. 2d at 1334.

Five years later, in 1969, the Florida Legislature enacted the Florida Human Relations Act ("FHRA"), 1969 Fla. Laws Ch. 69-287, a predecessor to the FCRA. Unlike Title VII, the FHRA as originally enacted *did not prohibit sex discrimination*, though the FCRA is said to have been patterned after Title VII, which did prohibit sex discrimination. *Ranger Ins. Co. v. Bal Harbor Club, Inc.*, 549 So. 2d 1005, 1009 (Fla. 1989) ("Florida's Human Rights Act appears to be patterned after Title VII of the federal Civil Rights Act of 1964 . . . ."). Rather, the Legislature limited the FHRA's scope to race, color, religion, and national origin discrimination. *DuChateau*, 822 F. Supp. 2d at 1335-36. The Florida Legislature did not amend the FHRA to define the term "discriminatory practice" as including "unfair treatment" based on "sex" until 1972. 1972 Fla. Laws Ch. 72-48.

The above chronology is relevant to ascertaining legislative intent, for if the Florida Legislature did not even prohibit *sex* discrimination when it enacted the FHRA in 1969, then *pregnancy* discrimination could not have been within the scope of the originally intended prohibitions. And, if the Florida Legislature patterned the FHRA after Title VII in 1969, then the Florida Legislature, which excluded "sex" from coverage, certainly could not have shared a unified intent with Congress.

2. In 1976, The U.S. Supreme Court Confirmed In *Gilbert* That "Sex" Did Not Encompass "Pregnancy" Under Title VII.

a. The *Gilbert* decision.

On December 7, 1976, the U.S. Supreme Court issued its decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). At issue in *Gilbert* was whether a private employer's disability benefits plan violated Title VII's prohibition against "sex" discrimination by excluding from coverage pregnancy-related disabilities. The Court held that the exclusion did not violate Title VII. Specifically, the Court held that the exclusion of pregnancy-related disabilities from an otherwise comprehensive sickness and accident disability plan was not sex-based discrimination absent a showing that the exclusion was used as a mere pretext designed to effect an invidious discrimination against members of one sex or the other.[10, 11] *Gilbert,* 429 U.S. at 136.

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[10] *Gilbert* was decided after *Geduldig v. Aiello*, 417 U.S. 484 (1974), where the Supreme Court similarly held that disparity in treatment between pregnancy-related disabilities and other disabilities did *not* constitute sex discrimination under the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

[11] With respect to the Court's use of the word "pretext," three years earlier, in *McDonnell Douglas v. Green*, the Court established a legal framework for Title VII discrimination claims. A Title VII plaintiff carries the initial burden of establishing a *prima facie* case of discrimination. If the plaintiff meets that initial burden, then the employer must articulate a legitimate, non-discriminatory reason for the alleged discriminatory action. If the employer articulates such a reason, then the plaintiff bears the ultimate burden of proving that the employer's proffered explanation is a mere "pretext" for unlawful discrimination. *McDonnell Douglas*, 411 U.S. 792, 802-805 (1973).

Simply stated, the *Gilbert* Court held that: (1) "pregnancy" did not fall within Title VII's definition of "sex"; and (2) *if* evidence existed that pregnancy was used as a "mere pretext" to discriminate against women, then there could be actionable *sex* discrimination, but not *pregnancy* discrimination (because pregnancy was not a protected class and, according to the Court, the term "sex" did not encompass "pregnancy"). Under the plan at issue, the *Gilbert* Court found no evidence that the exclusion of pregnancy-related disabilities was devised as a mere pretext to discriminate against members of one sex or the other. There was "no risk from which men [were] protected and women [were not]. Likewise, there [was] no risk from which women [were] protected and men [were] not." *Gilbert*, 429 U.S. at 138.

Importantly, and contrary to Delva's argument, the *Gilbert* Court's express rationale leaves no doubt as to the Court's holding – that "sex" does not equal "pregnancy" under Title VII:

> [w]hen Congress makes it unlawful for an employer to "discriminate . . . because of . . . sex . . .," without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant, . . . There is surely no reason for any such inference here, ...

Id. at 145 (internal citations omitted). Even more, the *Gilbert* Court did not lose sight of the fact that only women can become pregnant (which is at the core of Delva's argument that "sex" necessarily encompasses "pregnancy"):

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . .

Id. at 134.[12]

Even more important to the issue at hand, in finding that "pregnancy" does not equal "sex," the *Gilbert* Court recognized that lawmakers (i.e., legislatures) are free to include or exclude "pregnancy" as a protected class:

> Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation . . . , just as with respect to any other physical condition.

Gilbert, 429 U.S. at 125 (citing *Geduldig*, 417 U.S. at 496-497 n.20).

b. *Gilbert*'s reasoning can be applied to other protected classifications.

Gilbert's reasoning is easily understood when applied to protected classifications other than "sex." For example, if an employer were to terminate the employment of its Hispanic employees when they became pregnant, but not the

[12] *Gilbert*'s reasoning is consistent with earlier authority from a Florida U.S. District Court holding that sex-related characteristics (like pregnancy) do not fall under Title VII's prohibition against "sex" discrimination. *See, e.g., Rafford v. Randle E. Ambulance Serv.*, 348 F. Supp. 316 (S.D. Fla. 1972) (rejecting claim that termination of male employees who refused to shave moustaches and beards constituted sex discrimination; analogizing to pregnancy, stating that "the discharge of pregnant women or bearded men does not violate the Civil Rights Act of 1964 simply because only women become pregnant and only men grow beards.").

employment of non-Hispanic employees when they became pregnant, then, under *Gilbert*: (1) the pregnancy-based terminations would not constitute unlawful national origin discrimination (just as the pregnancy-based exclusion in *Gilbert* did not constitute unlawful sex discrimination); but (2) the door would be left open to explore whether the employer used pregnancy as a "mere pretext" to discriminate against Hispanic employees. In other words, if it could be established that the employer used pregnancy as a "mere pretext" (a cover-up, a sham, an excuse) for unlawful national origin discrimination, then the terminations would violate prohibitions against national origin (not pregnancy) discrimination under Title VII or the FCRA. That is all *Gilbert* said.[13]

c. Delva's interpretation of *Gilbert* is incorrect.

In her Initial Brief, Delva purports to "clarify the interpretive confusion" of Title VII case law and legislative history concerning the *Gilbert* decision. *See* Delva's Initial Brief at 9. Delva achieves the opposite result. Instead of tackling *Gilbert's* holding head on -- that pregnancy discrimination does not equal sex discrimination under Title VII -- Delva goes to great lengths to paint *Gilbert*, and its progeny, with a very narrow brush. In doing so, Delva reaches a flawed conclusion.

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[13] Under Delva's interpretation of *Gilbert*, if pregnancy is used as a mere pretext for national origin discrimination, then pregnancy itself achieves protected class status. Clearly, this example demonstrates the flaw in Delva's argument.

Specifically, it is Delva's position that *Gilbert*, *at times*, transforms pregnancy into a protected classification, but, *at other times*, does not, depending upon the pregnancy-related issue in dispute.[14] Elaborating on her interpretation, Delva states that *Gilbert* "stood for the much narrower proposition that *a certain* pregnancy-related exclusion in a health care plan was not pregnancy or sex discrimination *in that particular case* because the plaintiff had failed to present sufficient evidence to prove that the specific policy at issue masked the employer's intent to discriminate or had a discriminatory effect or impact upon female employees." *See* Delva's Initial Brief at 12.

Delva's position is incorrect and fails to recognize the critical distinction between: (a) pregnancy discrimination in itself establishing *a prima facie* case of sex discrimination under Title VII (which it can never do because it is not a protected class); and (b) the prohibited use of pregnancy *as a mere pretext* to discriminate against a protected class (which could occur based on the specific facts at issue).[15]

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[14] Similarly, Delva improperly relies on *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), concerning a claim brought under 42 U.S.C. § 1983 and decided on due process grounds in the context of mandatory leave policies. Delva argues that, *two years before Gilbert was even decided*, courts had drawn up an arbitrary distinction between the treatment of "under-inclusive" pregnancy discrimination and "undue burden" pregnancy discrimination under Title VII. *Gilbert,* decided under Title VII, did not draw or suggest any such distinction.

[15] *See* n.12 *supra.*

Delva then attempts to support her position by devoting several pages of her Initial Brief to a strained discussion of post-*Gilbert* decisions. Those decisions on which Delva heavily relies, however, recognize that pregnancy-based distinctions do not *per se* constitute sex discrimination. *See Nashville Gas Company v. Satty*, 434 U.S. 136, 137 (1977) (exclusion of pregnancy-related absences from sick leave plan was *not* a *per se* violation of Title VII); *In re: National Airlines, Inc.*, 434 F. Supp. 249, 257 (S.D. Fla. 1977) (*Gilbert* foreclosed the notion that pregnancy *per se* is equivalent to sex *per se*). Rather, as noted above, it is only when a pregnancy-based distinction is used as a mere pretext for sex discrimination that the distinction supports a sex (not pregnancy) discrimination claim.

For example, in *Satty*, the Court remanded the case for a finding as to whether the employee "had preserved the right to proceed further" on the theory that exclusion of pregnancy-related absences from a sick leave plan was used as a pretext for invidious discrimination. *Satty*, 343 U.S. at 137. Similarly, the *In re: National Airlines, Inc.* Court held that the airline's policy of requiring female flight attendants to stop working when they became pregnant had a discriminatory impact upon females since some "are capable of working during pregnancy." *In re: National Airlines*, 434 F. Supp. at 257.

Simply put, the only meaningful distinction between the *Gilbert*, *Satty*, and *In re: National Airlines* is that *while they all recognized that "pregnancy" does not*

equal "sex," *Satty* and *In re: National Airlines* held that pregnancy either was or may have been used as a pretext for sex discrimination, whereas *Gilbert* found no evidence of pretext.[16]

d. Delva's heavy (yet incorrect) reliance on *Gilbert* and its progeny distracts from the key issues before this Court.

Delva's lengthy and incorrect interpretation of *Gilbert* misses the key point -- that the Supreme Court, more than once, held that "pregnancy" did not fall under Title VII's prohibition against "sex" discrimination before enactment of the PDA.

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[16] *Delva* also cites *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 677 n.12 (1983), where the Court re-affirmed that because "pregnancy" did not equal "sex" *before* enactment of the PDA, pregnancy was only relevant to the extent it was used as a pretext for discrimination against a *protected* classification:

> [b]oth the majority and dissent agreed that in *Gilbert* the U.S. Supreme Court had expressly left open the concept that policies that exclude health coverage based on pregnancy would be considered as impermissible sex discrimination under Title VII where there is a sufficient evidentiary showing that "distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other" or if there is sufficient proof of discriminatory effect or impact on a protected class.

In *Newport News*, decided *after* Title VII was amended by the PDA (to overrule *Gilbert* by bringing "pregnancy" within the meaning of "sex"), the Court held that because an employer's health plan provided limited benefits to the spouses of male employees who became pregnant, and more extensive coverage for spouses for all other medical conditions, it was *males* who had been subjected sex discrimination. Therefore, while Delva contends that "pregnancy" equals "sex" because only women can become pregnant, *Newport News* demonstrates that pregnancy-based distinctions can also operate to discriminate against men.

More important to the issue at hand, however, is that Congress, by enacting the PDA in 1978 to overrule *Gilbert,* took immediate action to bring pregnancy discrimination within Title VII's definition of "sex." S*ee infra* § C(4). It was at that very point that one would have expected corresponding action by the Florida Legislature. Yet, as discussed below, approximately thirty-five years have passed, and the silence from the Florida Legislature has been deafening. This very point, critical to the issue before this Court, is entirely lost in Delva's analysis.

3. The Florida Legislature Amended The FHRA In 1977, But The Amendment Did Not Address *Gilbert* Or The Scope Of The FHRA's Prohibition Against Sex Discrimination.

In 1977, the Florida Legislature again amended the FHRA (and re-named it the Human Rights Act). 1977 Fla. Laws Ch. 77-341. Here, it is the Legislature's *inaction* that is of particular note. Despite the Supreme Court's landmark decision in *Gilbert* decision just one year earlier, the Florida Legislature chose *not* to add "pregnancy" to the list of protected classifications, and chose *not* to define "sex" as encompassing "pregnancy."[17] Either amendment would have addressed *Gilbert*'s

[17] By comparison, Minnesota amended the Minnesota Human Rights Act in 1977 to state that it would be "an unfair employment practice . . . not to treat women affected by pregnancy . . . the same as other persons . . . ." Minn. Stat. § 363A.08(5); 1977 Minn. Laws Ch. 408 – H.F.No.1015, p. 952. Oregon also amended its civil rights law in 1977 to add a section stating that "because of sex" includes . . . because of pregnancy . . . ." Or. Rev. Stat. § 659A.029; 1977 Or. Laws Ch. 330 – S.B. 714, p. 275.

central holding that "sex" did not encompass "pregnancy" (or, at the very least, an amendment would have cleared up any perceived confusion about *Gilbert*).

Under basic tenets of statutory construction, it must be presumed that the Florida Legislature was aware of *Gilbert*, so its inaction in 1977 is meaningful:

> When the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary.

Gulfstream Park Racing Ass'n, Inc. v. Dep't of Bus. Reg., 441 So. 2d 627, 628 (Fla. 1983); *see also DuChateau*, 822 F. Supp. 2d at 1335 ("Despite making these changes to the FHRA, the Florida legislature chose to make no modification to the language of the FHRA prohibiting discrimination on the basis of sex, even though the Supreme Court had, one year earlier, construed the federal equivalent as not encompassing pregnancy discrimination.").[18]

Notably, while the 1977 FHRA amendments did not address pregnancy, the amendments *expanded* the FHRA's coverage to prohibit discrimination because of age, handicap, and marital status. 1977 Fla. Laws 77-341; § 760.10(1)(a), Fla. Stat. (2012). As such, there is no question that the Florida Legislature knew how

[18] In fact, a central (but flawed) premise underlying Delva's argument is that when the Florida Legislature amended the FHRA in 1992, the Legislature intended to adopt Title VII's definition of "sex" as amended by the PDA. The logical extension of Delva's argument is that with the 1977 amendments to the FHRA, the Legislature intended to adopt Title VII's definition of "sex" as declared by *Gilbert* one year earlier.

to expand the FHRA's coverage, had an opportunity to do so, and in fact did so in 1977 with respect to age, handicap, and marital status discrimination. But, despite *Gilbert*, the Legislature remained silent with respect to pregnancy discrimination and the definition of "sex."

4. In Response To *Gilbert*, Congress Amended Title VII In 1978 To Cover Pregnancy, But The Florida Legislature Again Remained Silent On The Issue.

In 1978, in response to *Gilbert*, Congress enacted the Pregnancy Discrimination Act of 1978, which amended Title VII to define the term "because of sex" to include pregnancy and pregnancy-related conditions:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, ...

42 U.S.C. § 2000e(k) (1978); *see also Carsillo*, 995 So. 2d at 1119 (recognizing that Congress enacted the PDA in response to *Gilbert*); *DuChateau,* 822 F. Supp. 2d at 1335 (same).

Despite Congressional enactment of the PDA, the Florida Legislature again remained silent and again chose not to define the term "sex" as including "pregnancy" or otherwise to amend the FHRA to cover pregnancy

discrimination.[19] If the Legislature intended for the FHRA to provide the same protection as Title VII (as amended by the PDA), then the Legislature easily could have followed Congress' lead.[20, 21]

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[19] By comparison, in 1979, *the year after enactment of the PDA*, Maine amended the Maine Civil Rights Act to state that "the word "sex" includes pregnancy. . . ." Me. Rev. Stat. Ann. tit. 5, § 4572-A(1); 1979 Me. Laws Ch. 79 – H.P. 548 – L.D. 679, p. 79. That same year, South Carolina amended the South Carolina Human Affairs Law to add a subsection stating that "[t]he terms "because of sex" or "on the basis of sex" include . . . because of or on the basis of pregnancy . . . ." S.C. Code Ann. § 1-13-30(l); 1979 S.C. Acts No. 24 – R38, H2116, p. 26. Also in 1979, Ohio amended its code to state that "the terms "because of sex" or "on the basis of sex" include . . . because of or on the basis of pregnancy . . . ." Ohio Rev. Code Ann. § 4112.01(B); 1979/80 Ohio Laws Amended H.B. No. 19, pp. 1430-1431.

[20] Indeed, after enactment of the PDA, at least eleven other states and the District of Columbia (in addition to the states discussed in notes 18 and 20 above) took legislative action between 1983 and 2011 to expressly prohibit pregnancy discrimination. *See* N.D. Cent. Code § 14-02.4-02(18); 1983 N.D. Laws Ch. 173 - H.B. No. 1440, p. 469 (1983-enacting ND Human Rights Act, including pregnancy protection); D.C. Code § 2-1401.05; 1985 D.C. Sess. Law Serv. Act 6-21, pp. 2959-2960 (1985-adding Pregnancy Discrimination Act of 1985 to supplement DC's Human Rights Act of 1977); Iowa Code § 216.6(2); 1987 Iowa Acts Ch. 201 – H.F. 580, p. 322 (1987-adding subsection to IA Civil Rights Act of 1965 to cover pregnancy); Utah Code Ann. § 34A-5-106(1)(a)(D); 1989 Utah Laws Ch. 155-H.B. 393, p. 376 (1989-amending UT Antidiscrimination Act to add pregnancy as a protected category *separate from sex*); Nev. Rev. Stat. § 613.335; 1989 Nev. Stat. Ch. 332, p. 690 (1989-enacting statute to protect pregnant employees from receiving lesser benefits); Cal. Gov't Code § 12926(q); 1989-90 Cal. Legis. Serv. Ch. 15 – S.B. 1027, p. 2 (West) (1990-amending CA Department of Fair Employment and Housing Code to cover pregnancy); Ark. Code Ann. § 16-123-102(1); 1993 Ark. Acts, Act 962, p. 2784 (1993-enacting AR Rights Act of 1993, including pregnancy protection); Tex. Lab. Code Ann. § 21.106; 1993 Tex. Sess. Law Serv., Ch. 269 – H.B. 752, p. 13 (West) (1993-adding section to TX Labor Code to protect against pregnancy discrimination); Va. Code Ann. § 2.2-3900(B)(1); 1997 Va. Acts Ch. 404 - H 2544 (1997-adding pregnancy as protected

a. In 1979, the Florida Legislature amended its Career Service System statute to prohibit pregnancy-based terminations by the State.

The assertion that the Florida Legislature knew how to prohibit pregnancy discrimination immediately following enactment of the PDA is far from speculation. In 1979, the Florida Legislature amended its Career Service System statute, which covers State employees. The statute was amended to read, in pertinent part, as follows:

> 110.221 Maternity Leave. –
>
> (1) The state shall not:
>
> (a) Terminate the employment of any employee in the career service because of her pregnancy.

§ 110.221(1)(a), Fla. Stat. (1979).

Simply put, the year after Congress enacted the PDA, the Florida Legislature took immediate action to prohibit the termination of *State employees* on account of

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category, *separate from sex*, under VA Human Rights Act); Wyo. Stat. Ann. § 27-9-105(a)(i)-(ii); 2007 Wyo. Sess. Laws HB0227, 07LSO-0239 (2007-amending WY civil rights law to add pregnancy, *in addition to sex*, as a protected category); Okla. Stat. tit. 25, § 1301(6); 2010 Okla. Sess. Laws, Ch. 74 - S.B. 1814 (2010-amending OK civil rights law to protect pregnancy); 775 Ill. Comp. Stat. 5/2-102(I); 2011 Ill. Laws Ch. 68, par. 2-102 (2011-amending IL Human Rights Act to cover pregnancy).

[21] In addition to the states discussed in notes 18, 20 and 21 above, at least five other states have enacted civil rights statutes that expressly prohibit pregnancy discrimination. La. Rev. Stat. Ann. 23:342(1); Neb. Rev. Stat. § 48-1102(13); N.H. Rev. Stat. § 354-A:7(VI); Mich. Comp. Laws § 37.2202(1)(d); Tenn. Code. Ann. § 4-21-101(a)(1) (expressly adopting provisions of PDA).

pregnancy, yet took *no action* similarly to amend the FHRA. Importantly, at least as early as 1977, the FHRA covered private employers *and* "the state, or any governmental entity or agency." 1977 Fla. Laws Ch. 13-341.

With respect to the issue before this Court, the 1979 amendment of the Career Service System statute is instructive for two (2) reasons:

First, the Florida Legislature amended this statutory provision in 1979, the year after Congress enacted the PDA to afford *federal* protection against pregnancy-based employment terminations. § 110.221(1)(a), Fla. Stat. (1979). If, as Delva contends, the FHRA (which also covered State employees) prohibited pregnancy discrimination as of 1979, then there is no logical reason why the Florida Legislature would have had to amend the Career Service System statute to protect State employees against pregnancy-based terminations. The only logical conclusion that can be drawn is that the Legislature did not believe that the FHRA prohibited pregnancy discrimination in 1979. If the Florida Legislature also had intended to protect non-State employees from pregnancy-based terminations, it could easily have made the same or similar change to the FHRA. It did not.

Second, unlike the FHRA, the Career Service System statute, then and its current form, expressly references *both* "sex" and "pregnancy" in entirely separate subsections. *Compare* § 110.105(2), Fla. Stat. (2012) ("all appointments, terminations, . . . shall be made without regard to . . . sex") *with* § 110.221(1), Fla.

Stat. (2012) ("The state shall not: (a) [t]erminate the employment of any employee in the career service because of her pregnancy.") If, as Delva contends, "sex" encompasses "pregnancy," then reference to both would create a statutory redundancy in the Career Service System statute. *Clines v. State*, 912 So. 2d 550, 558 (Fla. 2005) (noting that court should seek to avoid redundant interpretations).

b. In 1989, the Florida Legislature amended the Florida Fair Housing Act to protect against pregnancy-based housing discrimination.

Moreover, the Florida Legislature has followed Congress' lead with respect to prohibiting pregnancy-based housing discrimination. Specifically, the aforementioned FFHA, *see supra* § B(2)(b), which prohibits housing discrimination, is patterned after the Federal Fair Housing Act of 1968, 42 U.S.C. § 3601, *et. seq.* (2006) ("Federal Housing Act"). *See Dornbach v. Holley*, 854 So. 2d 211, 213 (Fla. 2d DCA 2002) ("The Florida Legislature essentially codified the Federal Act when it enacted the Florida Fair Housing Act."); *Milsap v. Cornerstone Residential Mgt., Inc.*, No. 05-60033, 2010 WL 427436 at *2 (S.D. Fla. 2010) ("Florida's Fair Housing Act is the state counterpart to the Federal Fair Housing Act Amendments. The FFHA is patterned after the FHA and courts have recognized that it is to be construed consistently with federal law."). Congress amended the Federal Housing Act in 1988 to extend the prohibitions against "familial status" discrimination to any person "who is pregnant or is in the process

of securing legal custody, with the written permission of such parent or other person." PL 100-430, 1988 HR 1158, Sec. 5(b)(k)(2); 42 U.S.C. § 3602(k)(2) (1988). *The very next year,* the Florida Legislature followed suit and amended the FFHA to cover any person "who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years." 1989 Fla. Laws Ch. 89-321; § 760.23(6), Fla. Stat. (2012).

The Florida Legislature's decision to follow Congress' lead when it came to pregnancy in *housing discrimination*, but not when it came to pregnancy and *employment discrimination*, again reflects the Legislature's intent to exclude pregnancy discrimination from coverage under the FCRA. If both statutes (the FCRA and the FFHA) are patterned after federal law (Title VII and the Federal Housing Act), and if both state statutes are to be accorded the same meaning as their federal counterparts (as Delva presumably would contend), then why would the Legislature have deemed it necessary to act immediately in response to Congressional amendment of the Federal Housing Act but not the PDA? The answer is simple. The Legislature *chose* not to expand the scope of the FCRA to cover pregnancy discrimination.

5. In 1991, The First DCA Necessarily Held In *O'Loughlin* That The FHRA Did Not Prohibit Pregnancy Discrimination.

a. The *O'Loughlin* Court's reasoning

In 1991, a Florida District Court of Appeal addressed for the first time the issue of coverage for pregnancy discrimination under the FHRA. In *O'Loughlin v. Pinchback*, 579 So. 2d 788 (Fla. 1st DCA 1991), the appellant/employer appealed an administrative hearing officer's determination that the appellant/employer terminated the employment of appellee/employee from her Correctional Officer position at the St. Johns County jail because of her pregnancy.

The *O'Loughlin* Court addressed the primary legal issue at hand – whether a cause of action existed under the FHRA for pregnancy discrimination – first by reciting [as does Delva] the "long-standing rule of statutory construction which recognizes that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as in the federal courts to the extent the construction is harmonious with the spirit of the Florida legislation." *O'Loughlin*, 579 So. 2d at 791. The *O'Loughlin* Court concluded that the FHRA was patterned after Title VII. *Id.*

Next, contrasting Title VII and the FHRA, the *O'Loughlin* Court unambiguously recognized that, unlike Title VII, the Florida Legislature did not amend the FHRA to prohibit pregnancy discrimination:

> In *General Electric Company v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), the Supreme Court held that discrimination on the basis of pregnancy was not sex discrimination under Title VII. However, in 1978, in response to the *Gilbert* decision, Congress amended Title VII by enacting the Pregnancy Discrimination Act of 1978 (PDA). 42

> U.S.C. § 2000e(k). The PDA specifies that discrimination on the basis of pregnancy is sex discrimination, and therefore violative of Title VII. Florida has not similarly amended its Human Rights Act to include a prohibition against pregnancy-based discrimination.

O'Loughlin, 579 So. 2d at 791.[22]

Lastly, after concluding that the FHRA did not, itself, recognize discrimination against pregnant employees as sex-based discrimination, the *O'Loughlin* Court held that the FHRA "is preempted by Title VII . . . to the extent that Florida's law offers less protection to its citizens than does the corresponding federal law."[23] *Id.* at 792.

b. Delva's ever-changing interpretation of *O'Loughlin*

Before the Third DCA, Delva asserted that *O'Loughlin* "held that the FCRA could *not* be interpreted to prohibit pregnancy discrimination," and that the *O'Loughlin* Court "permitted the pregnancy discrimination [claim] to go forward

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[22] As the *DuChateau* Court noted, "it is not surprising that in 1991, the First District Court of Appeal in *O'Loughlin* concluded that the FHRA, which continued to prohibit discrimination on the basis of sex, as had the pre-PDA version of Title VII, provided no protection against pregnancy discrimination." *DuChateau*, 822 F. Supp. 2d at 1335.

[23] The *O'Loughlin* Court's preemption analysis has been criticized by other courts (and by Delva). *See, e.g.*, *Boone*, 565 F. Supp. 2d at 1326-27 (noting that "this Court disagrees that the FHRA or the FCRA 'conflict with' or undermine Title VII such that they are preempted. Title VII, as amended by the PDA, provides a cause of action for pregnancy discrimination and thus is broader in its protections than the FCRA, but Title VII is not undercut or diminished by the existence of the FCRA's lesser protections. Florida citizens may still bring suit under title VII unfettered by the FCRA's provisions, but the FCRA does not provide a pregnancy-discrimination cause of action of its own.").

under Title VII, but not under the FCRA." *See* Delva's Initial Brief Submitted to Third DCA at 5 (emphasis added).[24] After the Third DCA issued its Order on July 25, 2012, however, Delva switched gears, next arguing in her Motion for Rehearing that *O'Loughlin* stands for the proposition "that a claim for pregnancy discrimination is permitted *under the FCRA*. *See* Delva's Motion for Rehearing Submitted to Third DCA at 3 (emphasis added). It is this "revised" position that Delva advances before this Court.

In support of her current interpretation of *O'Loughlin* -- that a cause of action exists under the FCRA for pregnancy discrimination -- Delva relies primarily on the fact that the *O'Loughlin* Court affirmed the underlying administrative determination of discrimination and remanded for a calculation of damages, including back-pay and benefits. Delva, despite the position she advocated before the Third DCA, now goes so far as to assert that "it is plainly obvious that the First DCA recognized a claim and remedy for pregnancy

[24] In light of the fact that Delva advanced an interpretation of *O'Loughlin* before the Third DCA that is consistent with the interpretation advanced by Continental, it is surprising and unfortunate that Amicus would suggest that counsel for Continental somehow tricked the Circuit Court and the Third DCA into accepting Continental's reading of *O'Loughlin*, and that counsel for Continental somehow violated their ethical obligations. While Amicus may disagree with the reading of *O'Loughlin* advanced by Continental and numerous courts (*see infra* § C(5)(c)), the attacks are unwarranted.

discrimination under HRA77 even though the statute did not mention the word 'pregnancy.'" *See* Delva's Initial Brief at 35.

It is anything but "plainly obvious" that the *O'Loughlin* Court recognized a cause of action for pregnancy discrimination *under the FHRA*. The *O'Loughlin* decision itself does not state whether the *O'Loughlin* Court recognized the cause of action for pregnancy discrimination under state law (FHRA) or federal law (Title VII).[25] In fact, under a preemption analysis, it would be strange (and, Continental respectfully submits, incorrect) for a court to hold that a federal law (like Title VII) preempts a state law (like the FHRA), but that the resulting cause of action sounds under *state law*, not federal law. *Boone*, 565 F. Supp. 2d at 1326 ("In other words, the [*O'Loughlin*] court allowed the claim to proceed as a Title VII claim rather than an FHRA claim."). That is not how preemption works when properly applied. *Barnett Bank of Marion County, N.A. v. Nelson, Fla. Ins. Comm'r*, 517 U.S. 25, 28 (1996) ("We conclude that, under ordinary preemption principles, the federal statute pre-empts the state statute, thereby prohibiting application of the state statute to prevent a national bank from selling insurance in a small town."); *State v. Stepansky*, 761 So. 2d 1027, 1030-31 (Fla. 2000) (noting that "if federal law has preempted state law, either expressly or impliedly, the Supremacy Clause requires

[25] Indeed, the entire "Analysis" section of the *O'Loughlin* decision reads as if the Court analyzed a federal claim, particularly with respect to its analysis of the "BFOQ defense" under Title VII. *O'Loughlin*, 579 So. 2d at 792-795.

state law to yield."). Yet, this is precisely what Delva *now* suggests by asserting so adamantly that *O'Loughlin* recognized a cause of action for pregnancy discrimination *under the FHRA*.

Lastly, Delva's reading of *O'Loughlin* is at-odds with the interpretation ascribed to *O'Loughlin* in the "Bill Analysis and Fiscal Impact Statement" ("Impact Statement") prepared for the Florida Legislature in conjunction with a 2013 proposed amendment to the FCRA, which, if it had passed, would have defined "sex" as including "pregnancy." S*ee infra* § C(9). Bill Analysis and Fiscal Impact Statement, Fla. Senate Bill 774 (March 15, 2013). Summarizing the *O'Loughlin* holding, the Impact Statement provides that "the [*O'Loughlin*] court did not reach the question of whether the Florida law prohibits pregnancy discrimination." So, Delva's interpretation of *O'Loughlin* was not "plainly obvious" to the drafters of the Impact Statement either.

c. *O'Loughlin* necessarily held that the FHRA did not provide a cause of action for pregnancy discrimination.

While the *O'Loughlin* Court did, in fact, affirm the underlying administrative determination, and did, in fact, remand the matter for a calculation of damages, Delva's focus on these remedial issues is misplaced. For purposes of ascertaining the intent of the Florida Legislature with respect to the meaning of the FHRA/FCRA, which is the sole issue before this Court, the proper focus is the *O'Loughlin* Court's preliminary legal analysis. With respect to that legal analysis,

one thing is clear -- the *O'Loughlin* Court did *not* believe that the FHRA prohibited pregnancy discrimination. *See O'Loughlin*, 579 So. 2d at 792 (acknowledging that "Florida's law stands as an obstacle . . . by not recognizing that discrimination against pregnant employees is sex-based discrimination," and that "Florida's law offers less protection . . . than does the corresponding federal law."); *see also Boone*, 565 F. Supp. 2d at 1326 ("In this Court's view, *O'Loughlin* did not find that the FHRA prohibited pregnancy discrimination; it held that the FHRA did not cover pregnancy discrimination and therefore was preempted by Title VII.").

Clearly, if the *O'Loughlin* Court had believed that a cause of action existed under the FHRA for pregnancy discrimination, then the *O'Loughlin* Court would not have reached the preemption issue. There simply would have been no need to do so. Instead, the *O'Loughlin* Court simply would have held that the FHRA must be interpreted in a manner consistent with Title VII, which prohibits pregnancy discrimination by virtue of the PDA, and after which the FHRA was patterned. By reaching the preemption issue, however, the *O'Loughlin* Court necessarily held that the FHRA did not provide a cause of action for pregnancy discrimination.

In essence, the *O'Loughlin* Court did nothing more than interpret the FHRA "as the *Gilbert* Court had interpreted the pre-amendment Title VII, that is, as not including a cause of action for pregnancy discrimination." *Berrios*, 2012 WL 7006397, at *3; *Fernandez*, 2005 WL 2277591, at *1 (citing *O'Loughlin* for the

proposition that "protection against discrimination based upon pregnancy is not within the scope of the Florida Civil Rights Act."); *Frazier*, 495 F. Supp. 2d at 1186 ("In 1991, the First District Court of Appeal held that the Florida Human Rights Act did not state a cause of action for discrimination based on pregnancy . . . ."); *Swiney*, 2000 WL 1392101, at *1 (citing *O'Loughlin* and granting defendant's motion to dismiss, or, in the alternative, for summary judgment on the plaintiff's FCRA pregnancy discrimination claim).

6. The Florida Legislature Amended The FHRA In 1992, But Again Chose Not To Expand Coverage For Pregnancy Discrimination Despite The *O'Loughlin* Holding One Year Earlier.

In 1992, the year after the *O'Loughlin* Court necessarily held that the FHRA's coverage did not extend to pregnancy discrimination, the Florida Legislature enacted 1992 Fla. Laws Ch. 92-177. Again, however, the Florida Legislature remained silent with respect to pregnancy:

> [a]mong other modifications, this law changed the name of the FHRA to the Florida Civil Rights Act of 1992. *See* Fla. L. Ch. 92-177. But in contrast to the PDA, and despite the First District's construction of the FHRA [in *O'Loughlin v. Pinchback*] just one year earlier as not precluding pregnancy discrimination, the amendments to the FCRA did not modify in any way the statute's references to sex discrimination or otherwise suggest an intention that the statutory language prohibiting discrimination on the basis of sex be read to proscribe discrimination on the basis of pregnancy. Indeed, the language of the FCRA prohibiting discrimination on the basis of sex continued to include the pre-PDA language of Title VII.

DuChateau, 822 F. Supp. 2d at 1335-36.

Put simply, the Florida Legislature again did nothing to address *Gilbert*, did nothing to address Congressional enactment of the PDA, and did nothing to address *O'Loughlin*'s necessary holding that state law did not prohibit pregnancy discrimination. The Florida Legislature's inaction reflects its intent not to bring "pregnancy" within the definition of "sex." *See Westrich*, 2006 U.S. Dist. Lexis 27624, at *5-6 ("The Florida Legislature's failure to include language similar to the PDA when it enacted the FCRA after the *O'Loughlin* decision is a strong indication that it did not intend to include pregnancy-based discrimination in the FCRA."); *Frazier*, 495 F. Supp. 2d at 1187 ("As the legislature did not include the language from the PDA, it is presumed that it was aware of the *O'Loughlin* opinion and did not intend to include pregnancy-based discrimination in the FCRA."); *Gulfstream Park*, 441 So. 2d at 628 (noting that "[w]hen the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary.").

If the Florida Legislature had intended in 1992 for the term "sex" in the FCRA to carry the same meaning as the term "sex" in Title VII *as amended by the PDA*, then the Florida Legislature easily could have said so expressly.[26] Again, this

[26] Tennessee did precisely that. Tenn. Code. Ann. § 4-21-101(a)(1) (providing for execution within Tennessee of the policies embodied in, among other laws, the Pregnancy Amendment of 1978).

argument is grounded in reality, not speculation, because it is precisely what the Florida Legislature did with respect to the recovery of attorneys' fees under the FCRA. As part of the 1992 amendments, the Florida Legislature amended the FCRA's "Administrative and Civil Remedies" section to declare that "[i]t is the intent of the Legislature that this provision for attorney's fees be interpreted *in a manner consistent with federal case law involving a Title VII action.*" § 760.11(5), Fla. Stat. (2012) (emphasis added); 1992 Fla. Laws Ch. 92-177. The Florida Legislature similarly could have amended the FCRA, as part of the same 1992 amendments, to state expressly its intent for the word "sex" to be interpreted in a manner consistent with Title VII and the PDA. Instead, the Legislature remained silent, and its silence (particularly in the aftermath of *Gilbert*, enactment of the PDA, and *O'Loughlin*) must be presumed to have been intentional. *Russello v. United States*, 464 U.S. 16 (1983) (noting that where a legislative body includes particular language in one section of a statute but excludes it in another, it is generally presumed that the exclusion was intentional); *see also Board of Trustees v. Esposito,* 991 So. 2d 924 (Fla. 1st DCA 2008) (same).

As such, as of 1992, pregnancy discrimination still was not an unlawful employment practice under the FCRA.

7. The Florida Legislature Attempted But Failed Numerous Times, Including In 1994, To Amend The FCRA To Cover Pregnancy Discrimination.

Delva would have this Court believe that with the 1992 FHRA/FCRA amendments, *see supra* § C(6), the Florida Legislature intended to adopt the then-current definition of "sex" under Title VII (a definition that, according to Delva, carried the same meaning since enactment of Title VII in 1964). If that were the case, one never would expect the Florida Legislature to seek to amend the FCRA to expressly cover pregnancy discrimination shortly after the 1992 amendments. Under Delva's reasoning, it simply would not have been necessary. But, that is precisely what the Florida Legislature did in 1994. In two separate bills, SB 1596 and HB 1581, the Legislature sought to amend the FCRA to add the following language:

> An employer who employs more than one employee must treat all of the employer's female employees who are affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes, including receipt of benefits under fringe-benefit programs, as other employees who are not so affected but are similar in their ability or inability to work.

Fla. Senate Bill 1596 (1994); Fla. House Bill 1581 (1994). The 1994 bills "died" – as did six additional attempts between 2002 and 2004 to bring pregnancy discrimination within the scope of the FCRA's prohibitions.[27]

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[27]Between 2002 and 2004, three separate Senate Bills and three separate House Bills sought to amend the "Unlawful employment practices" section of the FCRA, § 760.10, Fla. Stat. (2012), to define the terms "because of sex" and "on the basis of sex" to include "because or on the basis of pregnancy, childbirth, or related medication conditions." *See* Fla. Senate Bill 410 (2002); Fla. Senate Bill 138

These repeated, unsuccessful legislative efforts to bring pregnancy discrimination within the scope of the FCRA's prohibitions are "highly relevant" to the statutory analysis:

> Finally, the Court finds highly relevant the subsequent, and unsuccessful, efforts by Florida lawmakers to amend the statute to extend to pregnancy discrimination . . . One year after *O'Loughlin*, moreover, the Florida legislature enacted Florida Law Chapter 92-177, which renamed the FHRA, titling it the Florida Civil Rights Act (FCRA) of 1992. Still, the legislature did not alter the provisions that defined sex discrimination, in the wake of a state appellate court decision interpreting these provisions not to extend to pregnancy discrimination. However in 1994, Florida Senate bill 1596 sought to do precisely this. The bill proposed to amend the FCRA to include claims for "discrimination because of or on the basis of pregnancy." *See* SB 1596, Fla. State Archives, Series 18, Carton 2059. Over the next ten years, Florida lawmakers introduced seven separate bills, each seeking to amend the FCRA to extend to claims of pregnancy discrimination. (D.E. 15-2). Each time, the proposed amendment failed. The Court interprets these repeated legislative efforts to amend the FCRA plainly to demonstrate that Florida's lawmakers understood, as had the appellate court in *O'Loughlin*, that the pertinent state statutes failed to provide a cause of action for pregnancy discrimination. As the relevant statutory provisions have remained the same, this Court is bound to conclude that the FCRA does not extend to pregnancy discrimination.

Berrios, 2012 WL 7006397, at *6. In neglecting to consider these legislative attempts (and failures) between 1994 and 2004, Delva's statutory analysis is flawed.

(2003); Fla. Senate Bill 208 (2004); Fla. House Bill 291 (2002); Fla. House Bill 933 (2003); Fla. House Bill 117 (2004).

8. In 2008, The Fourth DCA Incorrectly Held In *Carsillo* That The FCRA Does Prohibit Pregnancy Discrimination.

a. The *Carsillo* Ruling

In 2008, Florida's Fourth DCA held in *Carsillo v. City of Lake Worth,* 995 So. 2d at 1118, that the FCRA covers pregnancy discrimination. Specifically, the *Carsillo* Court held that when Congress enacted the PDA, it "expressed its disapproval of both the holding and reasoning of *Gilbert.*" *Carsillo*, 995 So. 2d at 1119 (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983)). Attempting to justify the Florida Legislature's inaction following enactment of the PDA in 1978, the *Carsillo* Court merely attributed to the 1964 Congress that originally enacted Title VII the same intent as the 1978 Congress that enacted the PDA (and, in an even more questionable leap, necessarily attributed that Congressional intent to the Florida Legislature):

> As we noted earlier, when Congress passed the PDA in 1978, it explained that it had intended to prohibit discrimination based on pregnancy when it enacted Title VII in 1964. Because it was the intent of Congress in 1964 to prohibit this discrimination, and under [*State v.*] *Jackson* [650 So. 2d 25 (Fla. 1995)] we construe Florida statutes patterned after federal statutes in the same manner that the federal statutes are construed, it follows that the sex discrimination prohibited in Florida since 1972 included discrimination based on pregnancy.

Carsillo, 995 So. 2d at 1121.

In other words, the *Carsillo* Court reasoned that "it was unnecessary for Florida to amend its law to prohibit pregnancy discrimination" because the FCRA

is patterned after Title VII, and the 1964 Congress always intended to prohibit pregnancy discrimination, as evidenced by the 1978 enactment of the PDA. *Id.* at 1120.

b. *Carsillo*'s Flawed Reasoning Should Be Rejected

Delva has adopted the reasoning of the *Carsillo* Court, advancing the argument that there was no reason for the Florida Legislature to define "sex" as including "pregnancy" after Congressional enactment of the PDA because Congress (and the Florida Legislature) always believed that Title VII's prohibition against "sex" discrimination extended to "pregnancy."[28] This reasoning is flawed for several reasons.

First, the argument completely side-steps the plain and unambiguous language of the FCRA, which does not reach pregnancy discrimination. *See supra* § B.

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[28] Attempting to draw an analogy, Delva similarly argues that even though the FCRA does not expressly obligate an employer to provide a reasonable accommodation for an employee's disability, that obligation exists under the FCRA because the FCRA was modeled after the federal Americans With Disabilities Act ("ADA"), which, by its terms, contains a reasonable accommodation obligation. *See* Delva's Initial Brief at 39, *citing Mangin v. Westco Security Systems, Inc.*, 922 F. Supp. 563 (M.D. Fla. 1996). Delva's reliance on *Mangin* is misplaced. With respect to any relationship between the ADA and the FCRA, there was no Congressional amendment to the ADA that logically would have triggered action by the Florida Legislature. In sharp contrast, Congressional enactment of the PDA as an amendment to Title VII was the type of seismic event that would have triggered action by the Florida Legislature if the Legislature had intended for "sex" under the FCRA to carry the same meaning as "sex" under Title VII and the PDA.

Second, the argument effectively ignores pertinent legislative history, Supreme Court developments (including *Gilbert*, which held that "sex" does not equal "pregnancy"), and Congressional enactments (including the PDA), all followed by the Florida Legislature's *inaction*. *See supra* § C.

Third, while this Court has recognized that, under certain circumstances, a federal statute patterned after a federal law should be given the same construction as the federal law, that canon of construction applies *only "to the extent the construction is harmonious with the spirit of the Florida legislation."* *O'Loughlin*, 579 So. 2d at 791.[29] The *Carsillo* reasoning, as advanced by Delva, is not harmonious with the spirit of the FCRA. The FCRA's plain language, ignored by the *Carsillo* Court and Delva, itself dispels any notion of harmony between legislative intent (or spirit) and a holding that equates "pregnancy" with "sex." *See City of Safety Harbor v. Communications Workers of Am.*, 715 So. 2d 265, 267-68 (Fla. 1st DCA 1998) (deeming misplaced the Public Employees Relations Commission's reliance on the National Labor Relations Act, a federal statute, to extend protections not afforded under § 447.203, Fla. Stat., a Florida statute

[29] Delva recognizes this canon in her Initial Brief, stating at page 7, "[i]t is well-established that if a Florida statute is patterned after a federal law, the Florida statute will be given at least the same construction as the federal courts give the federal act to the extent such construction is harmonious with the spirit of the Florida legislation."

patterned after the federal statute, where the language of the Florida statute and federal statute differed).

Fourth, the *Carsillo* Court and Delva improperly attribute to the 1964 Congress that originally enacted Title VII the same intentions as the 1978 Congress that overturned *Gilbert* by enacting the PDA, suggesting that *both* Congresses intended for the word "sex" to encompass "pregnancy." Straining the concept of statutory interpretation even further, the *Carsillo* Court and Delva, in an effort to justify inaction by the Florida Legislature, attribute the intentions of the 1964 and 1978 Congresses *to the Florida Legislature*, across sovereign lines. By no means is this a reliable method of ascertaining the intent *of the Florida Legislature* with respect to the meaning of the FCRA. *Bilski v. Kappos*, 130 S. Ct. 3218, 3250 (2010) ("[T]he views of a subsequent Congress . . . form a hazardous basis for inferring the intent of an earlier one."). Indeed, it is most unreliable.[30]

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[30] Delva also relies on judicial decisions from other states to argue that "numerous extrajurisdictional intermediate state appellate courts and federal district courts" have concluded that "pregnancy discrimination is a form of prohibited sex discrimination under state law." *See* Delva's Initial Brief at 32. Delva's reliance on cases from *outside of Florida* interpreting *different* statutes enacted under *different* circumstances and interpreted in the face of varying judicial and legislative precedent is hazardous and has no value in ascertaining the intent of the Florida Legislature – which is the only issue before this Court. *Browning v. Fla.*, 29 So. 3d 1053, 1070 n.16 (Fla. 2010) (noting that reliance on extrajurisdictional precedent unrelated to an issue under Florida law is "totally misplaced" and a "very serious analytical flaw, which totally overlooks the bulk of our controlling precedent.") To the extent there is any relevance in Delva's extra-jurisdictional analysis, Delva ignores authorities that directly contradict her position. *See, e.g.,*

9. In 2012, The Third DCA In *Delva* Rejected *Carsillo* And Held That The FCRA Does Not Prohibit Pregnancy Discrimination; Legislative Efforts To Overturn *Delva* Failed in 2013.

On July 25, 2012, Florida's Third DCA held in *Delva v. The Continental Group, Inc.*, 96 So. 3d 956 (Fla. 3d DCA 2012), that pregnancy discrimination is not an unlawful employment practice under the FCRA. In so holding, the *Delva* Court rejected *Carsillo,* deeming *O' Loughlin* "by far the better reasoned decision."[31] *Delva*, 96 So. 3d at 958.

Merely five (5) months after the Third DCA's decision in *Delva,* on February 11, 2013, a bill was introduced in the Florida Legislature, SB 774, titled the "Protect our Women Act," to expressly define the term "sex" as follows:

> "Sex" means the biological state of being a male, a female, or a female who is pregnant or affected by any medical condition

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Illinois Bell Tel. Co. v. Fair Employment Practices Comm'n, 407 N.E. 2d 539, 541 (Ill. 1980) (rejecting argument that Congressional intent should be considered when analyzing Illinois' sex discrimination statute, even though the state statute was patterned after federal law, because "a legislative body cannot retroactively effectuate a change in statutory language by issuing a declaration of prior intent."). Illinois did not amend its civil rights statute to cover pregnancy until 2011. *See supra.* n.21; *National Broad. Co., Inc. v. District of Columbia Com'n on Human Rights,* 463 A.2d. 657, 664-665 (D.C. 1983) (according retroactive effect to the legislative overruling of *Gilbert* "would raise serious constitutional issues. Thus, the notion that such congressional action should be construed as retroactively invalidating judicial constructions of the local statute is completely without foundation.").

[31] In adopting the *O'Loughlin* decision as its own, the *Delva* Court expressed "no opinion as to the merits of the alternative holding of *O'Loughlin*, that the plaintiff could proceed under the FCRA on a federal preemption analysis." *Delva*, 96 So. 3d at 958 n.4.

> related to pregnancy or childbirth. A female who is pregnant or who is affected by a medical condition related to pregnancy or childbirth shall be treated the same for all employment-related purposes as an individual not so affected who has a similar ability or inability to work.

Fla. Senate Bill 774 (2013). An identically worded bill was introduced in the House on February 12, 2013. Fla. House Bill 717 (2013).[32] According to a "Bill Analysis and Fiscal Impact Statement" for SB 774, the bill was "patterned after the federal Pregnancy Discrimination Act." *See* Bill Analysis and Fiscal Impact Statement, Fla. Senate Bill 774 (March 15, 2013).

Ultimately, HB 717/SB 774 "died" in committee in May 2013. So, fully aware of the Third DCA's opinion in *Delva*, the Florida Legislature *again* chose not to act.

The Florida Legislature's *inaction* over the last thirty-five years since *Gilbert* paints a clear picture of legislative intent to exclude pregnancy from coverage under the FCRA. The significance of that *inaction* is highlighted by the fact that the Legislature *has successfully acted* to amend the FCRA *ten times* since 1992 -- but not one of those ten amendments has addressed pregnancy

[32] The Florida Legislature was aware of the Third District's *Delva* decision and the fact that the appeal had been filed with this Court. *See* The Florida Senate, Bill Analysis and Fiscal Impact Statement, Senate Bill 774 n.12 (March 15, 2013).

discrimination.[33] In other words, the Legislature knows how to act when it wants to act, and it clearly has chosen not to act with respect to prohibiting pregnancy discrimination under the FCRA.

With all due respect and deference to this Court, Article II, § 3 of the Florida Constitution has been construed by this Court to prohibit the Legislature, absent constitutional authority to the contrary, from delegating its legislative powers to others. *Gallagher v. Motors Ins. Corp.*, 605 So. 2d 62, 71 (Fla. 1992). Therefore, if the Florida Legislature had intended for the term "sex" to encompass "pregnancy," then as this Court stated in *Donato,* "[i]t certainly could have done so. . . ." *Donato,* 767 So. 2d at 1155. This Court should not do what the Legislature so clearly has chosen not to do.

CONCLUSION

While pregnancy discrimination is prohibited under federal law, it is not an "unlawful employment practice" under the FCRA. This Court should approve the decision of the Third District Court of Appeal.

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[33] *See* 1994 Fla. Laws Ch. 94-91; 1996 Fla. Laws Ch. 96-399; 1996 Fla. Laws Ch. 96-406; 1996 Fla. Laws Ch. 96-410; 1997 Fla. Laws Ch. 97-102; 1999 Fla. Laws Ch. 99-333; 2001 Fla. Laws Ch. 2001-187; 2003 Fla. Laws Ch. 2003-396; 2004 Fla. Laws Ch. 2004-11; 2010 Fla. Laws Ch. 2010-53.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to the Supreme Court of Florida Administrative Order No. AOSC13-7, the foregoing has been electronically filed through the Florida Courts E-Filing Portal, and an electronic copy has been served this 17th day of June, 2013, to: Travis R. Holifield, Esq. (trh@trhlaw.com), Hollifield Legal Centre, 147 East Lyman Avenue, Suite C, Winter Park, FL 32789; Juliana Gonzalez, Esq., juliana@ljmpalaw.com, and Lawrence J. McGuinness, Esq., ljmpalaw@comcast.net, Law Office of Lawrence J. McGuinness, 1627 S.W. 37th Avenue, Suite 100, Miami, FL 33145; and P. Daniel Williams, Esq., dan@magidwilliams.com, Magid & Williams, 3100 University Blvd. South, Suite 115, Jacksonville, FL 32216. Paper copies will be served on June 18, 2013.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that Respondent's Answer Brief complies with the font requirements of Fla. R. App. P. 9.000(l) and 9.210(a)(2).

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