February 12, 2013

Via Hand Delivery

Hon. Tani G. Cantil-Sakauye, Chief Justice and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Veronese v. Lucasfilm Ltd.*, Case No. S208118
Letter in Support of Petition of Review filed January 18, 2013

To the Honorable Chief Justice and Associate Justices:

The undersigned *amici curiae* respectfully request that this Court grant review in the case of *Veronese v. Lucasfilm Ltd*.

I. The Interest of the *Amici Curiae*

Equal Rights Advocates (ERA) is a national non-profit civil rights advocacy organization based in San Francisco that is dedicated to protecting and expanding economic justice and equal opportunities for women and girls, which has advocated for the rights of pregnant workers through litigation and policy efforts since its founding in 1974. Legal Aid Society – Employment Law Center (LAS-ELC) is a non-profit public interest law firm based in San Francisco, whose mission is to protect the employment rights of low-wage workers and whose Work and Family Project advocates on behalf of pregnant workers, new parents, and employees facing family medical crises. Legal Momentum (formerly the NOW Legal Defense Fund), headquartered in New York, NY, is the nation's oldest legal defense and education fund dedicated to advancing the rights of women and girls and has made historic contributions through litigation and public policy advocacy to advance economic and personal security for women. The National Women's Law Center (NWLC), located in Washington, D.C., has worked for 40 years to expand, protect, and promote opportunity and advancement for women and girls at every stage of their lives—from education to employment to retirement security, and everything in between.[1]

[1] The following organizations also join in this letter: A Better Balance, American Association of University Women-California, California Women's Law Center, Center for WorkLife Law at UC Hastings Law School, Labor Project for Working Families, National Partnership for Women and Families, Women's Employment Rights Clinic of Golden Gate University School of Law.

Many of the *amici*—including ERA, LAS-ELC, NWLC, Legal Momentum, A Better Balance, and National Partnership for Women and Families—are members of a nation-wide working group formed in 2009 to address the alarming rise in pregnancy discrimination claims throughout the country.[2] This coalition of women's rights organizations works to provide solutions and seek redress for this ongoing problem. Most women working today will become pregnant at some time while employed.[3] While progress has been made towards ensuring equality for pregnant working women since the passage of California and federal pregnancy discrimination laws, many employers still discriminate against pregnant workers based on negative stereotypes, gender-related bias, and misplaced paternalism.[4] We and the undersigned organizations believe the Court of Appeal's ruling in the above-captioned case pertaining to *Johnson Controls* misinterprets established law to the detriment of women working during pregnancy and threatens to expose pregnant workers to increased discrimination on the job.

II. The Court of Appeal Decision

This case arises from an 11-day jury trial where Plaintiff Julie Gilman Veronese (Veronese) prevailed against Defendant Lucasfilm, Ltd. (Lucasfilm) on her claims of pregnancy discrimination and wrongful termination. Lucasfilm appealed the verdict, and the Court of Appeal reversed the judgment in favor of Veronese, holding, *inter alia*, that the trial court committed prejudicial instructional error.

Significantly, and of particular relevance to the undersigned *amici*, the Court of Appeal held that the trial court committed reversible error by instructing the jury that, "A potential hazard to a fetus or an unborn child is not a defense to pregnancy discrimination." While acknowledging that this instruction was legally accurate, the court held that it did not apply in this case because Lucasfilm did not have a blanket "policy" of barring pregnant workers on fetal protection grounds. Further, the court found that the instruction could have led the jury to believe that it was *per se* illegal for an employer to have concerns about the health of a pregnant woman or her unborn child. As discussed below, *amici* urge the Court to grant review because: (1) the Court of Appeal's ruling contravenes the well-established anti-paternalism principle of *Johnson Controls*, which applies equally to individual employer decisions as it does to blanket policies; and (2) the ruling conflicts with the California Fair Employment and Housing Act, which makes clear that an employer may not subject a pregnant worker to an adverse employment action based on "benign" concerns for the health of the worker or her fetus; instead, the Act expressly provides that it is for the woman to decide, in consultation with her health care provider, whether and when she needs a workplace accommodation or temporary disability leave to ensure a safe and healthy pregnancy.

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[2] EEOC charges of pregnancy discrimination have steadily climbed in recent years, increasing by over 30 percent since the year 2000. EEOC Pregnancy Discrimination Charges, *available at* http://eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm.

[3] *See* Lynda Laughlin, United States Census Bureau, *Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008* (2011).

[4] S*ee, e.g.*, Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1370-1371 (June 2008) (citing a series of studies documenting attitudes towards pregnant employees).

III. Why Review Should be Granted

Over the past fifty years, decisions applying sex discrimination laws have forcefully demonstrated that paternalism serves to close opportunities to women as arbitrarily and unfairly as does animus. As the U.S. Supreme Court has acknowledged, our Nation's "long and unfortunate history of sex discrimination" has traditionally been rationalized by paternalistic attitudes, "which, in practical effect, put women not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). For this reason, civil rights law in general, and sex and pregnancy discrimination law in particular, incorporate a strong anti-paternalism principle. The Court of Appeal's decision ignores this principle, misinterpreting and distorting established case law and California's robust protection against pregnancy discrimination.

A. The Ruling Upends Long-Standing Anti-Paternalism Precedent.

Historically, when women have been denied opportunities, it has more often than not been rationalized by the assertion that the denial is for their own good or the good of their potential or actual children. For example, in 1908, when the Supreme Court upheld legislation limiting women's work hours, but not men's, it explained that "healthy mothers are essential to vigorous offspring, [and so] the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908). Similarly, in upholding women's exclusion from the practice of law, a Supreme Court concurrence once asserted, "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell v. State*, 83 U.S. 130, 141 (1872).

These types of paternalistic justifications for excluding women from opportunity have long since been recognized as discrimination that holds women back from achieving parity in the workplace. For example, in 1971, in an important and groundbreaking decision in *Sail'er Inn, Inc. v. Kirby*, this Court soundly rejected asserted concerns for women's health or well-being as a sufficient basis for employment discrimination under Section 18 of the California Constitution, stating:

> The desire to protect women from the general hazards inherent in many occupations cannot be a valid ground for excluding them from those occupations under section 18. Women must be permitted to take their chances along with men when they are otherwise qualified and capable of meeting the requirements of their employment.

485 P.2d 529, 531 (Cal. 1971) (internal citations omitted).

Similarly, state protective labor legislation and employer policies excluding women from strenuous occupations were struck down across the country in the wake of the passage of Title VII of the Civil Rights Act of 1964. *E.g., Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1223-27 (9th Cir. 1971) (finding California law limiting weights women could lift and hours women could work incompatible with Title VII's prohibition on sex discrimination in employment);

Burns v. Rohr Corp., 346 F. Supp. 994 (C.D. Cal. 1972) (invalidating California law requiring rest breaks for women as discriminatory); *see also Weeks v. Southern Bell Tel. & Tel. Co*., 408 F.2d 228, 236 (5th Cir. 1969) ("Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unproductive tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing."); *Burwell v. Eastern Air Lines, Inc*., 633 F.2d 361, 371 (4th Cir. 1980) (rejecting employer's concern for pregnant flight attendants as valid legal basis for a requirement that flight attendants commence leave immediately upon becoming pregnant because "in the area of civil rights, personal risk decisions not affecting business operations are best left to individuals who are targets of discrimination"). As the U.S. Supreme Court has stated, "In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself." *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977).

This anti-paternalism principle is equally robust when an employer bases its denial of employment opportunities on an actual or purported concern for a woman's fetus or potential offspring. As the U.S. Supreme Court has stated in interpreting Title VII, "Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself." *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991). Nor is the sincerity of an employer's concern a defense to a discrimination claim. Antidiscrimination law denies employers the discretion to deny a woman employment opportunities based on concerns about the fetus that she carries or might carry, regardless of the benevolence of those concerns. "Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents." *Id.* at 206. California law provides precisely the same protection. *See infra*, *Johnson Controls, Inc. v. Fair Employment and Housing Comm'n*, 218 Cal. App. 3d 517, 551.

The Court of Appeal gravely erred when it suggested that the legal rule articulated in *Johnson Controls* is only applicable when employer policies categorically bar all women or all fertile women from particular jobs. The U.S. Supreme Court held not only that an employer was precluded from excluding all women capable of bearing children from working in positions that risked exposure to lead, but also that an employer was prohibited from excluding individual women who were actually pregnant. 499 U.S. at 207 ("Johnson Controls argues that it must exclude all fertile women because it is impossible to tell which women will become pregnant while working with lead. This argument is somewhat academic in light of our conclusion that the company may not exclude fertile women at all.") Indeed, courts have consistently applied this anti-paternalism principle in cases challenging an employer's decision to deny an individual pregnant woman employment opportunities on the basis of asserted concerns for the welfare of her fetus. *See, e.g., Spees v. James Marine, Inc*., 617 F.3d 380 (6th Cir. 2010) (holding that if a jury determined an employer reassigned a pregnant welder from welding duties to the tool room because of concerns about the safety of her fetus, this would constitute unlawful pregnancy discrimination); *Peralta v. Chromium Plating and Polishing Corp*., 2000 WL 34633645 (E.D.N.Y. 2000) (finding sex discrimination when undisputed evidence showed the employer refused to allow a pregnant employee to return to work, stating, "[T]he PDA mandates that the decision to work while pregnant be left to each individual woman to make for herself. An

employer cannot usurp this choice, even if it is motivated by a benevolent desire to help a woman or her unborn fetus."); *EEOC v. Corinth*, 824 F. Supp. 1302 (N.D. Ind. 1993) (firing of pregnant waitress out of concern that she was "too big" and "might fall down" and hurt herself or her fetus was impermissible sex discrimination).

The Court of Appeal's notion that an individualized decision to exclude a woman from a job based on concerns for her fetus can at times be humanitarian and therefore not illegal is misguided. A decision to exclude a woman from a job pursuant to an individualized determination rather than a blanket policy remains discriminatory when the decision is based on her sex or her pregnancy. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 456 (1982) ("Every *individual* employee is protected against . . . discriminatory treatment.") (emphasis in original).

B. The Ruling Directly Contravenes the California Legislature's Express Intent.

The Court of Appeal's ruling also conflicts with the express language and purpose of the California Fair Employment and Housing Act (FEHA). Under the FEHA, employers may not—whether via a blanket policy ***or*** an individual employment action—discriminate against pregnant women. Cal. Gov't Code § 12940(a) (making it an unlawful employment practice for an employer, "because of the . . . sex . . . of any person, to refuse to hire . . . or to bar or to discharge . . . or to discriminate against the person in compensation or in terms, conditions, or privileges of employment"); *id.* § 12926(q)(1)(A) (defining sex to include "pregnancy or medical conditions related to pregnancy").

The FEHA specifically makes it unlawful to subject a pregnant worker to an adverse employment action based on an employer's concerns for the health of the employee or her fetus. The Act provides that it is for the *woman* to decide, in consultation with her health care provider, whether and when she needs a reasonable accommodation, transfer, or temporary disability leave to ensure a safe and healthy pregnancy. It is not a cognizable defense to a claim of pregnancy discrimination under the FEHA that the employer was motivated by benign concerns for the health of the pregnant woman or her fetus. *See Johnson Controls, Inc. v. Fair Employment & Housing Comm'n* (1990) 218 Cal. App. 3d 517, 552 ("However laudable the concern by businesses such as the Company for the safety of the unborn, they may not effectuate their goals in that regard at the expense of a woman's ability to obtain work for which she is otherwise qualified.").

Consistent with the California Court of Appeal's decision in *Johnson Controls*, the FEHA's implementing regulations expressly prohibit an employer from depriving a woman of employment opportunities based on pregnancy, even if the employer is motivated by a desire to protect the woman or her fetus. For example, the regulations make it unlawful for an employer to transfer a woman against her will to another position based on her pregnancy. Cal. Code Regs., tit. 2, § 7291.6(a)(1)(G).[5] Likewise, the regulations make it unlawful for an employer to

[5] In adopting this provision, the California Fair Employment and Housing Commission explained that it "added a provision on involuntary transfer consistent with the holding in the U.S. Supreme Court's decision in *UAW v. Johnson Controls* (1991) 499 U.S. 187, which held that involuntary transfer of employees who might become pregnant to a less hazardous job constituted sexual

require a pregnant woman to take a leave of absence when she has not requested leave. *Id*. § 7291.6(a)(1)(H). Importantly, the FEHA leaves decisions over maternal and fetal health to pregnant women and their doctors, not to employers; it grants individual women the right to request and receive a workplace accommodation, transfer, or temporary disability leave to ensure a safe and healthy pregnancy, while prohibiting employers from imposing these measures when they are unsought. *See* Cal. Gov't Code § 12945(a)(3).

In this case, it is undisputed that once Lucasfilm was aware that Veronese was pregnant, the decision-maker made numerous statements to Veronese questioning whether the job was suitable for her, including repeatedly expressing new-found concern that it was a very stressful job and Veronese would be exposed to paint fumes on occasion. Therefore, a jury could have reasonably assumed that Lucasfilm's refusal to hire Veronese and rescinding of its previous employment offer was motivated by concern for the health of her fetus. Thus, it was entirely proper for the trial court to instruct the jury that an employer's concerns over potential hazards to a fetus cannot justify depriving a pregnant woman of employment opportunities.

The Court of Appeal held that the fetal hazard instruction could have led the jury to believe it was per se illegal for an employer to be concerned about the health of a pregnant woman and her unborn child. But the FEHA does not prohibit an employer from having such concerns; nor did the instruction suggest as much. Rather, the FEHA prohibits an employer from *committing an adverse action* based on pregnancy, whether motivated by animus or a benign desire to protect the fetus.

Contrary to the Court of Appeal's ruling, whether discrimination occurs via a blanket employer policy or an individual employment decision is of no consequence. Either way, it violates the FEHA. The distinction drawn by the Court of Appeal between a blanket policy and an individualized assessment is a red herring and not supported by law. As such, the jury instruction given was an accurate statement of the law.

C. Harmful Ramifications of the Ruling

Through our experience providing advice, counseling, and direct legal services to thousands of working women every year, *amici* are all too aware that employment discrimination against pregnant women remains a persistent problem. Whether based on animus or "benign" concerns, such discrimination often has devastating immediate impact and enduring economic harm on women and their families at a time in their lives when they most need economic security. Employers still frequently seek to justify adverse decisions against pregnant workers based on purported "concern" for the health of the woman or her unborn child. In fact, the Court of Appeal's decision in this case is being lauded by employer-side defense attorneys as

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discrimination, in violation of Title VII. This provision clarifies that involuntary transfer of an employee to a less strenuous or hazardous position because of her pregnancy or perceived pregnancy similarly violates Government Code section 12940, subdivision (a)." FEHC, Pregnancy Regulations Initial Statement of Reasons, http://www.dfeh.ca.gov/res/docs/FEHC%20Pregnancy%20Regs/Initial_Statement_of_Reasons_Preg.pdf, at p. 7

permitting – if not outright encouraging – employers to take adverse employment actions against pregnant woman based on the employers' own perception that a job presents potential hazards to the woman or her fetus.[6] This decision only reinforces the outdated and discriminatory notion that an employer's "conscience" is a defense to otherwise unlawful actions against pregnant employees, leaving millions of working women in California vulnerable to exactly the type of discrimination that both state and federal law expressly prohibit.

IV. Conclusion

For the foregoing reasons, Equal Rights Advocates, Legal Aid Society-Employment Law Center, Legal Momentum, National Women's Law Center, A Better Balance, American Association of University Women-California, California Women's Law Center, Center for WorkLife Law at UC Hastings Law School, Labor Project for Working Families, National Partnership for Women and Families, and Women's Employment Rights Clinic of Golden Gate University School of Law respectfully request that the Court grant review in this case and reverse the Court of Appeal's Decision.

Respectfully submitted,

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[6] *See* "Pregnancy Bias Ruling A Win For Cos. With 'Conscience'" Law360 (Jan. 28, 2013), *available at* http://www.law360.com/articles/408989/print?section=employment.