Litigation as Lobbying
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he women and men of the UAW were not the only ones who felt they had a stake in the outcome of *UAW v. Johnson Controls*. When the U.S. Supreme Court agreed to hear the case, ten briefs amicus curiae were filed on behalf of the UAW, while another eight were filed supporting Johnson Controls. The number of briefs alone, however, does not fully convey the level of interest group activity. Ninety-three organizations and thirty-seven individuals signed the ten briefs urging reversal of the Seventh Circuit decision. Those supporting the respondent company contained far fewer co-signatories—only two briefs contained more than one party, and the eight briefs were signed by a total of ten groups.

While it is typical for conservative groups to coordinate less with one another in their amicus activity than more liberal groups (Epstein 1985), the low overall number of parties on the respondent side of the case may be indicative of a belief by those following the case that it was unlikely to be overturned, and so therefore those supporting Johnson Controls were not as inspired to join the fray. Indeed, when *UAW v. Johnson Controls* was taken up by the High Court, several appellate courts under every possible Title VII framework had upheld fetal protection policies, and thus those content with the status quo would likely have been rather confident that the Supreme Court would hold in their favor. Those fearing the codification of an adverse Title VII precedent, however, felt compelled to urge the Court to find for the union. They knew that much was at stake, as the Supreme Court’s decision would become the rule of law on this issue throughout the United States. Several of the attorneys on this side recalled
### Table 4.
Amici Supporting the UAW

| American Civil Liberties Union (ACLU-Wisconsin) | Planned Parenthood Federation of America (PPFA) |
| American Federation of State, County, and Municipal Employees (AFSCME) | Rochester Council on Occupational Safety and Health |
| Amalgamated Clothing and Textile Workers Union | Santa Clara Center on Occupational Safety and Health |
| American Association of University Women | Service Employees Int'l Union (SEIU) |
| American Friends Service Committee | Silicon Valley Toxics Coalition |
| Asian Immigrant Women Advocates | United Mine Workers of America |
| Boston Women's Health Book Collective | Western New York Council on Occupational Safety and Health |
| Center for Constitutional Rights | Wider Opportunities for Women |
| Central NY Council on Occupational Safety and Health | Women's Economic Agenda Project |
| Coal Employment Project | Women Employed |
| Coalition of Labor Union Women | Women's Law Project |
| Committee for Responsible Genetics | Worksafe for Healthy Communities |
| Comm. Workers of America (CWA) | eighteen individual workers |
| Connecticut Women's Education and Legal Fund, Inc. | **Equal Rights Advocates** |
| Employment Law Center | NOW LDEF |
| Intl. Chemical Workers Union | National Women's Law Center |
| Maine Labor Group on Health | Women's Legal Defense Fund |
| MassCOSH | **Massachusetts** |
| Mexican American LDEF | Arizona |
| National Abortion Rights Action League | Connecticut |
| **9 to 5 National Association of Working Women** | Delaware |
| National Black Women's Health Project | Florida |
| National Council of Jewish Women | Louisiana |
| National Lawyers' Guild | Maine |
| National Lawyers' Guild-Mass. Chapter | Michigan |
| National Organization for Women (NOW) | Minnesota |
| National Union of Hospital and Health Care Employees | Nebraska |
| Natl. Women's Health Network | New Jersey |
| National Women's Political Caucus | New York |
| New York Coalition on Occupational Safety and Health | Ohio |
| Nontraditional Employment for Women | Oklahoma |
| North Carolina Occupational Safety and Health Project | Puerto Rico |
| Northwest Women's Law Center | Texas |
| Occupational Safety and Health Law Center | Vermont |
| Oil, Chemical and Atomic Workers Union (OCAW) | Virgin Islands |
| PhilaPOSH | Washington |

**Directors of Occupational Medicine Programs:**
- Nicholas A. Ashford, J.D., Ph.D.
- Eula Bingham, M.D.
- Vilma R. Hunt, B.D.S.
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**State of California**
- California FEHC

**Natural Resources Defense Council**
- NY City Bar Association
- Assoc. of Black Women Attorneys
- Committee on Women's Rights–NY
- County Lawyers Association
- NY City Commission on Human Rights

**State of New York**
- The United States
- The EEOC
their deep and genuine fear of an adverse precedent that would prove very damaging to Title VII. The motivations of the various amici will emerge in detail in this and the following chapter.

This case first attracted amicus briefs at the Seventh Circuit stage, when three briefs were filed (by the Employment Law Center, the ACLU, and the American Public Health Association). These three organizations then joined together, along with dozens of others, to file a single amicus brief urging the Supreme Court to grant certiorari. It was when certiorari was granted by the Supreme Court that amicus activity broadened considerably. While there were over ninety groups supporting the UAW’s challenge to Johnson Controls’ policy (see Table 4), not all of them played equal roles in the effort. Some, such as Joan Bertin and the ACLU, were close allies of the union from earlier stages, with prior involvement in the fetal protection policy issue, while others signed on to briefs as a show of support with little further involvement. All, however, played some role in moving the case toward the eventual outcome.

While at first glance the array of briefs and groups seems rather heterogeneous—and indeed it is—there exists a logical interconnectedness

**TABLE 5.**
Alignment of Amici Supporting Petitioner UAW

<table>
<thead>
<tr>
<th>Women's Rights / Antidiscrimination</th>
<th>Public Health</th>
</tr>
</thead>
<tbody>
<tr>
<td>EEO/Title VII: ACLU</td>
<td>Reproductive choice: APHA</td>
</tr>
<tr>
<td>PDA/BFOQ: Equal Rights Advocates</td>
<td>Public health impact: Massachusetts</td>
</tr>
<tr>
<td>Retain state precedent: California</td>
<td>Impact on workers of color: NAACP LDF</td>
</tr>
<tr>
<td>Gender stereotypes: NYC Bar Assoc.</td>
<td>Validity of animal studies of toxicity: NRDC</td>
</tr>
<tr>
<td>Tort Liability: Trial Lawyers for Public Justice</td>
<td></td>
</tr>
</tbody>
</table>

Proper Title VII framework:
EEOC
between them all that becomes apparent after exploring the agendas and strategy decisions of each. The interests that lined up in opposition to fetal protection policies can be divided roughly into two general categories: those seeking to advance an equality agenda and those focusing on health implications (see Table 5). Championing each cause were the expected interest groups, as well as some less predictable backup players that provided extra depth. On the whole, the amicus effort displayed on behalf of the UAW’s plaintiffs was a comprehensive and well-orchestrated campaign.

Again, one of the principal aims of this book is to illustrate how organized interests follow issues on their agendas across policy arenas, including into litigation. In so doing, they often work with a consistent set of allies who bring their expertise from prior policy skirmishes to bear on the issue when it ends up in court. Not every party that signed onto an amicus brief had prior involvement in this issue to the same extent but many were repeat players and had sought legal change through legislation and regulation prior to joining the UAW in this case. This chapter will reveal how these interests organized for a decisive Supreme Court victory through strategic use of both arguments and organizations. What this will also reveal is the extent to which such strategic necessity might have changed the terms of the debate.

THE WOMEN’S RIGHTS COMMUNITY IN COURT

There were two briefs filed that represented what may be termed the “women’s rights” agenda to the Court. The brief for the ACLU Women’s Rights Project focused primarily on advocating a particular interpretation of Title VII, while the one filed by Equal Rights Advocates was devoted to the legislative history of the Pregnancy Discrimination Act, arguing that fetal protection policies like Johnson Controls’ were precisely what the Act was designed to proscribe. As will become apparent, this division of parties and arguments was part of a deliberate strategy to present the strongest and most effective points to the Court.

*The ACLU Women’s Rights Project and Friends*

The previous chapter demonstrated that the preeminent amicus organization in the Johnson Controls litigation was the American Civil Liberties Union (ACLU), due to the work of Joan Bertin and the ACLU’s Women’s Rights Project (WRP). The ACLU filed one of the three amicus briefs on the side of the UAW at the Seventh Circuit stage, filed the only amicus brief at the certiorari stage, urging the Supreme Court to accept the case for review, and was the sponsor of one of the ten briefs for the UAW on the
merits at the Supreme Court level. The ACLU’s brief on the merits in the Supreme Court litigation contained forty-eight additional organizational and eighteen individual signatories, rendering it the largest brief in terms of parties. The efforts of Bertin and the WRP in the area of fetal protection policies is consistent with O’Connor’s (1980) characterization of the WRP as the only one of the women’s rights legal groups that could truly be characterized as an outcome-oriented litigant, and the only one to have pursued systematic litigation.

There is some minor historical significance in the strong position taken by the ACLU in this case, as this organization was one (along with the AFL-CIO and many others) that back in the 1960s had favored the retention of protective labor laws for women (see chapter 2 discussion). The ACLU, however, established a women’s rights project in 1971 following Ruth Bader Ginsburg’s ACLU-sponsored brief in Reed v. Reed (the case in which, for the first time, the Supreme Court declared a gender-based classification to be in violation of the Fourteenth Amendment). Indeed, pregnancy discrimination and reproductive hazards, both implicated in the Johnson Controls litigation, are among the WRP’s areas of concentration. The WRP claims to be “the principal group responsible for systematic legal reform through the courts in the areas of women’s equality and economic rights.”

Initially, the WRP focused on equal protection challenges to gender discrimination, in cases such as Craig v. Boren, the case that, largely due to the WRP, set forth the intermediate level of scrutiny subsequently applied to instances of gender classification, and Califano v. Goldfarb, in which discriminatory Social Security regulations were struck down. But, by the end of the 1970s, the Project had concluded that at that time the equal protection clause was of limited use, and that attainment of strict scrutiny for gender would likely not occur without a more sympathetic Court or a constitutional Equal Rights Amendment. Thus it shifted to statutory remedies such as Title VII, which had heretofore been used primarily to combat race discrimination. In the late 1970s and early 1980s, the Project “developed a litigation docket involving non-traditional jobs, such as truck driving, the skilled trades, and production line factory jobs,” focusing on areas that would have greater impact on poor women and women of color. The WRP was also involved in a number of pregnancy discrimination cases, which “is, in many ways, at the heart of most employment discrimination against women.” These agendas would lead it squarely into the fetal protection policy arena. The Project even coined a term for what it viewed as the intersection of the nontraditional employment and pregnancy discrimination issues, dubbing it the “new protectionism,” and pointed to UAW v. Johnson Controls as the culmination of their work in this area.
The WRP also pursued a series of cases that challenged sex-based actuarial tables that resulted in lower pensions and insurance benefits for women and attacked the undervaluation of work traditionally performed by women. The WRP describes these types of cases as “complex, requiring the use of statistics and experts, and highly experienced litigators,” confirming the observations of much of the literature on group litigation that full-time attorneys and expertise are critical to a successful group litigation program (O’Connor 1980; O’Neill 1985; Tushnet 1987).

The ACLU’s involvement in the Johnson Controls litigation was essentially preordained, as the Women’s Rights Project had become an acknowledged repository of expertise on the issue. Bertin had represented the plaintiffs in the litigation against American Cyanamid in the early 1980s, and was of counsel in Johnson Controls at the district court level. The ACLU was also involved as amicus in Wright v. Olin and had coordinated expert witnesses in other cases. The ACLU in fact had crafted a long-term strategy with regard to fetal protection policies, and during the 1980s devoted considerable effort to the issue and to developing legal arguments. It had identified such policies as a target issue in the 1970s, and part of the strategic plan was to have a case reach the Supreme Court. Thus, when Johnson Controls went forward, the ACLU was ready, having filed amicus briefs in other fetal protection cases such as Wright v. Olin, Hayes v. Shelby Memorial Hospital, and Zuniga v. Kleberg County Hospital. As stated by Joan Bertin, the organization felt that the Seventh Circuit decision in this case “did such violence to Title VII” that it was imperative that it be overturned. “The moving force,” stated Bertin, “was direct representation in prior cases.” Through filing an amicus brief, Bertin and the WRP essentially continued in an unofficial representational capacity, continuing the efforts begun in earlier, appellate level cases.

The coalition that she led was also a continuation of that earlier time, one that began as formal (CRROW) and became de facto (the various cosignatories to this Supreme Court brief). Bertin emphasized the value of this historical coalition activity, for by the time UAW v. Johnson Controls reached the Supreme Court, any disagreements between coalition partners had been resolved and there was a clearly defined strategy and consensus of opinion.

The ACLU generally participates more frequently as a direct party rather than as amicus, except at the Supreme Court level, where it has filed amicus briefs in cases with a direct bearing on the Johnson Controls case, including Wards Cove Packing v. Atonio (Title VII burden of proof framework), Price Waterhouse v. Hopkins (applicability of Title VII to sex stereotyping in employment), and California Federal S&L v. Guerra (how employers may treat pregnancy under the PDA). As the Johnson Controls
case proceeded from the District Court to the Seventh Circuit, Bertin removed herself from direct representation to coordinate the amicus activity in the case. One reason for this move was to bring forth information and arguments to present to the Supreme Court, as there was no trial record below due to the summary judgment disposition at the District Court level. There was also a strategic decision made by the ACLU to encourage greater union involvement in the litigation to conserve resources, as the Cyanamid litigation had proved very costly.7

The ACLU thus presents a striking example of an organization with an institutional commitment to an agenda of eradicating barriers to gender equality that has systematically pursued that agenda over the years across many venues. While most of its work in this area has been through litigation, the ACLU was also a formal supporter of the Pregnancy Discrimination Act, the legislation that ultimately provided the statutory basis for the decision in UAW v. Johnson Controls. At times the group has taken the lead, and at others served as amicus. In both capacities, expertise and alliances were forged and developed. When the issue of barring women from what had the potential to be a wide range of jobs manifested itself in the Johnson Controls litigation, the ACLU was simply continuing along a well-defined path when it served, in effect, as the lead amicus organization.

When the ACLU (along with APHA) filed the brief amicus curiae urging the Supreme Court to grant certiorari in Johnson Controls, it stated two broad points. The first was that the case presented issues of great public importance, particularly to working women and their families, including: the range of health effects associated with lead; evidence of male reproductive harm; the validity of animal data; and individual rights to make risk assessments. The second point was that review was needed to resolve conflict among the circuits regarding the correct application of Title VII in this context, including clarification of the meaning of the Pregnancy Discrimination Act (PDA) and the BFOQ defense, and the type of guidance to provide the EEOC. The brief argued that the court below had departed radically from established Title VII law, and that the BFOQ exception related only to the ability to actually perform the job. The ACLU also claimed that fetal protection policies themselves had negative health effects due to income loss to women, that male reproductive risks were being ignored, and that the lower court decision generally undermined good public health policy.

As will be seen below, many of these latter arguments were taken up by the American Public Health Association at the merits stage. While the ACLU and the APHA joined forces on the lone amicus brief filed at the certiorari stage, when review was granted and it was time to file briefs on the
merits of the case, the APHA filed its own separate brief and took some of the original ACLU co-signatories (primarily individual scientific and health experts) with it. This strategy was explained by Joan Bertin as an attempt to separate and clarify the political from the scientific and medical arguments, a distinction it was felt the Court needed to see. Thus the ACLU’s brief on the merits focused much more on Title VII and the PDA (including the inappropriateness of cost increases as a sex discrimination defense) and the importance of equal employment opportunity (including the importance of eliminating decision making based on group characteristics), leaving the health arguments to the APHA in its separate brief (which the ACLU cited in its own brief). These amici determined that the best strategy was to divide the legal and public health arguments up and file them in briefs under the names of organizations that possessed the requisite expertise to get them heard.

But even this division of labor and expertise was not clear cut. While Bertin was the counsel of record for both of the ACLU briefs (at certiorari and on the merits), and the spin-off APHA brief lists Nadine Taub of Rutgers University as counsel, Bertin actually was the principal author on all three. Taub explained that she had written the APHA’s brief when the case went to the Seventh Circuit, but that her involvement at the Supreme Court stage was “peripheral.” While it is not uncommon to have a counsel of record listed who was not the primary author on the brief, in this case, it is more significant as the two briefs shared a common origin and author (Bertin) who served as an invisible link. The two attorneys had worked together before—Bertin authored a chapter in a book edited by Taub that came out just prior to the Supreme Court level of litigation in this case—and there have always existed close ties between the ACLU and Taub’s Women’s Rights Litigation Clinic at Rutgers University. Taub has served in an advisory capacity to the ACLU’s Women’s Rights Project (WRP) and to a lesser extent the Reproductive Freedom Project of the ACLU. Thus Bertin’s role as coordinator of amicus activity extended even beyond the actual briefs that bore her name. Bertin’s knowledge of the issue was so deep that she was used to craft both documents, while Taub was experienced at drafting amicus briefs for APHA. The APHA’s brief will be discussed more fully below.

It is also interesting to note that the ACLU stated that the courts in this case were essentially inappropriately performing a legislative function by assuming the responsibility for the balancing of interests that the issue required. The arguments put forth in its brief are, as expected, more conservative than the ACLU’s public statements. While the WRP claims to be a premier force in changing the law to expand women’s rights, in this brief,
### TABLE 6.
Parties to Brief Supporting Certiorari Filed by ACLU

<table>
<thead>
<tr>
<th>ACLU</th>
<th>United Mine Workers of America</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACLU-Wisconsin</td>
<td>WNYCOSH</td>
</tr>
<tr>
<td>Amalg. Clothing and Textiles Workers</td>
<td>Wider Opportunities for Women</td>
</tr>
<tr>
<td>AAUW</td>
<td>Women Employed</td>
</tr>
<tr>
<td>AFSCME</td>
<td>Women's Law Project</td>
</tr>
<tr>
<td>American Public Health Association</td>
<td>Women's Legal Defense Fund +</td>
</tr>
<tr>
<td>Am. Society of Law and Medicine</td>
<td>Nicholas Ashford, J.D., Ph.D. *</td>
</tr>
<tr>
<td>Central NY Council on Occupational Safety and Health</td>
<td>David Bellinger, Ph.D. *</td>
</tr>
<tr>
<td>CLUW</td>
<td>Eula Bingham, M.D. *</td>
</tr>
<tr>
<td>Committee for Responsible Genetics</td>
<td>Mark Cullen, M.D. *</td>
</tr>
<tr>
<td>Communications Workers of America</td>
<td>Philip J. Landrigan, M.D. *</td>
</tr>
<tr>
<td>Employment Law Center</td>
<td>Marvin S. Legator, M.D. *</td>
</tr>
<tr>
<td>Environmental Defense Fund</td>
<td>Donald Mattison, M.D. *</td>
</tr>
<tr>
<td>International Chemical Workers</td>
<td>Herb Needleman, M.D. *</td>
</tr>
<tr>
<td>MassCOSH</td>
<td>John F. Rosen, M.D. *</td>
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<tr>
<td>NARAL</td>
<td>Jeanne Stellman, Ph.D. *</td>
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<td>9 to 5 National Association of Working Women</td>
<td>Directors of Occupational Medicine Programs:</td>
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<tr>
<td>National Black Women’s Health Project</td>
<td>*</td>
</tr>
<tr>
<td>NOW</td>
<td>Eddy Bresnitz, M.D.</td>
</tr>
<tr>
<td>National Women’s Health Network</td>
<td>Steve Hessl, M.D.</td>
</tr>
<tr>
<td>National Women’s Law Center</td>
<td>Philip J. Landrigan, M.D. #</td>
</tr>
<tr>
<td>National Women’s Political Caucus</td>
<td>Laura Welsh, M.D.</td>
</tr>
<tr>
<td>Natural Resources Defense Council #</td>
<td>*</td>
</tr>
<tr>
<td>NY Coalition on Occupational Safety and Health</td>
<td>+ Joined ERA brief at merits stage</td>
</tr>
<tr>
<td>Nontraditional Employment for Women</td>
<td># Filed own brief at merits stage</td>
</tr>
<tr>
<td>North Carolina Occupational Safety and Health Project</td>
<td></td>
</tr>
<tr>
<td>NOW Legal Defense and Education Fund + Occupational Safety and Health Law Center Oil, Chemical and Atomic Workers</td>
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<td>PhilaPOSH</td>
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</tbody>
</table>

* Joined APHA brief at merits stage
+ Joined ERA brief at merits stage
# Filed own brief at merits stage
it argued that existing law adequately addressed the issue at hand, and even stated that, in effect, this was not truly a matter for the courts.

Bertin proffered that once policies such as those at issue in this case are adopted by employers, finding a plaintiff for an organization like the ACLU is not difficult. In the Cyanamid case, she was invited to come and talk to the women employed there about a possible cause of action, at which point they asked her to represent them in such an action. Thus, she stated, although the ACLU will sometimes become involved in a case over a matter of legal theory, when Johnson Controls arose, she felt she was representing the workers that the ACLU had already represented over the years on this issue—distinct clients with serious legal claims. She was therefore representing individual women and men, but also the larger class of those similarly affected by fetal protection policies. The emphasis on representing the interests of workers was enhanced by including eighteen individual workers as parties on the briefs, as well as their statements of interest.

Litigation strategy decisions can have a direct impact on representational issues. While Bertin and the ACLU were of counsel in the initial stages, the fact that this was a labor union case created a different representational dynamic, and indeed affected the character of the case itself. While organized labor and women’s rights advocates are both constituencies known to the courts, they often come from quite different perspectives on issues. Thus bringing this case forward as a labor issue rather than a “women’s” issue makes for a different perception, both to the Court and the outside world. The distinction, however, may be more apparent than real, as the previous chapter revealed how closely those two sectors really are (at least on these issues). Nevertheless, appearance does matter. As explained by Nadine Taub, having the UAW as the litigant helped the issue be seen as one of workers’ rights and not a narrower “women’s rights” issue. Having a labor union present the challenge on behalf of both women and men, whose interests in a clean workplace were essentially the same, “helped get the issue across.” Taub added, however, that it also helped the UAW to have Joan Bertin and the women’s rights community involved. She recalled a session in which Bertin and Carin Clauss worked with Marsha Berzon to prepare her for the Supreme Court oral arguments, each providing their unique and critical perspectives on women’s rights and labor law, respectively.

While Joan Bertin characterized her decision to withdraw as necessary to the coordination of the amicus activity, Marsha Berzon, the AFL-CIO Associate General Counsel brought in for the Supreme Court level, cited some actual tension between the parties who were involved in representing the affected workers in this case. Berzon stated that there was some initial mistrust by the women’s rights sector of organized labor and its commit-
ment to this issue. These initial misgivings were eventually overcome, however, and Berzon cited the expertise of Bertin and others as indispensable to her efforts at the Supreme Court level. Affirming Bertin’s belief in the importance of the earlier work that had been done on this issue, Berzon also cited the “institutional women’s movement interest” that had developed extensive experience and expertise that would not have existed had it been solely the purview of private attorneys. The degree of direct coordination between the UAW litigators and Bertin’s ACLU made for a high degree of congruence between the interests of each.

While it is neither feasible nor necessary to explore the involvement of each group that signed onto the ACLU’s brief at the merits stage, the Employment Law Center (ELC) emerges as one of the more significant ACLU allies in this effort. This is largely because, while it was one of many groups to join the ACLU’s brief, the organization had been directly involved in the parallel case involving Johnson Controls in the state of California (a case in which Bertin also served in an advisory capacity). The ELC is a project of the Legal Aid Society of San Francisco that focuses exclusively on issues of economic justice in the workplace, particularly legal issues affecting employment of poor and underrepresented groups. In this it is philosophically similar to the ACLU’s WRP. As stated by Pat Shiu, a senior staff attorney with ELC, the organization faces no restrictions in the types of cases it can litigate, and thus takes on big issues to try and push the law, or clarify the law and establish favorable precedent.

The ELC represented Queen Elizabeth Foster, the plaintiff in the case of Johnson Controls v. California Fair Employment and Housing Commission (see discussion below). According to Shiu, the group got involved in the federal Johnson Controls case to assert the same points it had made (successfully) in the parallel California case, as the same legal challenge was present in both. The ELC was quite concerned about the Court altering the BFOQ defense in a way that would have “serious and huge ramifications for every other Title VII case.”¹² Shiu said that she was quite surprised at the Supreme Court’s decision, given the lower court decisions and the prevailing bias about protecting fetuses that seemed to be dominant at the time, a bias that “threatened to change the very landscape of Title VII.”

The ELC joined the ACLU brief despite the fact that its frequent coalition partner (and neighbor within the same San Francisco office building), Equal Rights Advocates, was filing its own brief. Shiu stated that the reason for ELC joining the ACLU’s brief was that while the arguments being put forth by ERA, which focused heavily on the proper interpretation of the PDA, were important, ERA was approaching the case “from a different slant,” and ELC’s experience with Queen Foster and Johnson Controls in
California made it a more natural partner in the ACLU effort. Shiu also emphasized the importance in major cases like *Johnson Controls* of garnering as much broad-based support as possible for the position being taken, so that it is not viewed solely as the position of the women’s rights community but of “a progressive coalition of civil rights communities.” Demonstrating a significant “force of people who are united” behind a position brings valuable credibility to the effort. She noted that it was particularly useful to have the support of organized labor, and indeed all of the unions involved as amici in this case were on the ACLU brief. Thus the strategy that ELC believed most effective and important was being pursued in the ACLU’s brief, which listed dozens of diverse organizations, including nine labor unions. ERA’s brief, in contrast, was joined by the NOW Legal Defense and Education Fund, the National Women’s Law Center, and the Women’s Legal Defense Fund, a more homogeneous set of groups.

One of the questions presented for exploration in this book was whether groups must present narrower or more conservative positions when their issues move to litigation, given the unique constraints of that process. While I initially speculated that such an approach would be manifested primarily through language used in legal arguments, it appears from studying the women’s rights groups involved in *Johnson Controls* that this may have been effected through strategic partnering as well. Rather than tempering the arguments, groups might attempt to obtain a diverse set of organizations to support their position, making it seem less radical by its endorsement by a coalition of mainstream groups or groups spanning the political spectrum. Judith Kurtz of Equal Rights Advocates maintained that it was sometimes legitimate to question whether the presence of the women’s rights community might sometimes hinder a litigation effort. In a slightly different vein, she also said that having certain groups join a brief may serve to lend “clout” to the brief, or to signify the unity of sometimes disparate interests, such as East and West Coast feminists (who have at times differed in their philosophical and strategic approaches to advancing women’s rights). ERA’s brief in *Johnson Controls* indeed contained women’s rights advocates from both coasts (itself and NOW). Pat Shiu of the Employment Law Center also stressed the importance of backing positions with broad-based coalitions for the sake of credibility. The efforts of Joan Bertin to secure such an array of co-signatories on the ACLU’s brief further supports this view.

Shiu was emphatic in stating that the client’s interests never get sacrificed in a public interest litigation effort such as this—that as attorneys their first duty is always to the client. But she also did say that there are ways to make the broader interests of the organization and those of the client
align themselves. Since the ELC has the luxury of taking only those cases they wish, they can literally wait for the “public interest plaintiff,” someone who shares their broader view of the issues at stake. Shiu also stated a strong belief in coalition activity, believing that it actually serves clients better as the ideas become more refined as they are bounced off of “smart people.”

The rest of the groups that joined the ACLU’s brief fell into several broad categories, but all “had a connection to the purpose of non-discrimination in the workplace” according to Bertin. These included: other civil rights organizations, including the Center for Constitutional Rights and the Mexican American Legal Defense and Educational Fund (a frequent coalition partner of the ELC); the nine unions listed above; religious groups (American Friends Service Committee, National Council of Jewish Women); numerous health groups, including the Boston Women’s Health Book Collective, the National Women’s Health Network, and occupational safety and health groups from various states and regions; reproductive rights groups (NARAL, Planned Parenthood); women’s rights organizations that focused on employment and economic issues (9 to 5 National Association of Working Women, Nontraditional Employment for Women, Women Employed); and other women’s rights groups (AAUW, NOW, the National Women’s Political Caucus, the Northwest Women’s Law Center). Many of these also had prior involvement in some of the precursor policy issues that came before Johnson Controls. NOW, for example, which was formed for the very purpose of effecting Title VII’s nondiscrimination mandate for women, was also involved in the passage of the Pregnancy Discrimination Act and the *Cal Fed* litigation. The National Women’s Political Caucus and NARAL were also part of the pro-PDA coalition.

**Legislative History**

While the ACLU Women’s Rights Project’s amicus brief represented the women’s rights perspective and also included a host of diverse allies, there was another brief filed that also represented the women’s rights legal community, authored by several other prominent women’s legal groups. The Women’s Legal Defense Fund (WLDF)\(^16\) was the lead organization on the brief, for reasons that will emerge, while the brief’s author was not formally affiliated with any of the groups. It was joined by the NOW Legal Defense and Education Fund, the National Women’s Law Center, and Equal Rights Advocates (ERA).

The statement of interest of amici curiae in the brief states that the four sponsoring organizations “were leaders in the Campaign to End Discrimination Against Pregnant Workers (CEDAPW), the coalition which was the
principal proponent of the Pregnancy Discrimination Act. ... Amici believe that the decision below has the potential for causing great harm to enforcement of the PDA.” The National Women’s Law Center, which began as the Women’s Rights Project of the Center for Law and Social Policy, represented amici curiae in the General Electric v. Gilbert decision that provided the impetus for the PDA (see chapter 2), and participated in the development of this remedial legislation. The Women’s Legal Defense Fund, in addition to participating in the coalition to enact the PDA, was active in pressuring the EEOC following the statute’s adoption to issue guidelines on the application of Title VII as amended by the PDA in light of the proliferation of employer exclusionary policies based on reproductive hazards. WLDF formed the Coalition for the Reproductive Rights of Workers (CRROW) to further this mission, and also participated as amicus in the 1983 Newport News case (the first at the Supreme Court level to address the PDA) and in California Federal S&L v. Guerra (1987). Donna Lenhoff of WLDF explained that, in the 1970s, WLDF had taken the “hard line position” on the treatment of pregnancy in the employment context, advocating equal treatment of the sexes by treating pregnancy the same as any other temporary disability. In the context of reproductive hazards, this philosophy meant cleaning up the workplace rather than excluding fertile women, in effect using the pregnant woman as the OSHA yardstick for determining employee vulnerability.

An interesting closing note to the interest statement states that “the ACLU, which was also a major participant in the CEDAPW, fully endorses this amici curiae brief, but is submitting a separate brief on behalf of itself and other amici.” This disclaimer was included to forestall any speculation that there were divisions within the women’s civil rights community over this case, as had become evident in the California Federal S&L case. Susan Deller Ross, the brief’s author, noted that given the issues related to child-bearing implicated in Johnson Controls, the case indeed had the potential to have “heated up to be a rehash of the same old controversy but never did.” ERA’s Judith Kurtz recalled that the ACLU’s brief had been “well in the works for some time” as it was an issue Joan Bertin had been working on for years, and so therefore most of their arguments had been previously decided upon. Thus, although there were in effect two “women’s rights” briefs, each had a different emphasis and it was a deliberate strategic move to file both.

The legislative history brief was authored by Susan Deller Ross of Georgetown University Law Center, one of the principal drafters of the Pregnancy Discrimination Act (PDA), whose career reads much like the modern history of the evolution of sex discrimination law. She was
involved in crafting the ACLU’s brief in Phillips v. Martin Marietta as a law student, and while at the EEOC in 1971, she drafted the Commission’s pregnancy guidelines that were effectively overruled in the Gilbert decision. Ross then served as Clinical Director at the ACLU’s Women’s Rights Project and co-chaired the Campaign to End Discrimination Against Pregnant Workers (CEDAPW), before moving into teaching at George Washington and then Georgetown University, where she continues her involvement with significant sex discrimination litigation.

Ross’s brief presents a telling illustration of how a complex litigation campaign is formed. She noted that in Supreme Court litigation it is typical for litigating attorneys to assess the coalition of communities and organizations interested in the issue and to then assign roles in the litigation to those organizations to carry out through amicus briefs. As described by Ross, the groups “divvy up topics”: “The level that the [parties’] lawyers are functioning on is figuring out what the legal arguments are that need to be made, which are the strongest and the weakest, where you need bucking up one argument versus another, and figuring out which group is going to fulfill each of those needs. There is a group of legal organizations on behalf of women that work loosely together and often informally divvy up who is going to play what role.” Ross also noted that, in her experience, the subject matter needs and the appropriate drafters come first in consideration, with organizations added to provide the institutional backing. In this case, that institutional backing came from the four groups listed above. Donna Lenhoff of WLDF observed that because these groups often partner with the ACLU and some of the other groups that were on the ACLU brief, the fact that they were on this separate brief points to a probable “deal” that was struck with Joan Bertin, who in effect released several of them from her own brief to sponsor this additional brief. Without Bertin’s consent, Lenhoff asserted, WLDF “would never have left” her brief. Here is further evidence of the high degree of coordination that was occurring between the various briefs and sets of groups on those briefs, with Bertin squarely placed in the central role.

While Bertin had taken on the responsibility of creating a coalition of amicus support for the UAW at an early stage, Ross related that somewhat late in the process, Marsha Berzon decided that a brief devoted to the legislative history of the PDA was needed. For this, she turned to Ross, a fellow drafter of the legislation, who already had a strong interest in becoming involved with the case. Ross said that they devoted an entire brief to legislative history because that history was so strong—“our real ace in the deck.” Like the ACLU’s desire to create a factual record in its amicus brief that was lacking from the lower courts, explicating relevant legislative history is
another common goal of amicus groups (Wasby 1984; Scheckpele and Walker 1991). As Ross describes the process, that realization was the impetus for the document, and while she concentrated on the content of the brief, Judy Lichtman and Donna Lenhoff of the Women’s Legal Defense Fund worked on the strategy and mechanics of assembling a late-entry coalition. Lenhoff described WLDF’s role in some of the earlier fetal protection policy cases as “the Washington segment” of the effort, performing policy work and “squelching some legislative skirmishes.” Therefore, Lenhoff stated, it was logical that WLDF would take the lead on the legislative history brief once the issue reached the Supreme Court. Their goal was to influence what the Supreme Court framework should be by delineating the intent of the PDA. She echoed Bertin’s observation that by this time the arguments of this community had been well established since the Cyanamid case.17

The brief was for the most part the work of the WLDF and Ross, but ERA, the NOW LDEF, and the National Women’s Law Center were retained to give the brief additional organizational support and depth. All but Equal Rights Advocates had been parties to the ACLU’s amicus brief supporting certiorari, but then moved over to Ross’s brief. This particular collection of organizations also served to inform the Court and others that the notorious rift between the two different camps over the legal treatment of pregnancy that had surfaced in Cal Fed was not present in this case. Thus, beyond the substance of the arguments contained in the brief, the very composition of actors on the brief was itself part of the message, confirming another phenomenon identified in the group litigation literature—making a statement to the Court on the issue at stake in the pending case.

Like the ACLU and the Women’s Legal Defense Fund, ERA’s involvement in this case could almost be considered preordained. The organization was formed in 1974 as “a law firm specializing in issues of sex-based discrimination”18 by a group of feminist attorneys that included Wendy Williams, now at the Georgetown University Law Center, who testified at the PDA hearings and authored an influential article on fetal protection policies in 1981, and Nancy Davis, who served as the organization’s Executive Director until 1995. “Since 1974, the ERA has been involved in most major cases involving sex discrimination, particularly those involving pregnancy discrimination, an issue that has pitted traditionally allied women’s groups against each other” (O’Connor and Epstein 1989, 71).

ERA also joined a brief amicus curiae with the NOW LDEF in the case In Re A.C.,19 in which a pregnant woman was forced via court order to undergo a cesarean section against her will. ERA and NOW LDEF argued that a competent adult woman is entitled to make her own decisions about the course of medical treatment. The case also implicated broader philo-
sophical questions about women's autonomy when childbearing is introduced as a factor, the same issues at stake (if in somewhat less dramatic terms) in Johnson Controls. ERA was also a party on briefs filed in several key abortion cases: Webster v. Reproductive Health Services and Bray v. Alexandria Women's Health Clinic (with the National Abortion Rights Action League), and Rust v. Sullivan (with NOW LDEF). The outcome of UAW v. Johnson Controls was listed in ERA's 1990–91 Annual Report, in which the organization describes the major cases in which it was involved in the previous year.

Although ERA was founded as a “teaching law firm specializing in issues of sex-based discrimination,” the organization now stresses that it has “evolved into a legal organization with a multifaceted approach to achieving equality and economic justice for all women” (1992–93 Annual Report). Judith Kurtz reinforced this by stating that while litigation is how ERA began it certainly is not primary now—while they view it as necessary and useful, it is but one of the “skills and weapons” that they have and employ. Sometimes, she said, the experience gained through litigation provides necessary knowledge to advocate for public policy change in other ways. Nonetheless, the group’s annual reports are dominated by accounts of the cases in which ERA is currently involved.

According to Kurtz, the organization participates predominantly as a direct litigant, with amicus activity “almost incidental.” She said that other groups will do the amicus work and that ERA will not file additionally unless they have a distinctly different point of view or other groups are not fully focusing on a particular issue with which they are concerned. The key legal issues in a case will be raised “with or without amicus briefs” she stated, and what the briefs can do is bring forth broader implications. Echoing many others, she said that amicus briefs are not effective if they merely repeat the briefs of the litigating parties. She also said that there are occasions when there is conflict between groups who are ostensibly on the same side in a case, and a litigating party may have groups writing amicus briefs that they do not want.

The ERA brief itself reads like a defense of the legacy of the PDA, focusing heavily on its legislative history, and makes three primary arguments. First, it asserts that the PDA intended to classify any exclusion of fertile women based on their pregnancy or potential pregnancy as facial discrimination under Title VII. Second, it argues that only ability to perform the job, and not fetal health concerns, was relevant in determining whether a challenged policy met the narrow BFOQ exception for disparate treatment. Finally, to implement a fetal protection policy, an employer such as Johnson Controls would have to make it sex neutral, allowing it to comply with
Title VII and make the workplace safe for the children of both male and female employees. The brief also admonished the Seventh Circuit for not considering the PDA or its legislative history in its decision, and referenced testimony at the PDA hearings in favor of the legislation by the EEOC and by Laurence Gold of the AFL-CIO (who was of counsel for the UAW in *Johnson Controls*), as well as testimony against the PDA by the Chamber of Commerce.²³

**CALIFORNIA: AHEAD OF THE CURVE**

There were two briefs filed in support of the UAW by states—one by California and its Fair Employment and Housing Commission, and the other by Massachusetts and several other states and territories. No states filed in support of the company. As will be shown, however, the two state-sponsored briefs took very different approaches to the case and became involved for different reasons, although both had prior involvement in the issue.

The brief filed by California properly belongs within the family of briefs and groups that were focused intensively on Title VII and the PDA and their applications in this context (that is, more on the employment discrimination than the public health side of the issue). A similar case involving the same company had arisen in the California state court system, and was actually decided before the Supreme Court oral arguments in *UAW v. Johnson Controls*. In that case, *Johnson Controls v. California Fair Employment and Housing Commission*,²⁴ the state had argued that fetal protection policies violated California’s equivalent of Title VII and prevailed. The state did not want this ruling invalidated by the federal case and so filed a brief amicus curiae in *UAW v. Johnson Controls* before the U.S. Supreme Court.

There were many links between this state-court litigation and the parallel proceeding moving through the federal courts. Prudence Poppink of the California Fair Employment and Housing Commission (the state analogue to the EEOC) had been an attorney with the Employment Law Center (ELC) from 1975–1981; Pat Shiu of the ELC became counsel for the plaintiff in the California case, and the organization also joined the ACLU’s amicus brief in the federal *Johnson Controls* case. On the other side, the same attorney who ultimately represented Johnson Controls at the U.S. Supreme Court, Stanley Jaspan, also litigated the *California FEHC* case.

Poppink stated that the sole reason for California filing in the UAW case was because of the prior case that had been decided in California, that the state does not pick and choose cases in which it would like to get involved but only does so if a case will affect its established law. Once California was on record and had been upheld by its appellate court, “we definitely felt we
had something to say” as there was no other case law at that time supporting a finding of sex discrimination on this issue. Poppink was insistent that it be noted that the case in California was decided prior to the UAW case, that they had already fought that fight and won and were thus ahead of the federal courts on this issue.25 Echoing the rhetoric of the amicus brief, Poppink said that the state was concerned with the “disingenuous, results-oriented approach of the [federal] circuit court opinions.” Manuel Medeiros of the State Attorney General’s office, who was involved in both the California litigation and the Supreme Court brief for the state in the UAW case, confirmed this view and explained that the state will often become involved as amicus when a national case will affect California or states generally.26 In this case, there was even greater impetus for California to file, as they had just established favorable precedent in the state court system for prohibiting fetal protection policies and did not want to see that policy overturned mere months later by the U.S. Supreme Court.

Poppink believes that even if the Supreme Court had affirmed the Seventh Circuit’s opinion California’s law could have prevailed in the state, as state law is allowed to be more stringent than federal law. Under this scenario, she said, there would have been an anomalous situation in which such policies would be outlawed only in California and not elsewhere in the United States. In that case, they predicted that the company would have likely moved its operations to another state, a potential economic loss for the state and the current employees of the company. The state thus had a practical as well as legal desire to have the Supreme Court concur with the state court’s ruling on fetal protection policies.27

The California brief in UAW v. Johnson Controls was fairly strong in the presentation of its arguments. The two primary assertions of the brief were that “judicial treatment of sex discrimination predicated upon fetal protection has been ill-reasoned and manifestly result oriented” and that “neither society’s interest in workplace fetal safety nor its interest in equal employment opportunity for women are adequately served by allowing employers to discriminate against women in purported furtherance of fetal safety.” The brief also stated: that courts applying Title VII are not equipped to resolve fundamental policy disputes; that the history of the issue in the circuit courts has been one of attempting to circumvent the PDA; that Johnson Controls is making multiple erroneous assumptions about women; and that where concern for fetal safety would require exclusion of both male and female employees, the employer would “most likely ignore societal concern altogether in favor of economic self-interest.” Perhaps as a state—one with considerable prior experience adjudicating this policy issue—California felt more able to use strong language than would
an interest group attempting to gain the attention and favor of the Court. As a state, California cannot be considered as an interest group per se. The state did have significant relationships with other parties to the litigation nonetheless, because of the previous litigation that had occurred in California involving the same company and policy. These relationships did not take the form of direct coalition activity in filing the amicus brief, but, as was observed above, Prudence Poppink of the Fair Employment Housing Commission was formerly with the ELC, which had litigated the Queen Foster case and was a co-signatory to the ACLU brief in the Supreme Court Johnson Controls case. She recalled having attended at least one strategy session over the federal Johnson Controls case at the Employment Law Center. Poppink said that the state, however, is unlikely to partner with private groups in litigation, as they cannot ally too closely with entities that could potentially come before the FEHC. In addition, she noted, the state will usually have a somewhat different perspective than a private interest group. Medeiros concurred, saying that while he was not aware of the state ever joining with private groups, it will join with other states. When this occurs, each state must of course review the brief to ensure that it comports with its own existing laws. He said that there was no consultation with the attorneys for the UAW when drafting their amicus brief, as “they [the UAW] were not involved in the California case.”

THE PUBLIC INTEREST LAWYERS’ BRIEFS: THE NEW YORK CITY BAR AND TRIAL LAWYERS FOR PUBLIC JUSTICE

Group litigation commonly involves organized interests allying with attorneys, as the former need the technical expertise of the latter, for the judiciary is the terrain of lawyers. In this case, several of the amicus groups followed this pattern (Ross and the Women’s Legal Defense Fund, Taub and the American Public Health Association), but there were also two briefs filed by groups of attorneys themselves—the Association of the Bar of the City of New York, and Trial Lawyers for Public Justice.

The brief filed by the New York City Bar Association had one essential premise, which was that stereotypes about women workers are both outmoded and illegal under Title VII. The brief argues that the assumptions about women and their reproductive lives that underpin Johnson Controls’ fetal protection policy are too reminiscent of the days of Muller v. Oregon (1908), and that such unwarranted exclusion of women results in women’s economic harm and also in reproductive harm to men, who are left to work in unhealthy environments. The brief states that the company’s
policy clearly conflicts with Title VII as amended and clarified by the PDA. But, while the legal basis for invalidating fetal protection policies was certainly stated, the Bar’s main emphasis was rather on the unfair stereotyping that led to the adoption of such policies. The brief referred to reinforcing notions that women should be childbearers and homemakers, the denigration of women’s labor force participation, assumptions that only women are responsible for the health of future generations, and that they are incapable of making decisions about work and family for themselves.

The Association bills itself as having been founded for the purpose of eliminating corruption in the government and courts of New York in the 1870s, and as continuing to work for political, legal, and social reform. Among the Association’s activities are a Study of Women’s Advancement in the Legal Profession, intended to analyze the glass ceiling in large law firms; viewed in light of this project, the brief’s emphasis on the traditional sexism of the legal profession seems quite consistent. The Association had also filed a brief in support of Ann Hopkins in *Price Waterhouse v. Hopkins*, a case dealing with gender stereotypes. Its *Johnson Controls* brief references an article by Joan Bertin, author of the ACLU amicus brief and a longtime advocate in the area of women’s employment rights. So, while there may not have been direct collaboration between the Bar and the ACLU as far as amicus strategy, the brief linked itself at least indirectly to the broader amici coalition.

While there were three briefs filed in support of the UAW by governments or government agencies—California and its FEHC, Massachusetts and numerous other states, and the U.S./EEOC—this brief presents the rather anomalous situation of a partnership between public and private entities. The New York City Commission on Human Rights, the city agency charged with enforcing local antidiscrimination laws, signed onto the New York City Bar Association’s brief, along with the Association of Black Women Attorneys and the Committee on Women’s Rights of the New York County Lawyers’ Association (NYCLA).

The other attorney association brief filed came from Trial Lawyers for Public Justice (TLPJ), a membership organization that comprises trial lawyers and law firms, which filed its brief alone. As stated by Arthur Bryant, the organization’s Executive Director, the TLPJ was founded because there were not public interest lawyers doing damage-related suits. In the brief itself, TLPJ bills itself as “a national public interest law firm dedicated to using the skills and approaches of plaintiffs’ trial lawyers to advance the public good.”

The statement of interest goes on to explain that TLPJ is particularly interested in this case because it involves two policy areas in which it
regularly works—sex discrimination and workplace safety—that should be viewed as complementary rather than contradictory. This brief thus presents another example of a group filing an amicus brief based at least in part upon its expertise and prior experience in at least one of the issue areas implicated in the case, again confirming the observations of much of the literature on group litigation that full-time attorneys and expertise are critical to a successful group litigation program (O’Connor 1980; O’Neill 1985; Tushnet 1987). TLPJ has participated in cases related to Johnson Controls, including United States v. Virginia (challenging Virginia Military Institute’s male-only admissions policy), as well as in the Harris v. Forklift Systems case involving sexual harassment. The group also filed an amicus brief on behalf of the National Women’s Health Network in Silkwood v. Kerr McGee.

According to Bryant, TLPJ participates in “precedent-setting litigation,” primarily through direct litigation but also through amicus briefs, and mostly below the Supreme Court level. The group’s primary (but not only) issue area is tort liability, which positioned it perfectly to weigh in on one of the more contentious issues in UAW v. Johnson Controls. TLPJ’s brief, authored by Lucinda Finley of the SUNY Buffalo law school, focused primarily on that issue, and Bryant said that they also vetted the briefs of other amici to ensure that they did not misstate tort issues. Marsha Berzon recalled Finley coming to California for a short stint and writing the brief in one concerted effort, and noted that TLPJ’s work was particularly helpful to the litigation. Here was a clear example of specialized amicus backup. Like several other attorneys involved in amicus briefs in this case, Finley had previously authored a law review article on maternity and the workplace, in which she argued that “the fact that women bear children and men do not has been the major impediment to women becoming fully integrated into the public world of the workplace” (1,119).

TLPJ used some of the strongest language of all the amici supporting the UAW in its condemnation of Johnson Controls’ policies. The brief stated that the fetal protection policy “has little to do with fetal protection and a lot to do with sex discrimination,” that it is “based on a web of speculation” about the adverse effects of allowing fertile women to work around hazards, and argued that such policies “trample on women’s autonomy.” The brief further claimed that the company’s “professions of ‘moral concern’ are severely undermined by the amount of risk to worker and consumer health that the company routinely tolerates as an aspect of lead battery manufacturing.”

It is only after leveling the above charges that the brief delves into Title VII and tort liability issues, warning that the proposed expansion of the
BFOQ defense would “eviscerate Title VII and undermine the safety-enhancing goals of tort law.” The brief asserted that a fundamental tenet of tort law—that fear of liability will deter unsafe actions and create incentives to make improvements in safety—would be devastated if speculative tort liability could excuse discrimination. Finley argued that the social costs of dangerous workplaces are so open-ended that incorporating such considerations into Title VII litigation would “overwhelm” such trials with social policy judgments “better left to Congress.” The brief further argues that concern about potential tort liability is an improper component of a Title VII defense. Finally, the TLPJ brief adds its imprimatur to the argument that animal study data should not be disregarded, and that the entry of such data by the plaintiffs below should have precluded the entering of summary judgment in favor of the employer. This argument, although focused on more extensively by the Natural Resources Defense Council (NRDC) was not merely incidental to the Trial Lawyers’ brief, as a ruling on the validity of animal studies would affect victims of toxic torts, a key area for TLPJ.

Bryant said that TLPJ files approximately 75 percent of its amicus briefs solo, and that decisions regarding whether to participate in coalition briefs depend on the case at hand. He observed, as did many others, that the Supreme Court does not like to be overloaded, so there is an effort made by groups to combine efforts and file as few separate briefs as possible. If TLPJ agrees with a position being taken by an existing brief and has nothing unique to add, it will sign on in order to avoid the redundancy that is frowned upon by the Court.

THE APHA BRIEF: TAKING THE LEAD FOR SCIENCE AND PUBLIC HEALTH

As noted at the beginning of this chapter, the two dominant themes in the arguments for the union side were equal employment opportunity and public health. The American Public Health Association (APHA) most clearly symbolizes the public health faction within the pro-UAW amici, with its position as the oldest and largest public health organization in the nation and the highly regarded co-signatories on its amicus brief. While both equal opportunity and public health issues were cited within the ACLU’s brief urging certiorari, which the APHA joined, when the case was accepted for review, the ACLU and APHA divided the two areas and fanned out with their respective allies to provide greater depth to each set of arguments. The briefs just reviewed placed greater emphasis on the legal and discrimination
issues. As described by Joan Bertin above, APHA took the more scientific
tack, and was in effect backed up by the state of Massachusetts, the NAACP
LDF, and the NRDC, which provided depth to specific public health issues
in additional briefs.

The APHA has a longstanding commitment to reproductive choice,
dating back to Roe v. Wade, which provides part of the philosophical foun-
dation for its involvement here. Beyond that, the organization was con-
cerned in this case with the prospect of unsound public health policy being
promulgated by scientifically and technically ill-equipped courts. The
APHA has organized sections within its structure devoted to Occupational
Health and Safety and to Population, Family Planning, and Reproductive
Health. From the brief’s statement of interest: “Amici do not believe that
there is a sound scientific basis to focus attention only on women workers,
because all workers face significant health risks from occupational expo-
sures such as those at Johnson Controls. This kind of policy disserves over-
all promotion of workplace safety and health, as well as the health of
women and children, who lose income and benefits that are essential to
their health and well-being.” And further: “APHA's reproductive health
policy, adopted in 1979, ‘condemns the corporate practice of forcing
women to choose between their jobs and the right to reproduce [and urges
governmental agencies to develop] occupational exposure standards that
protect women, men, and the fetus.’”

The APHA does not have a formal litigation section or program, but
has been quite active in the courts nonetheless, filing ten to twelve briefs
per year. It has participated in every major abortion case, including Roe v.
Wade. Katherine McCarter, the organization’s Associate Executive Director
for Programs and Policy in the early 1990s, stated that it is an important
policy role for a group like APHA to be present in the judiciary, making
clear statements to the Court on issues that figure prominently on the
organization’s agenda.32 Interestingly, McCarter observed that the organi-
zation’s general membership was for the most part unconcerned with and
unaware of APHA’s litigation activity, or might even question the group’s
involvement in some cases. Such work thus appears to be much more of a
staff-driven activity that is seen as a necessary but relatively minor part of
the organization’s overall policy work. According to McCarter, litigation is
solely a policy activity, as APHA is not a trade association with "pocket-
book issues" of its membership at stake.

APHA’s heightened litigation activity in fact dates to the mid-1970s,
when a feminist health clinic in Florida approached APHA for amicus
assistance in a case in which they were involved dealing with client access.
McCarter retained Nadine Taub of Rutgers University’s Sex Discrimination Clinic to do the brief pro bono for APHA, and Taub has since remained active in litigation for the organization on women’s rights issues. It was Taub, in fact, who was counsel of record on APHA’s brief in *Johnson Controls*, although as explained above it was largely authored by Joan Bertin of the ACLU Women’s Rights Project. Taub has been involved as counsel for amici in many important abortion and gender discrimination cases, including *Planned Parenthood v. Casey*, *Rust v. Sullivan* (1990), *Ohio v. Akron Center for Reproductive Health*, *Webster v. Reproductive Health Services* (1989), and *Price Waterhouse v. Hopkins* (1989).

In its public materials, the APHA, like other groups, describes its wide array of activities and emphasizes the impact that it has had on the policy process, but only refers to the legislative and regulatory processes and does not cite its litigation work at all. This combined with the observations of Katherine McCarter that the membership is in fact barely aware of the group’s litigation efforts indicate that the APHA’s purpose in working through the judiciary is not to enhance its public image or to even represent its members. This stands in contrast to other participants in the litigation—for example, the UAW and its employee members, or the various state health departments concerned about the health and financial status of its constituencies—where direct representation of member interests was more of an impetus for involvement in the case.

In its amicus brief supporting the UAW, the APHA uses strong language in its rejection of Johnson Controls’ efforts to address its reproductive hazards problem via fetal protection policies, stating that “once again, women’s biological role as childbearer is advanced as a rationale for discrimination that would deny women lucrative employment or, in a modern twist, require them to be sterilized to qualify for full employment rights. Johnson Controls’ policy, sweeping in scope and virtually unlimited in its implications, treats all women as ‘childbearing vessels’ . . . ” (3–4). The brief asserts that Johnson Controls has ignored the evolution in federal policy that reflects an understanding that reproductive risks are mediated through both sexes. Part of its argument, to some extent, actually concerned the forum more than the substance of the debate, as it contended that Title VII litigation was “not the appropriate forum for addressing workplace safety and health concerns which are addressed under other federal laws.” The brief states that the legal issues involving application of Title VII are in fact straightforward, and that the “failure of the court below to enforce Title VII enmeshed it in a dispute over the scientific validity of a discriminatory policy . . . the inevitable result of establishing workplace health rules as an
accidental by-product of discrimination litigation would be to undermine the work of health and safety officials charged with assessing and regulating workplace hazards” (7–8).

In addition to arguing that Title VII was not the vehicle to fashion sound policy around reproductive health hazards, the APHA brief further contended that the solution proffered by the lower courts would seriously threaten public health. Citing OSHA’s lead standard, the brief notes that Johnson Controls’ stated position in the present case mirrors that taken by the Lead Industries Association in opposing the lead standard in the 1970s, a position rejected by OSHA.

APHA’s final argument concerned risk assessment and risk management of workplace hazards, and the effects of such assessment on occupational health policy. The brief expressed concern that ad hoc case law would create poor and inconsistent policy, citing the divergence of the state of California in its case against Johnson Controls from the federal courts of appeal. The brief concludes that the judicial process is ill-suited to the creation of policy of this sort, that it should be left to elected representatives to balance the competing interests and to technical regulatory experts to fashion appropriate specific policies and regulations.

There was a great deal of strategic partnering on this brief—as with the ACLU and ERA briefs, the composition of the authoring coalition was an important part of the message. APHA included Dr. Eula Bingham as a party, who had been head of OSHA when the lead standard was adopted. Bingham explicitly worked to have nondiscrimination language included in that standard, and generally had taken a strong stance in opposition to fetal protection policies during her tenure at OSHA, including a letter to Fortune 500 companies. Her statement of interest in the APHA brief notes that “[Dr. Bingham] was the Assistant Secretary of Labor for OSHA from 1977 through January, 1981, during which time OSHA’s lead standard was promulgated. Thus, she was the government official responsible for reviewing and evaluating the submissions regarding OSHA’s lead standard.” Carin Clauss was Solicitor of Labor at that time and assisted in the development of the OSHA lead standard. She then went on to the University of Wisconsin–Madison, where she led the appellate-level litigation against Johnson Controls for the UAW (see chapter 3).

The APHA brief also provided a forum through which some of the occupational health experts cited by Johnson Controls in support of its position could contest what they viewed as misguided use of their research. The company had used a 1987 study published in the New England Journal of Medicine by Dr. Herbert L. Needleman and Dr. David Bellinger—a study
that linked maternal blood lead levels and physical and neuropsychological development in children—to bolster the validity of its fetal protection policy. Even in that study, however, the authors had stated that they had not studied paternal exposure and “thus cannot rule this out as a contributing factor.” The authors published a follow-up commentary in 1988 to protest the misuse of their work by Johnson Controls in the earlier phases of its litigation, and both appear as co-signatories to the APHA brief.

In the late 1980s, the Massachusetts Department of Health conducted a study of employers in the state, in part to determine what policies were in place relating to reproductive hazards. The study found that a significant number of manufacturers had some form of exclusionary policy in effect. The Massachusetts Department of Health was one of the parties that joined the APHA brief. On the study of Massachusetts industry, Department of Health staff worked with private sector researchers, including Dr. Maureen Paul, who has published extensively in the area of reproductive hazards. Her 1993 book contains a chapter by Joan Bertin, as well as a chapter by Dr. Bellinger. A 1994 text by Needleman and Bellinger also contains a chapter by Bertin. There is thus a network of public health professionals who have continued to work closely together on these issues, a network that contains Bertin, a vital link to the civil rights side of the antifetal protection policy alliance.

Several of the other signatories of the APHA brief had also published on the issue in the past. In a 1983 law review article, one of APHA’s signatories, Nicholas Ashford, Ph.D., had written that, as workers become more aware of the reproductive risks that they face on the job, “they will begin to focus on legal mechanisms for reducing reproductive hazards in the workplace” (abstract). Ashford and his co-author go on to explore the use of compensatory remedies, worker protection laws, and antidiscrimination law to push employers to provide safer workplaces. Donald R. Mattison, M.D., had a chapter in the same 1993 Paul text cited above, and Marvin Legator, M.D., had published a book on the subject in 1984. Jeanne Stellman, Ph.D., had written on some of the policy aspects of fetal protection policies (see literature review in chapter 1).

While the APHA split from the ACLU to develop the public health arguments against employer fetal protection policies, there were several other briefs that also explored public health angles, in a sense further dividing up these issues and providing even greater depth and expertise. Two of these briefs took population-based and epidemiological approaches to demonstrate the impact of these policies, while a third focused specifically on the science of toxicity assessment.
The Commonwealth of Massachusetts, along with a large number of other states and territories, filed a separate amicus brief in *Johnson Controls* in support of the plaintiff employees. In many respects, this brief is atypical as compared with many of the others in this case (with the exception of California and the U.S./EEOC), as Massachusetts and the other states are not interest groups in the traditional sense. As is demonstrated by the content of the brief, however, these states nonetheless had a substantial stake in the outcome. Massachusetts had in fact already demonstrated a special interest in the issue through its study of employer practices referenced above.

Massachusetts’ brief combined straightforward legal reasoning with health arguments akin to those of the APHA, as well as pragmatic concerns of a state charged with safeguarding public health. While APHA expresses the concerns of public health professionals, as a state, Massachusetts is responsible for the health of its population and the financial implications of threats to public health. The state argued that not only could the challenged fetal protection policy not meet the BFOQ test, it also could not be justified on public health grounds, as it undermined both Title VII’s goal of equal economic opportunity and the goals of workplace health and safety.

The brief gave the most emphasis to the adverse public health effects of the types of employer practices at issue in this case. The state outlined economic problems associated with gender discrimination in employment, including the continuing wage gap and poverty of female-headed households and how lack of health insurance exacerbates poverty problems. It went on to note that exclusion of women from jobs with good benefits has negative long-term effects on public health, and especially on children. And, the brief argued, the state is faced with significant costs of resulting occupational illness, including lost tax revenue and welfare costs. Thus, while the brief grounds its opposition to fetal protection policies safely in a straightforward legal interpretation, it clearly is intended to perform just the type of function that is considered typical and even critical of amici—informing the Court of the broader implications of the issues in the case.

The brief asserted that the Pregnancy Discrimination Act makes it clear that only the ability to work is relevant in assessing whether a challenged policy qualifies as a BFOQ, and that women must not be treated as if they are always potentially pregnant. In addition, the brief cast doubts on the company’s claimed fears of tort liability, pointing out that Johnson Con-
trols had presented no evidence of litigation or a threat thereof related to lead exposure. It was also noted that the pattern of fetal protection policy implementation raises doubts about their true motivation, as they are only found in traditionally male-dominated occupations where women have only recently begun to attain employment (often in the face of employer resistance).

*UAW v. Johnson Controls* also inspired the involvement of the pioneer civil rights litigating organization, the NAACP Legal Defense and Education Fund (LDF). Best known for challenging racially discriminatory policies in court, the Fund also participates in litigation that may not on its face seem to be about race, in order to present the impact of a particular case on people of color. The LDF was also involved in drafting the 1964 Civil Rights Act that included Title VII, and has been active in major subsequent cases interpreting it. In its 1994 Annual Report, the LDF listed *Phillips v. Martin Marietta,* the first Title VII gender discrimination case, among its historical victories.

Marianne Lado, an attorney with the LDF who authored the *Johnson Controls* brief, explained how the case came to be on the Fund’s docket. The LDF functions as a law firm and is not a membership organization, and so it generally becomes involved in cases through outside requests. Individuals or groups, such as the National Black Women’s Health Project (its partner on this brief), will request the LDF’s involvement in cases deemed relevant to its mission. The Fund often works in coalitions in its litigation efforts. For some time, a segment of the NAACP’s constituency had been pressuring the LDF to become involved in the abortion cases, which at first the organization perceived to be outside its area of concern. *UAW v. Johnson Controls,* says Lado, served as a “bridge case into the reproductive rights area,” as it involved both discrimination and reproductive rights, and the Fund came to see this set of issues as “squarely within its area of expertise.” Finally, the Fund would be able to get involved in abortion cases on behalf of the women who had been asking because it could build on its experience in this fetal protection policy case. Because, for poor African American women, reproductive health is not merely access to abortion but the entire range of reproductive care, and, as outlined below, there is extensive data indicating that black women are at greater risk from workplace reproductive hazards. Since its involvement in *Johnson Controls,* according to Lado, the LDF now has “a whole docket of reproductive health cases.”

The LDF’s brief in *Johnson Controls* began as did many others with statements regarding the facially discriminatory aspects of Johnson Controls’ policy and why it therefore needed to be judged according to the disparate treatment–BFOQ framework. The brief did, however, add a novel
argument not put forth by any of the other parties, one that clearly demonstrates the utility of interest groups participating to articulate the needs of a group that might otherwise be overlooked, even by sympathetic allies. The LDF observed that the BFOQ was not available as a justification for racial discrimination, as it is for sex. Allowing the business necessity defense to be used to evaluate fetal protection policies, the brief asserted, would in effect allow a defense for racial discrimination that did not previously exist, as it would open the door to treating facially discriminatory practices as a less serious infraction.

The majority of the brief, however, was devoted to demonstrating that African American workers are disproportionately affected by unhealthy workplaces because of their concentration in dirty jobs, and particularly in jobs with high female concentration. Additionally, the document argued, excluding all potentially pregnant women from these better-paying jobs, where fetal protection policies have been found, places African-American women at greater risk of poverty and poor health. This was illustrated by noting that the earnings of these women are vital in supporting their families, and that most low-wage jobs lack employer-provided health coverage.

Lado explained that the brief had two basic parts: the legal portion and the extralegal policy portion. The legal theory was straightforward, and LDF was making no new legal claims but rather supporting the arguments being made by the women’s groups. But the LDF strove to go beyond that to demonstrate to the Court the impact of these employer policies on poor women of color—this was the primary emphasis of the brief. The LDF’s brief here reads much like a modern-day Brandeis brief, as it is rife with empirical and epidemiological data on the prevalence of toxic working conditions and health problems of African Americans, particularly women, as well as evidence of reproductive risks to men from toxic exposure. As stated by Lado, the Fund was clearly “appeal[ing] to the Court as a major policymaker.” The brief also cited several pertinent public policies, including the PDA, the recent decision of the California court of appeals, and the EEOC’s updated guidance, which stated that the BFOQ was the correct defense for fetal protection policies. Like the New York City Bar Association brief, Lado’s brief also referenced an article by Bertin, indicating at least a level of awareness if not direct connection between amicus parties. This brief therefore expanded on the public health emphasis of the APHA brief, providing support to the public health arguments and expanding on the impact of those issues on a particular segment of the population.

The final public health-oriented brief came from the Natural Resources Defense Council (NRDC), another organization that was on the ACLU’s
brief supporting certiorari and then branched off to more fully develop its own specific arguments. The sole purpose of the NRDC brief was to argue for the validity of animal studies, which formed the basis for what scant research existed at the time on reproductive risks to men from toxic exposure (a cornerstone of the argument on the plaintiff’s side that excluding only women from reproductive hazards is only a partial solution to the problem). Thomas McGarity of the University of Texas Law School wrote NRDC’s brief at the request of Al Meyerhoff in the organization’s San Francisco office. McGarity explained that filing the brief was a “defensive move,” as NRDC was quite concerned over the Seventh Circuit’s “frightening language” denigrating animal studies. At that time, there was little Supreme Court language on animal studies in the public law context, and the NRDC was afraid of the Seventh Circuit’s view becoming national precedent. McGarity conceded that, while the organization was sympathetic to the plaintiffs, protecting animal data validity was its primary concern. This brief thus presents the clearest example in this litigation effort of an amicus party using an existing case to advance its agenda, even when the issue on which it is advocating is not central to the parties to the case. The stance taken was, however, also philosophically consistent with the NRDC’s overall political agenda.

NRDC’s brief made two arguments. The first was that an established body of scientific opinion supports the use of laboratory animal studies in assessing the reproductive toxicity of chemicals. The brief asserted that judges lack the requisite expertise in toxicology to be drawing conclusions about the worthiness of scientific data. The second main argument was that courts and administrative agencies have consistently relied upon such animal studies in assessing the risks of chemicals to humans. NRDC noted that the 1990 revised EEOC policy guidance said that its investigators should not reject animal studies. According to McGarity, the brief was deliberately narrowly focused on the animal studies issue, and was designed to “flag” the issue for the justices. So, again, a brief was filed that backed up the public health side of the UAW’s amicus coalition but provided depth on one particular aspect of that side’s position.

**THE FEDERAL GOVERNMENT WEIGHS IN**

Although three of the ten briefs supporting the UAW were filed by governments (California, Massachusetts, and the United States with the EEOC), the EEOC’s clearly stands as unique among the amicus briefs supporting the UAW, as it was filed by the federal agency charged with enforcing the law in question (Title VII as amended by the PDA), and its policy guidances on the
issue were directly implicated in the legal dispute. Its interest in the outcome is thus quite evident. According to Charles Shanor, then General Counsel with the EEOC, the Commission will file amicus briefs (on the merits only, seldom at the cert stage) if a case involves EEOC policy or a law it is charged with enforcing. Shanor stated that “the Commission feels it ought to speak on the issues in which it is involved.”

The EEOC had a somewhat checkered history with the reproductive hazards issue going into this Supreme Court litigation, dating back to the late 1960s (see discussion in chapter 2). The Commission’s first chairman was publicly dismissive of the sex discrimination portion of its mission, and throughout its history the EEOC has not taken definitive stances on sex discrimination issues or had significant enforcement muscle to support its policy statements. Its 1971 pregnancy guidelines were disregarded by the Supreme Court in *Gilbert*, and its attempt to regulate employer practices around reproductive hazards in 1980 foundered. When litigation emerged and progressed in the early 1980s, the EEOC tended to follow the courts when crafting its own policies, rather than the reverse.

It was not until just before the certiorari petition in *UAW v. Johnson Controls* was filed at the Supreme Court that the EEOC came out in opposition to the Seventh Circuit’s ruling on fetal protection policies in the form of new policy guidance. There was speculation on the part of the AFL-CIO’s Marsha Berzon regarding the politics of the timing of that revised policy guidance. She thought it far too coincidental that the new guidelines were released just two days before the petition for certiorari in *Johnson Controls* had to be filed, and believed that it was timed deliberately to influence the Court’s decision to take up the case. She noted that, as the government generally does not file amicus briefs on certiorari petitions (this observation was echoed by Shanor), this was an alternative means of conveying the agency’s opinion to the Court. Berzon opined that if the Court had requested an opinion from the solicitor general (as it will do in cases involving an interest of the federal government), that amicus brief would have said essentially what was in the new guidelines, but that it “would have become a much bigger political mess. I don’t know who generated it and why, but find it hard to believe it was an accident—somebody there decided to get this out so it could be used.” The UAW cited the EEOC’s new guidance in a footnote (p. 19) and included the policy “for the Court’s convenience” as an appendix.

Shanor confirmed that the EEOC had generally pursued a course of following the lead of the federal courts in crafting its policy guidance on fetal protection policies. The EEOC was “simply restating the judicial position, solidifying it, providing a national sweep to that view.” The Commission
had thus adopted the more lenient business necessity framework as the proper defense in its 1988 guidance. But, when the controversial decision in *Wards Cove Packing v. Atonio* significantly broadened that defense by crafting a burden of proof scheme heavily favoring defendants, the EEOC was “left in an awkward position with a policy it didn’t really want” with regard to these employer practices. This, combined with the Seventh Circuit’s opinion in *Johnson Controls*, provided the internal impetus for the EEOC to revise its policy in January 1990.

The arguments presented by the EEOC in its brief take on special significance as they have the status of a policy statement from the enforcement agency for Title VII. The importance of the EEOC’s opinion on how to evaluate Johnson Controls’ policy is evident, as Johnson Controls itself and several of its amici cited the EEOC’s brief in their own briefs (only those on the respondent side would have been able to do so, as their briefs were filed after all of the amicus briefs on the UAW side were filed).

The U.S./EEOC brief stated that Johnson Controls’ fetal protection policy constituted facial sex discrimination and that the only available defense to a sex-based, facially discriminatory employment policy is the statutory BFOQ defense. This much nearly all of the parties, litigant and amicus, conceded. The brief went on, however, to assert that it is possible for a sex-based fetal protection policy to meet the BFOQ test, as nothing in the language or scope of the BFOQ provision precludes its use to defend such a policy. The EEOC also said that the BFOQ was not limited to mere ability to adequately perform the job but that it included safety concerns for third parties, including fetuses. Additionally, the brief stated that there was no existing determination that either federal or state law immunizes employers for injury to fetuses caused by workplace conditions, or that state tort liability would be preempted by Title VII compliance.

These statements were seized upon by the company and several of its amici to support their position that the challenged policy did indeed meet the BFOQ provision. The EEOC brief, however, qualified the concession regarding the possibility of meeting the BFOQ standard by noting that the employer “bears a rigorous burden” in justifying its use of a sex-based policy, and went on to state that the court of appeals below had in fact misapplied the BFOQ defense. The lower court’s “most glaring error,” the EEOC brief commented—an error significant enough to warrant reversal—was its failure to consider reproductive harm mediated through men. The Commission urged adherence to OSHA’s gender-neutral lead standard.

Shanor explained that the EEOC can participate in litigation independently at all levels except the U.S. Supreme Court, at which point it must act through the office of the solicitor general. The participation of the
solicitor general (SG) in this case merits specific attention, as the SG possesses unique status as a litigator before the Supreme Court, representing the position of the current presidential administration. As described by Salokar (1992, 1995), the solicitor general occupies a multifaceted position at the nexus of law and politics, functioning as an advisor to the Supreme Court while advocating for the administration that the office serves. Caplan (1987) argued that under Ronald Reagan the office of the solicitor general became politicized as never before, an assertion challenged by Salokar and others who noted that the office has always been political in nature. “That the solicitor general professionally presents the government’s case and adeptly employs the norms of precedent and legal reasoning, should not be taken to minimize the office’s role as an advocate who wants to prevail on the merits for a client (namely, the executive branch and its interests)” (Salokar 1995, 60).

Salokar goes on to observe that “the solicitor general can be a valuable operative for an administration seeking policy change through the courts” (Salokar 1995, 61). Thus the United States, in a sense, behaves in a manner similar to the private interest groups that bring suit or file briefs. Like interest groups, the SG participates both as direct party and as amicus curiae before the Court. Amicus submissions are filed at the discretion of the SG, but often the Supreme Court invites such briefs, as do other outside parties such as interest groups or members of Congress. The SG enjoys considerable success before the Court in both direct party and amicus capacity. Salokar found that in the Supreme Court terms from 1959 through 1986, the government’s position was upheld in nearly 72 percent of the cases in which it filed as amicus. The success rate was higher when the SG supported the petitioner in a case (78 percent) than when it backed the respondent (58 percent).

O’Connor (1983) determined that the government’s amicus activity was indeed influenced by the political preferences of the sitting administration. This is borne out by the tack taken in the U.S./EEOC brief filed in Johnson Controls. Although filed in support of the petitioners, the Republican Bush administration brief was far less strident in its condemnation of the employer’s policy, and clearly allowed for the possibility of similar policies, differently tailored, passing Title VII muster.

CONCLUSION

The amicus effort on the UAW side of this litigation was a highly integrated campaign. Marsha Berzon, the UAW’s Supreme Court litigator, described asking the NRDC to file the brief on the animal testing issue, having meet-
ings and conversations with the authors of the APHA and TLPJ briefs, extensive work with Joan Bertin of the ACLU, the importance of the Massachusetts brief, and holding a press conference following the ruling that was organized by Nancy Davis of Equal Rights Advocates. Clearly, part of Berzon’s strength as a Supreme Court litigator was not only in effectively presenting legal arguments to the Court but also in working to ensure that a reputable cast of supporting players was assembled. But when it came right down to it, said Berzon, “without the ACLU Women’s Rights Project and the AFL-CIO’s Supreme Court litigation project it would have been damn hard to do this.” The institutional knowledge developed by Bertin, combined with the Supreme Court expertise of Berzon, presented a formidable challenge to employer fetal protection policies. While many attorneys interviewed for this study (particularly those on the side of Johnson Controls) made observations concerning the value of filing amicus briefs at the certiorari stage, seemingly supporting Caldeira and Wright’s (1988) conclusion that such briefs can affect the Supreme Court docket, there was only one brief filed supporting cert in this case. That brief, however, represented years of experience in prior litigation and policy work around fetal protection policies, and on it the ACLU was joined by forty organizations and fourteen scientific and public health experts. A brief with that many parties urging the Supreme Court to take up a case quite strongly assumes the appearance of a lobbying campaign, which in effect it was, continuing through the merits stage of the litigation.

One of the most striking revelations of the foregoing examination is the degree of shared goals and cooperation between the labor and women’s rights communities. In the previous chapter, the emerging ties were shown at the founding of the Coalition of Labor Union Women (CLUW), ties that strengthened through the remainder of the 1970s, as the two sectors worked together on comparable worth, in the Campaign to End Discrimination Against Pregnant Workers (CEDAPW) for the Pregnancy Discrimination Act, in the Coalition for the Reproductive Rights of Workers (CRROW) for the failed EEOC reproductive hazard guidelines, and in the early 1980s in litigation around fetal protection policies.

What the table in chapter 2 indicated that was illustrated more fully in this chapter is the extent of prior experience the amici in this case brought to the effort. Several of the most active organizations—the ACLU, the Women’s Legal Defense Fund, Equal Rights Advocates—were not only veterans of previous policy battles related to women’s equal employment opportunity, they were accustomed to working with each other. This facilitated a high degree of coordination and cooperation among these key players. Other groups, while not necessarily veterans of this same de facto
coalition, were nonetheless experienced in working on many of the component issues in the case. Thus the NAACP’s expertise in illustrating the adverse impact of discrimination on African Americans, and Trial Lawyers for Public Justice’s experience in taking on issues of tort liability provided additional dimensions to the litigation effort. Whether working in concert or individually, these well-organized interest groups, as outlined in the first chapter, continued to press their agendas through litigation when important issues surfaced in this case.

Johnson Controls had its own amici, of course, some of whom also had extensive histories in this area. Their efforts are examined in the following chapter.