No. 10-7073

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARY KATE BREEDEN,
Appellant,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE CENTER, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, AND EQUAL RIGHTS ADVOCATES

Sally Dworak-Fisher
Jessica Weber
Public Justice Center
One North Charles Street, Suite 200
Baltimore, Maryland 21218
410-625-9409
(410) 625-9423 facsimile
dworak-fishers@publicjustice.org

Counsel for *Amici Curiae*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Federal Cases

State Cases

STATUTORY PROVISIONS

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

No one should have to choose between family needs and employment. Congress passed the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2006) ("FMLA") in 1993 to ensure that workers could take unpaid leave to care for a new child or seriously ill family member (or to seek medical treatment themselves) without losing their jobs or suffering other adverse employment consequences. Today, as increasing numbers of mothers enter or return to the workforce, increasing numbers of fathers assume child care responsibilities, and more employees find themselves caring for aging parents, there is a heightened need for vigilant enforcement of the FMLA.

In particular, courts must be sensitive to the diverse, and often subtle, forms of discrimination and retaliation experienced by many employees upon returning to work after FMLA leave. These employees, who are most often mothers, may be excluded from meetings, receive unjustly negative performance evaluations, or suffer unrequested reductions in clients and workload—thus paving the way for their eventual termination. A diminished workload is especially harmful in the sales industry, where an employee's total sales revenue is far more determinative of her value to the employer than her ability to meet discrete sales goals. Accordingly, when analyzing the question of causation in FMLA cases, courts must consider how initially insidious instances of discrimination and/or retaliation

can lead to more obviously adverse employment actions later in an employee's career.

INTERESTS OF AMICI

The **Public Justice Center (PJC)**, is a non-profit legal services organization founded in 1985 that seeks to enforce and expand the rights of people who are denied justice because of their economic status or because of discrimination. The PJC has a longstanding commitment to advancing the rights of employees in particular. Towards that end, the **PJC** has represented thousands of workers in both trial and appellate courts nationwide, including poultry employees seeking to enforce fair labor standards against Tyson Foods and women fighting gender discrimination at Wal-Mart stores. Moreover, the PJC submitted numerous briefs in appeals involving an array of worker protection laws. *See, e.g.*, *Perez v. Mountaire Farms, Inc.*, No. 09-1917 (4th Cir., pending); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325 (4th Cir. 2003); *Prince of Peace et al v. Linklater*, No. 66, Sept. Term 2009 (Md., pending). In keeping with its commitment to advancing the rights of workers, the PJC has an interest in ensuring that the FMLA is interpreted consistently with its intended purposes.

The **National Partnership for Women & Families** is a nonprofit, nonpartisan organization that uses public education and advocacy to promote

fairness in the workplace, policies that help women and men meet the dual demands of work and family, and quality health care for all. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of working women, including advancements in sexual harassment law and the passage of the Pregnancy Discrimination Act. In 1985, the Women's Legal Defense Fund drafted the original Family and Medical Leave Act. For the next 8 years, the Women's Legal Defense Fund led the coalition working for the passage of this legislation, which finally occurred in 1993. Since the passage of the FMLA, the National Partnership has worked to defend the law to ensure its full and intended application. In 2003, the National Partnership served as counsel to William Hibbs in *Nevada Dep't of Human Resources v. Hibbs,* 538 U.S. 721 (2003), the United States Supreme Court case regarding sovereign immunity and the caregiver leave provisions of the FMLA. The National Partnership remains a leader in the efforts to preserve and extend FMLA leave.

Equal Rights Advocates (ERA) is a national women's advocacy organization based in San Francisco, California. Founded in 1974, ERA's mission is to protect and expand economic and educational access and opportunities for women and girls. ERA employs a three-pronged approach to achieving its mission: public education, policy advocacy, and litigation. ERA is committed to

assisting working women who face a myriad of workplace challenges. In furtherance of that objective, ERA has been involved in historic impact litigation including *Dukes v. Wal-Mart Stores, Inc.*, the largest class action law suit in United States history, that seeks to remedy sex discrimination in hiring and promotions at the retail giant's stores. ERA's nationwide multi-lingual hotline serves hundreds of women every year and helps them navigate these challenges. ERA also advocates for the development of the law to better support working families, and thus has an obvious interest in ensuring that women are adequately protected by the application of the FMLA in a manner that is consistent with its original intent.

ARGUMENT[1]

I. Vigilant Enforcement of the FMLA Is Especially Important in the Twenty-first Century Workplace.

Prior to the enactment of the FMLA, workers were often forced to choose between attending to family caretaking obligations (or their own health needs) and keeping their jobs. This dilemma disproportionately affected women, who were and still are more likely to take on caretaker roles within the family. Congress passed the FMLA in 1993 to address this disturbing phenomenon. Since its passage, the protections afforded by the FMLA have grown ever more important. Growing numbers of families now depend on two incomes to make ends meet. As

[1] *Amici* fully endorse the arguments presented by Appellant and the National Employment Lawyers Association as well.

increasing numbers of parents enter or return to the workforce and more employees take on the care of their elderly parents, the benefits and protections offered by the FMLA have gained new salience.

A. Congress Passed the FMLA to Help Employees Balance Work and Family and to Promote Gender Equality in the Workplace.

Congress enacted the FMLA in 1993 "to balance the demands of the workplace with the needs of families." 29 U.S.C. § 2601(b)(1). At the time, growing numbers of women were entering the workforce, while growing numbers of men were assuming childcare responsibilities. Nevertheless, only 37 percent of full-time employees in medium and large firms had access to job-protected parental leave. Christopher J. Ruhm & Jackqueline L. Teague, *Parental Leave Policies in Europe and North America*, in *Gender and Family Issues in the Workplace* 133, 136 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997). The FMLA was designed to reduce the number of Americans forced to choose "between job security and parenting" by providing twelve weeks of unpaid leave to eligible employees who take leave for qualifying reasons, including circumstances such as the birth or adoption of a child or the serious health condition of an immediate family member. *Id.* §§ 2601(a)(3), 2612(a)(1). Congress passed the FMLA to ensure that employees could attend to new children or seriously ill family members without sacrificing their careers. Under this law, employers must

assign employees returning from FMLA leave to their previously-held positions (or to equivalent positions). *Id.* § 2614(a)(1).

Congress also aimed to promote gender equality in the workplace. *See id.* § 2601(b)(5) (stating that one of the purposes of the FMLA is "to promote the goal of equal employment opportunity for women and men"). As the Supreme Court observed in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 737 (2003), "[b]y creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men." Because the FMLA ensured the availability of leave on a gender-neutral basis, it challenged the notion that women are less valuable employees. The FMLA's drafters hoped that a new leave entitlement, coupled with the FMLA's prohibition on retaliation against employees who take protected leave, would make it easier for both mothers and fathers to meet significant family responsibilities while remaining in the workforce. *See, e.g.*, 139 Cong. Rec. S985-03 (1993) (statement of Sen. Feinstein) (explaining that the FMLA will provide an opportunity "to allow a mother to keep her job to give birth to a child or to care for a sick child or an elderly parent"); 139 Cong. Rec. S985-03 (1993) (statement of Sen. Boxer) (clarifying that the FMLA applies "to fathers, as well as to mothers"

because she did not believe that "men are not caring parents and men are not loving sons"); *see also* 134 Cong. Rec. E2132-01 (daily ed. June 22, 1988) (statement of Rep. Green) (noting that "[t]oday's fathers need and want time to spend with their families when their families need them" and that the "Family and Medical Leave Act gives fathers the right to be nurturers as well as breadwinners").

B. Employees Are More Likely Now Than in the Past to Have Significant Family Care Responsibilities and Therefore Require the Protections of the FMLA.

The FMLA has grown increasingly important as more parents enter and return to the workforce. In 1975, only 40 percent of families with children under age eighteen had both parents or the sole resident parent participating in the labor force; by 2008, this proportion had expanded to 66 percent. Heather Boushey & Ann O'Leary, *Our Working Nation* 2 (2010).[2] This change is largely attributable to the increase in mothers working outside of the home. Whereas only 47 percent of mothers with minor children were employed in 1975, fully 71 percent were employed in 2007. U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Participation Rate of Mothers, 1975-2007 (2009).[3] A mere 27 percent of children under age fifteen now live with a full-time, stay-at-home parent. U.S. Dep't of

[2] *Available at* http://www.americanprogress.org/issues/2010/03/pdf/our_working_nation.pdf.
[3] *Available at* http://www.bls.gov/opub/ted/2009/jan/wk1/art04.htm.

Labor, Bureau of Labor Statistics, Parents and Children in Stay-at-Home Parent Family Groups: 1994 to Present (2010).[4] This means that more and more parents are juggling work and child care duties, with large percentages experiencing conflict between the two roles. Families and Work Institute, *Times Are Changing: Gender and Generation at Work and at Home* at 18-19 (2009).[5]

The importance of the FMLA is also compounded by the growing number of employees who, as the U.S. population ages, find themselves caring for elderly adults. Nearly one in four Americans are caring for elders, and this number is on the rise. *See* Nat'l Alliance for Caregiving & AARP, *Family Caregiving in the U.S.: Findings from a National Survey* (1997)[6]; Ctr. on an Aging Soc'y, Georgetown Univ., *Data Profile: Family Caregivers of Older Persons* (2005).[7] About 74% of those who care for adults have worked either full or part-time while caregiving. Nat'l Alliance for Caregiving, *Caregiving in the U.S.* at 12, 52 (2009).[8] Approximately 69% of these caregivers made some adjustment to their work schedules, such as altering their hours or taking additional leave, to accommodate their caregiving responsibilities. *Id.* at 54. Many Americans who provide elder care

[4] *Available at* http://www.census.gov/population/socdemo/hh-fam/shp1.xls.
[5] *Available at* http://familiesandwork.org/site/research/reports/Times_Are_Changing.pdf.
[6] *Available at* http://assets.aarp.org/rgcenter/il/caregiving_97.pdf.
[7] *Available at* http://ihcrp.georgetown.edu/agingsociety/pdfs/caregivers1-E.pdf.
[8] *Available at* http://www.caregiving.org/data/Caregiving_in_the_US_2009_full_report.pdf.

are in the "sandwich generation," meaning that they also must care for children under age eighteen. Families and Work Inst., *The Elder Care Study: Everyday Realities and Wishes for Change* 2 (2010).[9]

As the number of caregivers in the workforce has increased, so too has FMLA usage. According to one estimate, employees have taken leave under the FMLA more than 100 million times since the law's enactment. *See The Family and Medical Leave Act of 1993; Proposed Rule*, 73 Fed. Reg. 7876, 7944 (Feb. 11, 2008) (multiplying seven million workers per year by the seventeen years since FMLA enactment). About half of all workers who have taken FMLA leave have used it for caregiving: nearly one-third spent their leave caring for a seriously ill child, spouse, or parent, and nearly one-fifth spent it bonding with a new child. David Cantor et al., *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys 2000 Update* 2-5, Tbl. 2.3 (2000). Perhaps unsurprisingly given the number of employees seeking to exercise their rights to job-protected leave, FMLA violations are widespread. Between 2001 and 2008, employees registered 22,023 FMLA complaints with the U.S. Department of Labor, the majority of which led to findings of employer noncompliance. U.S. Dep't of Labor, Wage and Hour Div., 2008 Statistics Fact Sheet (hereinafter "2008

[9] *Available at* http://familiesandwork.org/site/research/reports/Times_Are_Changing.pdf.

Statistics Fact Sheet").[10] Researchers estimate that as many as 43% of employers are out of compliance with the FMLA. Naomi Gerstel & Amy Armenia, *Giving and Taking Family Leaves: Right or Privilege?*, 21 Yale L.J. & Feminism 161, 178 (2009). In a society in which millions of Americans are needlessly forced to choose between job security and caregiving, courts must be mindful of the various ways in which employers try to circumvent their obligations under the FMLA.

II. To Achieve the Purposes of the FMLA, Courts Must Take a Real-World Approach To the Question of Causation, Which Recognizes that Employees—Especially New Parents—Frequently Suffer Reduction in Their Workload as an Insidious Form of Retaliation that Eventually Costs Them Their Job.

The full impact of discrimination and/or retaliation against employees who take FMLA leave is not always immediately apparent. Discrimination often takes the form of an unsolicited reduction in workload or curtailment of job responsibilities, which may result in grave consequences for employees in the longer term. A salesperson who is reassigned to a smaller sales territory, and consequently makes fewer sales, will be less valuable to her employer and more vulnerable to discharge when the employer conducts rounds of lay-offs at some future point. In applying the FMLA, therefore, courts must recognize that one discriminatory or retaliatory act may snowball into an even more harmful employment decision.

[10] *Available at* http://www.dol.gov/whd/statistics/2008FiscalYear.htm.

A. Many Employers Assume that Employees with Family Responsibilities Cannot or Will Not Handle a Substantial Workload and May Limit Such Employees' Responsibilities as a Result.

Retaliation against employees who have taken federally protected leave is woefully common. Fifty-three percent of the FMLA complaints filed between 2001 and 2008 involved a refusal to restore the employee to an equivalent position or termination in retaliation for requesting or taking FMLA leave. 2008 Statistics Fact Sheet, *supra*. By one estimate based on survey data collected by the U.S. Department of Labor, in the seven years after the FMLA was enacted, over 357,000 leave-takers were downgraded to a lower position at work after their leave. U.S. Dep't of Labor, Wage and Hour Div., The 2000 Survey Report ch. 4.[11] Because most workers who take FMLA leave are women with children in the home, *id.* at ch. 3,[12] the illegal penalties employers impose on leave-takers likely fall most frequently on working mothers.

Working mothers are particularly vulnerable to discrimination or retaliation because employers assume they will be distracted from their work by caretaking duties. *See* Cecilia L. Ridgeway & Shelley J. Correll, *Motherhood as a Status Characteristic*, 60 J. of Soc. Issues 683, 695 (2004). A recent study found that

[11] *Available at* http://www.dol.gov/whd/fmla/chapter4.htm.
[12] *Available at* http://www.dol.gov/whd/fmla/chapter3.htm.

mothers were 37% less likely to be hired, recommended 8.2 times less often for a promotion to a management position, offered an average of $11,000 less in salary, judged as less competent and less committed to their work, and held to harsher performance and punctuality standards than childless women with *identical* resumes. Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 Am. J. Soc. 1297, 1316-17, 1320, 1323 (2007). A wealth of literature is devoted to exploring this so-called "maternal wall." *See, e.g.*, Iman Syeda Ali, *Bringing Down the "Maternal Wall": Reforming the FMLA to Provide Equal Employment Opportunities for Caregivers*, 27 Law & Ineq. 181, 196-97 (2009); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 Harv. Women's L.J. 77, 94-98 (2003). The general consensus is that workplace discrimination against mothers "is the strongest and most open form of gender discrimination in today's workplace." Joan C. Williams, *Correct Diagnosis; Wrong Cure: A Response to Professor Suk*, 110 Colum. L. Rev. Sidebar 24, 24-25 (2010).

Harmful stereotypes about mothers' commitment to their work frequently lead employers to discriminate and/or retaliate against women when they become pregnant or return from maternity leave. *See* Martin H. Malin, *Litigating the Glass Ceiling and the Maternal Wall*, 7 Emp. Rts. & Emp. Pol'y J. 329, 344 (2003) (describing how employers often believe that employees returning from maternity

leave will be unable to perform at pre-pregnancy levels and adjust these employees' job responsibilities accordingly); Deborah L. Rhode, *Myths of Meritocracy*, 65 Fordham L. Rev. 585, 588 (1996) (quoting a female attorney as reporting that "since I came back from maternity leave, I get the work of a paralegal ... I want to say 'look, I had a baby, not a lobotomy!'"). This discrimination, even when underhanded, is nonetheless professionally damaging. One survey of professional women found that being stripped of professional responsibilities, excluded from meetings and committees, or snubbed by coworkers upon becoming pregnant or taking maternity leave often "translated into long-term career penalties in advancement and promotions." Deborah J. Swiss & Judith P. Walker, *Women and the Work/Family Dilemma: How Today's Professional Women are Finding Solutions* 24 (1993).

The facts of *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667 (S.D.N.Y. 1995) illustrate how unfair assumptions regarding a new mother's capabilities can lead to an employee's eventual termination. In *Sigmon*, the plaintiff, a law firm associate, took a six-month maternity leave. *Id.* at 671. Upon her return, the law firm partners significantly decreased her workload against her wishes. *Id.* at 672. Her billable hours dropped from 2000 the year before her pregnancy to 1200 the year after her leave, even though she requested more assignments. *Id.* From this unwanted reduction in workload flowed further

negative consequences. When the law firm found it necessary to reduce the size of its workforce, it decided to terminate the associate based in part on her low number of billable hours. *Id.* at 674. Given that the law firm's discriminatory allocation of assignments caused her to bill fewer hours, the court denied the law firm's motion for summary judgment on her pregnancy discrimination claim.[13] *Id.* at 678.

Sales representatives, like members of every other profession, commonly face discrimination or retaliation upon becoming pregnant or starting families. Employers sometimes deny sales positions or promotions to pregnant women or new mothers on the mistaken assumption that women with children are unwilling to travel or move for work. *See, e.g.*, *Lust v. Sealy*, 383 F.3d 580, 583 (7th Cir. 2004); *Stern v. Cintas Corp.*, 319 F. Supp. 2d 841, 861 (N.D. Ill. 2004). Moreover, employers of sales professionals, like other employers, often take for granted that mothers will prioritize family over their job responsibilities. To use just one example, in *Neis v. Fresenius USA, Inc.*, 219 F. Supp. 2d 799 (E.D. Mich. 2002), a sales representative's supervisors allegedly told her shortly after she returned from maternity leave that they "doubted a new mother could cover her territory" and that they "had never seen a mother choose business over her children." *Id.* at 805. They terminated her a few months later. Persistent maternal wall bias, exemplified in

[13] Although this case resulted in a claim under the Pregnancy Discrimination Act, the same career track damage can and does take place in cases arising under the FMLA such as the one at bar.

this case and others, inhibits the professional advancement of many women in sales.

B. In a Sales-based Industry, Cutting an Employee's Workload Invariably Diminishes the Employee's Ability to Advance in the Workplace and Puts the Employee at Risk for Termination.

Sales-dependent careers are particularly endangered by one type of adverse action: the undesired reduction in workload. Female sales representatives returning from parental leave may find themselves reassigned to a smaller sales territory or to a shorter client list. Rather than function as "helpful" (albeit unsolicited) accommodations, these reductions often limit an employee's professional development and leave her vulnerable to discharge. In the sales industry, even an employee who meets or exceeds a company's sales goals for a small region will nevertheless be susceptible to termination or have diminished opportunities for advancement if the employee's overall sales are lower than those of coworkers with larger regions.

Courts have found that total sales volume, because of its direct effect on an employer's revenue, is the most important measure of a salesperson's performance. *See Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 920 (8th Cir. 2000) (noting that "[i]n the context of sales ... the selling of product is the primary responsibility of a salesperson and thus … sales volume is generally the principal indicator of a

salesperson's performance"); *Brewer v. Quaker State Oil Ref. Co.*, 72 F.3d 326, 331-32 (3d Cir. 1995) (recognizing that "the volume of sales may always be the primary measure of a salesperson's performance").

When a salesperson's workload or sales territory is reduced, she has fewer available customers and opportunities and, therefore, likely sells fewer products. Subsequently, she is less valuable to her employer and more likely to suffer professionally. *See Sims v. Chezik/Sayers Iowa, Inc.*, 361 F. Supp. 2d 926, 932 (S.D. Iowa 2005) (involving a plaintiff who was turned down for a promotion in favor of a coworker with a higher sales volume)[14]; *Wojan v. Alcon Labs., Inc.*, No. 07-11544, 2008 WL 4279365, at *4-8 (E.D. Mich. Sept. 15, 2008) (finding sufficient evidence that the defendant's refusal to adjust plaintiff's sales quotas to account for her FMLA maternity leave set in motion a chain of events culminating in plaintiff's termination). The Third Circuit Court of Appeals recognized this downward spiral in *Goss v. Exxon Office Systems Co.*, 747 F.2d 885 (3d Cir. 1984). The plaintiff in *Goss* was a successful sales representative with a sales territory that included important accounts. *Id.* at 888. After taking a few days off following a miscarriage, the plaintiff returned to work and was given a choice between resigning or accepting a reassignment to a less lucrative sales region. *Id.*

[14] There was no question in *Sims* that the plaintiff's low sales volume was due not to any discriminatory or retaliatory action on his employer's part but rather to his own underperformance. 361 F. Supp. 2d at 930.

at 888-89. Understanding the negative professional consequences that flow from a transfer to a less desirable sales territory, the Third Circuit affirmed the district court's holding that the plaintiff had been constructively discharged.[15] *Id.* at 889.

In addition to inhibiting opportunities for growth within a company, a reassignment to a smaller sales region that results in fewer sales puts the employee at risk of termination. *See, e.g.*, *Phillips v. Pepsi Bottling Group*, No. 08-1003, 2010 WL 1619259, at *4 (10th Cir. Apr. 22, 2010) (involving the discharge of an employee based in part on his failure to meet sales targets); *Town v. Michigan Bell Tel. Co.*, 568 N.W.2d 64, 69-70 (Mich. 1997) (involving a plaintiff who was terminated because he did not generate enough sales revenue to pay his own salary).[16] Thus when an employer reduces an employee's number of potential clients, the employer simultaneously renders that employee more vulnerable to discharge during subsequent layoffs or realignments.

As set forth above, courts have recognized under a variety of statutes that an initial, unwanted decrease in workload can set off a chain of events culminating in an adverse employment action. Accordingly, in judging questions of causation

[15] Although the plaintiff in *Goss* took a pay cut following her transfer, the *Goss* court was concerned additionally with the reassignment's effect on the plaintiff's morale and standing within the company, a concern that is equally applicable in Ms. Breeden's case. *See* 747 F.2d at 888.

[16] Like the *Sims* plaintiff, the plaintiffs in these two cases did not allege that their low sales volumes could be traced back to any discriminatory or retaliatory employment action.

under the FMLA, too, courts must consider the real and practical causal effects of instances of discrimination and retaliation that may lead to an employee's eventual termination. Faithful enforcement of the goals of the FMLA demands this real-world approach. To carry out Congress's vision of a society in which employees do not have to choose between paid work and family, courts must acknowledge the realities of the modern-day workplace and the ripple effect produced by retaliation against those who exercise their rights under the FMLA.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States District Court for the District of Columbia because the Appellant has satisfied the causation requirement under the FMLA.

CERTIFICATE OF COMPLIANCE

1. This brief contains 4,080 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 33(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Office 2003 in Times New Roman 14-point font.
3. In making this certification, I have relied on the word count feature of the word-processing program used to prepare this brief.

CERTIFICATE OF SERVICE

I hereby certify this 4th day of January 2011, the foregoing Brief of *Amici Curiae* was served on all counsel by the Court's electronic filing system and by first class mail.

/s/
Sally Dworak-Fisher