INTEREST OF *AMICI CURIAE*[1]

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before this Court, singly or jointly with other *amici*. Some recent cases include *Pollard v. E. I. du Pont de Nemours & Co.*, 121 S.Ct. 1946 (2001); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); and *Kolstad v. American Dental Association,* 527 U.S. 526 (1999).

AARP is a nonprofit membership organization of more than 34 million persons, age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older Americans. In 1993 the Family and Medical Leave Act (FMLA) was enacted with strong support from AARP because of the horror stories of AARP members who lost their jobs either when they became ill themselves or when they cared for their ill spouse, children, or parents. Many AARP members are in that "sandwich" period of their lives where the responsibility for rearing their own child while caring for parents, grandparents and other members of their extended family falls on their shoulders. AARP, "IN THE MIDDLE: A REPORT ON MULTICULTURAL BOOMERS COPING WITH FAMILY AND AGING ISSUES."

Equal Rights Advocates ("ERA") is a San Francisco-based human and civil rights organization dedicated to securing legal and economic equality for women through litigation. Since its inception in 1974, ERA has focused much of its effort on ensuring family-friendly workplaces, representing plaintiffs in two of the first pregnancy discrimination cases heard by the Supreme Court, *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977). More recently, ERA has advised and represented individual women on the application and interpretation of the Family and Medical Leave Act.

The Legal Aid Society - Employment Law Center ("The LAS-ELC") is a non-profit public interest law firm that focuses exclusively on employment-related issues affecting the working poor throughout the nation. The LAS-ELC litigates enforcement actions under the FMLA to protect the rights of low-income, working women and men to take family/medical leave. For example, The LAS-ELC successfully litigated *Mora v. Chem-tronics, Inc.*, 16 F. Supp.2d 1192 (S.D. Cal. 1998) which decided a myriad of issues of first impression in the Ninth and other Circuits, including what constitutes adequate notice by both the employer and employee when the employee requests FMLA leave. The LAS-ELC continues its efforts to promote and to protect workplaces that allow employees to balance the demands of work and family.

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[1]Copies of the parties' consent to the filing of this brief have been filed with the Clerk of the Court. No part of the attached brief has been authored by counsel for either party or any other entity. In accordance with Supreme Court Rule 37.6, *amici* state that no persons other than the *amici curiae*, its members or its counsel made a monetary contribution to the preparation and submission of this brief, other than the counsel for Petitioner, Luther O. Sutter, who has been a member of NELA and as such has paid general membership dues.

The National Depressive and Manic-Depressive Association is a nonprofit organization, based in Chicago, which is dedicated to more than20 million adults with depression, 2.5 million adults with manic depression -- also known as bipolar disorder -- and their families. Its mission includes improving access to care. The FMLA plays an important role in that regard by protecting the jobs of patients and families during periods of illness.

The National Women's Law Center ("Center") is a nonprofit legal advocacy organization dedicated since 1972 to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. The Center focuses on major policy areas of importance to women and their families, including employment, education, family economic security, reproductive rights and health — with special attention to the needs of low-income women. Fair and adequate family and medical leave policies and programs, which allow women to balance their work and family responsibilities, are central to the Center's goals.

The interest of *amici* in this case is to protect the rights of the clients of NELA members, ERA and The LAS-ELC and to promote the mission of each *Amici*, by ensuring that the FMLA's goal of providing protected designated leaves of absence is fully realized. This cannot happen when the FMLA is interpreted in a way which makes it more difficult for employees to understand their rights under the Act. *Amici* submit this brief because of the importance of the issues at bar to furthering their goals.

INTRODUCTION

The Secretary of Labor's notice regulations fill gaps in the statutory scheme of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq. These regulations reasonably prescribe what information employers must provide to employees and when and how they must provide it.

This brief presents a detailed application of *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the regulations in question. When *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 938 (8th Cir. 2000), *cert. granted,* (June 25, 2001) invalidated the notice regulations, the Eighth Circuit failed to consider whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 841. The court of appeals below failed to recognize that there are gaps in the statute because the FMLA itself is silent as to the specifics of the "notice an employer must give to an employee before designating his paid leave as FMLA leave." *Plant v. Morton International, Inc.*, 212 F.3d 929, 935 (6th Cir. 2000), *rehearing and suggestion for rehearing en banc denied* (July 25, 2000). Consequently, *Ragsdale* fails to give the requisite deference to the notice regulations in question.

SUMMARY OF ARGUMENT

Congress enacted the FMLA to provide eligible individuals with assurance that an employee's job, or an equivalent one, would be waiting upon his or her return to work. *Price v. City of Fort Wayne*, 117 F.3d 1022, 1023 (7th Cir. 1997).

Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 841 (1984), states that when "Congress has directly spoken to the precise question at issue" and the "intent of Congress is clear" then the agency's regulations must be set aside. However, if the agency's

view "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design," a court must defer to the agency's judgment. *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995).

In the instant matter, the Eighth Circuit erroneously concluded that Congress unambiguously expressed its intent with respect to notice issues and the FMLA. *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 938-39 (8th Cir. 2000), *citing* 29 U.S.C. §2612(e)(1). Consequently, the court of appeals failed to give "controlling weight" to the agency's judgment. 513 U.S. at 257.

The court of appeals disregards the fact that there are gaps in the FMLA. "The FMLA does not specify when the 12-weeks of FMLA leave begin or how FMLA leave is initiated. The FMLA provides that an employer or an employee may substitute paid leave for unpaid leave, but it does not specify how or when an employer or employee must inform the other that paid leave will be substituted for unpaid leave." *Chan v. Loyola University Medical Center*, 6 Wage & Hour Cas.2d (BNA) 328, 1999 WL 1080372, slip op. at 7 (N.D. Ill. Nov. 23, 1999) (Gottschall, D.J.); *Plant v. Morton International, Inc.*, 212 F.3d 929, 935 (6th Cir. 2000).

The notice regulations are a reasonable interpretation of the FMLA and promote its purposes. They are not intended to be a penalty or an entitlement by which employees can obtain leaves longer than 12 weeks. *Contra McGregor v. Autozone*, 180 F.3d 1305, 1308 (11th Cir.1999); *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 939 (8th Cir. 2000). The notice regulations reflect a "reasonable accommodation of conflicting policies" and deserve to be upheld. *Chan v. Loyola University Medical Center*, 6 Wage & Hour Cas.2d (BNA) 328, 1999 WL 1080372, slip op. at 10 (N.D. Ill. Nov. 23, 1999), *quoting Chevron*, 467 US. at 843-44.

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CONCLUSION

For the foregoing reasons, *Amici* respectfully urge that the judgment below be reversed and the case remanded with the direction that the Secretary of Labor's FMLA notice regulations are valid and must be applied by the District Court.

Respectfully submitted,

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