THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Appellant, v. MARYLAND COMMISSION ON HUMAN RELATIONS, Appellee.	)	IN THE CIRCUIT COURT FOR BALTIMORE CITY Case No. 90144065/ CL114163

MEMORANDUM OF AMICI CURIAE NOW LEGAL DEFENSE AND EDUCATION FUND, THE NATIONAL ORGANIZATION FOR WOMEN, MARYLAND CHAPTER, THE NATIONAL ORGANIZATION FOR WOMEN, BALTIMORE CHAPTER, THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, MARYLAND DIVISION AND THE WOMEN'S LAW CENTER

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THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Appellant, -against- MARYLAND COMMISSION ON HUMAN RELATIONS, Appellee.	IN THE CIRCUIT COURT FOR BALTIMORE CITY Case No. 90144/065 CL114163

MEMORANDUM OF AMICI CURIAE NOW LEGAL DEFENSE AND EDUCATION FUND, THE NATIONAL ORGANIZATION FOR WOMEN, MARYLAND CHAPTER, THE NATIONAL ORGANIZATION FOR WOMEN, BALTIMORE CHAPTER, THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, MARYLAND DIVISION AND THE WOMEN'S LAW CENTER

Preliminary Statement

The NOW Legal Defense and Education Fund ("NOW LDEF"), the National Organization for Women, Maryland Chapter ("Maryland NOW"), the National Organization for Women, Baltimore Chapter ("Baltimore NOW"), the American Association of University Women, Maryland Division ("Maryland AAUW") and the Women's Law Center, Inc. (the "Women's Law Center") (collectively, the "Amici"), by their attorneys NOW LDEF and Laurence Eisenstein of Covington & Burling, respectfully submit this amici curiae memorandum in support of Appellee, the Maryland Commission on Human Relations ("MCHR"), pursuant to the Order of this Court dated November 21, 1990, granting Amici leave to intervene for the purpose of participating as amici curiae in this case.

INTERESTS OF AMICI

As set out more fully below, each of the Amici is a public interest group with a significant interest in the outcome of the controversy now before this Court. Each of the Amici have worked to combat sex discrimination in insurance and have amassed significant expertise about the nature of sex-based insurance ratemaking. Amici oppose gender-based insurance ratemaking both because it violates the right of women and men to be treated as individuals rather than as members of a group and because gender-based insurance hurts women economically.

(a) NOW LDEF

The NOW Legal Defense and Education Fund was founded in 1970 by leaders of the National Organization for Women as a non-profit civil rights organization to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. During NOW LDEF's twenty year history, challenging sex discrimination in insurance provision and rate-setting has been a major focus of work, particularly since 1983 when NOW LDEF established an Insurance Project. Over the years, NOW LDEF has filed a number of suits challenging insurance discrimination, using a variety of different legal theories and has developed extensive expertise on the working of the insurance industry and the negative effects of its discriminatory practices. NOW LDEF has also been involved in successful legislative campaigns in Massachusetts and Montana to bar sex discrimination in insurance.

NOW LDEF has particular expertise concerning the Maryland Equal Rights Amendment. NOW LDEF, together with Philadelphia, Pennsylvania-based Women's Law Project, operated an "ERA Impact Project" from 1979 to 1984. This project tracked decisions under state equal rights amendments in all sixteen of the states with ERAs, including Maryland, and produced analyses of their effects. This work led to NOW LDEF's involvement as amicus curiae in a series of suits in Pennsylvania which established the unconstitutionality of sex-based insurance ratemaking under that state's ERA.

(b) Maryland NOW

The Maryland National Organization for Women is a multi-issue, statewide political action organization which campaigns for women's economic, social and political rights. Representing 8000 members in 15 chapters, Maryland NOW has consistently worked to combat gender discrimination in insurance on both the state and federal level. Maryland NOW has supported proposed legislation in Maryland that would prohibit sex-segregated insurance ratemaking and other insurance practices that discriminate against women. In addition, Maryland NOW was active in efforts that led to the enactment of the Maryland ERA in 1972.

(c) Baltimore NOW

The Baltimore National Organization for Women is a membership organization of approximately 500 members, founded in 1972. Baltimore NOW's purpose is to take action to bring women

into full participation in the mainstream of American society, including freedom from discrimination because of age, marital status, sexual preference and parenthood. Toward that end, Baltimore NOW has long supported the abolition of sex discrimination in insurance ratemaking and has worked actively for gender-neutral insurance ratemaking through lobbying and public education. In 1983-84, for example, Baltimore NOW conducted a public education campaign, including distribution of literature and participation in a televised debate, in support of proposed state and federal legislation to prohibit gender discrimination in insurance. Since that time, Baltimore NOW has continued to actively support abolition of insurance practices such as those at issue in this case.

(d) Maryland AAUW

Maryland AAUW is a membership organization of approximately 1800 members. Founded more than fifty years ago, Maryland AAUW's goal is to promote equity for women and girls. Maryland AAUW has had a long history of working against discriminatory insurance practices on the federal and state level. During the 1984 legislative session, Maryland AAUW testified before the Maryland legislature in support of HB 1155, which prohibited the use of sex-based actuary tables as justification for differential treatment of males and females with respect to insurance. This bill was sponsored an AAUW member. A comparable bill introduced on the federal level was also actively supported by Maryland AAUW.

During the same legislative session, HB 30 was introduced which purported to transfer jurisdiction over claims of sex discrimination in insurance from the MCHR to the Maryland Insurance Commission. Maryland AAUW testified against this bill. These two bills -- HB 1155 and HB 30 -- directly relate to the instant case. Thus, Maryland AAUW has significant expertise on the issues currently before this Court.

(e) Women's Law Center

The Women's Law Center, Inc. is an advocacy organization whose membership consists of attorneys and judges in the State of Maryland. In existence since 1971, the goal of the Women's Law Center is to promote the legal rights of women through litigation, legislative efforts and education.

The Women's Law Center has been actively involved in enforcement of Maryland's ERA. For example, the Center appeared before the Court of Appeals as an amicus in State v. Burning Tree Club, Inc., an important case concerning the scope of the ERA which directly bears on the issues before this Court.

Over the years, the Women's Law Center has also worked to eliminate gender-based ratemaking by the insurance industry and has been actively involved in promoting legislation in this area. For example, during the 1983 session of the Maryland General Assembly, the Women's Law Center began meeting regularly with a coalition of women's organizations to monitor legislation to abolish gender differentiations in insurance.

The following year, insurance discrimination was chosen as a

priority issue by the Women's Law Center. Work for the pending non-gender insurance bill included lobbying and providing technical assistance to the bill's sponsor.

The work of the Women's Law Center Legislation Committee during the 1985 Legislative Session focused on sex discrimination in insurance, and testimony was submitted in favor of a bill eliminating the discrimination. A coalition of women's groups targeted insurance discrimination for the next session, and the Women's Law Center actively contributed to the coalition's efforts. In 1986, the Women's Law Center asked the Governor to veto an amendment to the Insurance Code which purported to limit the MCHR's jurisdiction over sex discrimination in insurance.

The Women's Law Center anticipates that it will continue to be active in the area of discriminatory rate setting by the insurance industry. The Women's Law Center believes the issues of discrimination raised in this case are critical to the legal rights of women.

STATEMENT OF FACTS

The procedural history of this matter is fully set out in the Appellee's Answer to Equitable's Memorandum of Law dated November 7, 1990 and will not be repeated in full here.

In brief, the matter before this Court concerns a challenge to the insurance ratemaking practices of the Equitable Life Assurance Society of the United States ("Equitable"). The proceeding was initiated by the MCHR under Maryland's Public Accommodations Law. Md. Ann. Code art. 49B, § 8 (1986). Among Equitable's practices at issue are its (1) reliance on sex-segregated rate tables in setting insurance premiums for life and disability insurance; (2) use of an income "floor" of $16,500 for disability income insurance that disparately affects non-whites and women; (3) use of occupational classifications in setting premiums for disability insurance that disparately affect non-whites and women; (4) failure to issue disability income insurance for normal pregnancy and delivery.[1]

In 1986, a Hearing Examiner issued a Provisional Opinion and Order in which she concluded that Equitable's practices outlined above constituted unlawful discrimination in violation of Article

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[1] In its Memorandum of September 24, 1990, Equitable stated that "[t]his issue is now moot because Equitable now treats disability from pregnancy like any other disability." Respondent's Memorandum of Law, dated Sept. 24, 1990 ("Equitable Mem.") at 4. Based upon this representation, Amici will not address the issue in this Memorandum. However, in the event that upon further briefing or argument it becomes apparent that this issue is not moot, Amici respectfully request that they be allowed to file a supplemental memorandum addressing Equitable's policy concerning disability insurance for pregnancy and delivery.

49B, § 8 of the Maryland Code. The Hearing Examiner also noted the MCHR's argument that the construction of the Insurance Code urged by Equitable would violate the Maryland Equal Rights Amendment, but declined to decide that issue in light of her decision that Equitable's practices were barred under the Public Accommodations Law. Equitable appealed the Proposed Order to the Appeal Board of the MCHR. The Appeal Board affirmed the Hearing Examiner's Order on May 9, 1990. In particular, the Appeal Board determined that the use of sex segregated ratemaking tables constituted discriminatory disparate treatment of women and that Equitable's work classifications, minimum income levels and pregnancy exclusion have a discriminatory, disparate impact on women and non-whites.

Equitable appealed the Appeal Board's ruling to this Court in accordance with the provisions of the Maryland Administrative Procedure Act. Md. State Gov't Code Ann. § 10-215(a) (1984 & Supp. 1990). In this appeal, Equitable alleges, inter alia, that the Insurance Commissioner has exclusive jurisdiction under Article 48A, § 25(4) of the Insurance Code over MCHR's allegations against Equitable of sex discrimination in insurance ratemaking. Equitable also argues that, even if jurisdiction was properly exercised by the MCHR, the Maryland Insurance Code rather than the Public Accommodations Law establishes the standard to be followed in determining if Equitable's practices are discriminatory and that under the Insurance Code, discriminatory insurance practices are permissible if they are

actuarially justified. See Md. Ins. Code art. 48A, §§ 223(a), (b), 234A(b). Finally, Equitable asserts that, applying the standards of either Article 48A or Article 49B, there is insufficient evidence to support the Appeal Board's conclusion that Equitable's ratemaking practices are discriminatory.[2]

ARGUMENT

POINT I

THE CONSTRUCTION OF THE INSURANCE CODE URGED BY EQUITABLE WOULD RENDER THE CODE UNCONSTITUTIONAL UNDER THE MARYLAND EQUAL RIGHTS AMENDMENT

The Maryland Equal Rights Amendment, one of the earliest and strongest state ERAs in the nation,[3] provides in its entirety that "[e]quality of rights under the law shall not be abridged or denied because of sex." Md. Const. Decl. of Rts. art. 46. According to the primary sponsor of the bill, the Maryland ERA was "designed to reform the market to end gender bias" in Maryland.[4]

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[2] Equitable also argues that the MCHR's complaint was defective and that a substitute hearing examiner was improperly utilized. With respect to these arguments, Amici join the Commission's Answer to Equitable's Memorandum of Law, dated Nov. 7, 1990 ("MCHR Answer").

[3] Note, "The Maryland Equal Rights Amendment: Eight Years of Application," 9 U. Balt. L. Rev. 342 (1980); NOW LDEF and Women's Law Project, Maryland State ERA Experience, ERA Impact Project (1981); Annotation, "State Equal Rights Amendments," 90 A.L.R. 3rd 158, 164 (1979 & Supp. 1990).

[4] Note, "Comparable Worth and the Maryland ERA," 47 Md. L. Rev. 1129, 1164-65 n.167 (1988) (citing conversation with Charles Blumenthal, former delegate to General Assembly and primary sponsor of the Maryland ERA).

Maryland courts have construed the Maryland ERA to mandate profound reforms in the state's laws and in the practices of state-regulated industries. As the Maryland Court of Appeals opined in Rand v. Rand, 280 Md. 508, 511-12, 374 A.2d 900, 903 (1977), a case addressing the unilateral obligation under common law of a father to support his minor children, the language of the ERA is "clear and unambiguous": "This language mandating equality of rights can only mean that sex is not a factor." Id. See also Turner v. State, 299 Md. 565, 574, 474 A.2d 1297, 1301-02 (1981). More recently, the Court of Appeals reaffirmed its commitment to the ERA in Burning Tree Club, Inc. v. Bainum, 305 Md. 53, 501 A.2d 817 (1985), in which the court struck down a savings clause that permitted certain social clubs to discriminate on the basis of sex. See also State v. Burning Tree Club, Inc., 315 Md. 254, 554 A.2d 366 (1989) (challenge to non-discriminatory law in effect after Burning Tree by social clubs previously permitted to discriminate).

In accordance with Burning Tree, there are two prerequisites for finding a violation of the Maryland ERA. First, there must be state action. Second, the state action must "abridge[] equality of rights on the basis of sex." State v. Burning Tree Club, Inc., 315 Md. 254, 293, 554 A.2d 366, 386 (1989). The pertinent provisions of the Insurance Code, as construed by Equitable, meet both requirements. Accordingly, this Court must reject the unconstitutional construction of the Insurance Code advanced by Equitable and instead construe the

Insurance Code in a manner that preserves its constitutionality -- in this case, by finding that it does not permit discrimination on the basis of sex.

A. In Determining Whether Equitable's Practices Violate The Public Accommodations Law, This Court Can Properly Consider The Unconstitutionality Of The Construction Of The Insurance Code Urged By Equitable In Support Of Its Practices

This Court has requested that Amici address Equitable's contention that the Court cannot properly consider the argument advanced by Amici, i.e., that the construction of the Insurance Code urged by Equitable would violate the Maryland ERA.[5] In particular, Appellant argues that (1) Equitable was not charged with a violation of the Maryland ERA, and (2) the MCHR, and thus Amici, have no standing to bring an action for violation of the Maryland ERA.

Appellant's claims are based on a serious mischaracterization of Amici's argument. Amici have never argued that Equitable was charged with a violation of the ERA, and the question of whether or not the MCHR could bring such a charge is

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[5] By letter dated November 13, 1990, Appellant advanced four objections to the Court's consideration of this issue, two of which -- discussed in the text above -- challenge this Court's "jurisdiction" to consider the ERA argument raised by Amici. The Appellant's third objection, that the Maryland ERA requires state action, is discussed in Point I.B below. The Appellant's fourth objection -- that Amici are not appropriate groups to present an argument under the ERA -- has been resolved by this Court's decision to grant Amici leave to appear herein.

simply a red herring.[6] Amici's ERA argument concerns statutory construction and is offered to support the MCHR's charge that Equitable's discriminatory ratemaking practices violate the public accommodations law. Because neither the MCHR nor Amici now claim that Equitable's practices per se violate the ERA, rather that Equitable's version of the Insurance Code would violate the ERA, Equitable's claim that "standing" is required is a non sequitur.[7] A rule requiring standing in order to assert accepted principles of statutory construction would lead to absurd results and it is not the law.

Contrary to the distorted picture presented by Equitable, the MCHR has charged Appellant with violations of the public accommodations law. Appellant has responded by invoking the Insurance Code as a shield, arguing that the Insurance Code alone

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[6] Amici take no position on whether or not the MCHR could charge Appellant with violations of the ERA. It is clear, however, that this Court itself has the power to raise constitutional matters sua sponte rather than ignore a blatant constitutional violation. See, e.g., Sugarloaf Citizens Association, Inc. v. Gudis, 319 Md. 558, 573 A.2d 1325 (1990); Cirelli & Sons v. Harford Co. Council, 26 Md. App. 491, 382 A.2d 400 (1975). Particularly because this purely legal issue was raised before the Hearing Examiner below, it is clear this Court can address the issue in the course of its review on appeal. See, e.g., Montomery Co. v. Md. Soft Drink Ass'n, 281 Md. 116, 377 A.2d 486 (1977) (court may review undecided issues on appeal where the relevant inquiry concerns questions of law); Wheaton Moose Lodge v. Montgomery Co., 41 Md. App. 401, 397 A.2d 250 (1979) (appellate court may review undecided legal issues).

[7] According to Black's Law Dictionary, "standing to sue" means that a "party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." Black's Law Dictionary (5th ed. 1979). Neither Amici nor the MCHR has presented this Court with a case or controversy under the ERA, but have raised the ERA as a factor that must be considered in construing the Insurance Code.

governs Equitable's practices and that the Code permits certain sex discrimination in ratemaking. Amici and the MCHR contend, on the other hand, that the construction of the Insurance Code urged by Equitable is impermissible, because such a construction would be unconstitutional under the ERA. This contention was first raised by the MCHR before the Hearing Examiner below.

It is black letter law that in evaluating Appellant's argument, this Court should avoid construing the Insurance Code in a manner that would render it unconstitutional. Moberly v. Herboldsheimer, 276 Md. 211, 217, 345 A.2d 855, 858 (1975) (statute must be construed to avoid conflict with the Constitution whenever possible); State v. Wagner, 15 Md. App. 413, 291 A.2d 161 (1972) (Court should avoid unconstitutional construction). Thus, Amici and the MCHR argue, this Court should reject the unconstitutional construction of the Insurance Code urged by Equitable and find that, as the MCHR has charged, the Insurance Code does not shield Equitable from the requirements of the public accommodations law.

B. As Construed By Equitable, The Insurance Code Meets The State Action Requirement Of The Maryland ERA

State action sufficient to invoke the ERA may take the form of "the enactment of legislation which on its face draws classifications based on sex." State v. Burning Tree, 315 Md. at 293, 554 A.2d at 386 (1989). In Burning Tree v. Bainum, for example, Judge Rodowsky wrote that

> the General Assembly has included in [the statute at issue] a prohibition against discrimination

> based on sex. That legislation is state action. Obviously the equality 'under law' which the E.R.A. guarantees embraces an enactment by the General Assembly.

Burning Tree v. Bainum, 305 Md. at 86, 501 A.2d at 833-34. See State v. Burning Tree, 315 Md. at 294, 554 A.2d at 386.[8]

The provisions of the Insurance Code at issue here are strikingly similar to the statutory scheme struck down by the Court of Appeals in Bainum. Burning Tree v. Bainum involved a challenge to a 1965 statute that authorized the state to enter into agreements with private country clubs for the purpose of granting tax deferrals in return for guarantees that open spaces on club property would be preserved for ten years. A general anti-discrimination provision was added to the law in 1974, with a savings clause that exempted any club whose primary purpose was to serve or benefit members of a particular sex. Specifically, the "exception" provided that

> [t]he provisions of this section with respect to discrimination in sex shall not apply to any club whose facilities are operated with the primary purpose, as determined by the Attorney General, to serve or benefit members of a particular sex, nor to the clubs which exclude certain sexes only on certain days and at certain times.

Bainum, 305 Md. at 57, 501 A.2d at 819.

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[8] Under Pennsylvania's Equal Rights Amendment -- a provision that is virtually identical to Maryland's ERA -- the Pennsylvania Supreme Court has determined that there is no requirement of state action. Bartholomew v. Foster, 541 A.2d 393 (Pa. Cmwlth. 1988), aff'd mem., 563 A.2d 1390 (Pa. 1989) (holding that automobile insurance rates based in part on the sex of the individual driver violate the Pennsylvania ERA, even though the rates are actuarially sound). See also Hartford Accident & Indem. Co. v. Ins. Comm'r, 505 Pa. 571, 482 A.2d 542 (1984).

The Court of Appeals held that this provision violated the Maryland ERA and struck down the entire statute. According to Judge Rodowsky, "once the General Assembly decides to address sex-based discrimination in an anti-discrimination statute which also prohibits discrimination on other bases, the E.R.A., in light of its underlying policy, prevents the General Assembly from conferring lesser benefits on persons who are objects of sex-based discrimination." Bainum, 305 Md. at 88, 501 A.2d at 834.

As construed by Equitable, Article 48A also draws distinctions based on sex, making a special exception for sex discrimination in insurance ratemaking, and specifically allowing the Insurance Commissioner to approve such discriminatory rates when they are actuarially justified[9] -- a substantial benefit to insurers that would otherwise be subject to the general prohibition on discrimination contained in Article 48A. Article 48A, §§ 223(a), 234A(a),(b).

For example, according to Equitable, while health insurers may not "make or permit any unfair discrimination" in rate-setting, an insurer does not discriminate if there is an "actuarial justification" for a differential in ratings, premium payments, or dividends "based on the sex of the applicant or policyholder." Article 48A, § 223(b).

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[9] "Actuarial justification," according to Equitable, "is the establishment of premium rates and underwriting standards in conformity with the information obtained by the insurance company during the course of its routine analysis of its own loss experience." Equitable Mem. at 59.

The same rule, Equitable argues, applies to the determination by an insurance company whether to underwrite a particular life or health risk. While an insurer may not impose special conditions in an "unfair, or discriminatory manner based in whole or in part upon race, creed, sex, religion, national origin, place of residency, or blindness or other physical handicap or disability," Equitable argues that "[a]ctuarial justification" justifies discrimination based on sex. Article 48A, § 234A(b).

The Insurance Code appears to preclude sex discrimination in life insurance rate-setting, and explicitly provides for consideration of "actuarial justification" only with respect to "physical handicap or disability other than blindness or hearing impairment." Art. 48A, § 223(a)(2)(ii). Equitable argues, however, that by providing that life insurance rates may not unfairly discriminate "between individuals of the same class and equal expectation of life," the statute implicitly approves the discrimination based on sex when it is "actuarially justified." Art. 48A, § 223(a)(1) (emphasis added). See Equitable Mem. at 58-59.

Finally, as a result of a 1986 amendment to Article 48A, § 25(4) of the Insurance Code, charges of sex discrimination in ratemaking are singled out from all other discrimination claims.[10] While the MCHR exercises concurrent jurisdiction over

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[10] The enactment of Section 25(4) modified the statutory scheme considered by the Attorney General at 68 Op. Att'y Gen. 164 (1983). In that opinion, rendered prior to both the Court's

"alleged discrimination on the basis of race, creed, color or national origin" in underwriting or rate setting, the Insurance Commissioner alone may consider charges of sex discrimination.[11]

Thus, as construed by the Appellant, the Insurance Code distinguishes (1) between the standards and administrative procedures applicable to sex discrimination and other types of discrimination, and (2) between sex discrimination that is "actuarially justified" and that which is not. Despite the general prohibition on discrimination in ratemaking, Equitable argues for a construction of the Insurance Code that would allow differential rates based on sex, without regard to whether such rates are unfairly discriminatory, if the insurer can establish a generalized actuarial basis for the differential rates. Because it purports to provide benefits to insurers that discriminate, under certain circumstances, on the basis of sex, this scheme is

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decision in Bainum and the 1986 amendments to the Insurance Code, the Attorney General concluded that the process by which insurance rates are set in Maryland "does not amount to 'state action.'" Id. In Bainum, the Court of Appeals distinguished the Attorney General's Opinion and instead cited with approval a Pennsylvania case, Hartford Accident & Indem. Co. v. Ins. Comm'r, 505 Pa. 571, 482 A.2d 542 (1984), that reached the opposite conclusion that gender-based automobile insurance rates approved by the state were unfairly discriminatory. Bainum, 305 Md. at 68, 501 A.2d at 824. More recently, the Maryland Attorney General opined that if the Insurance Code were interpreted as Equitable now urges, to allow "actuarial justification" as a defense to sex discrimination claims, it would "raise a constitutional question under the ERA as interpreted in [Bainum]." See MCHR Answer, Exh. D (Att'y Gen. letter, Feb. 14, 1986, at 6-7).

[11] The parties have not disputed the prospective meaning of this provision, but disagree over whether or not it retrospectively applies to the instant proceeding, which was pending at the time the amendment was passed.

virtually indistinguishable from that found to constitute state action in Bainum. See also State v. Burning Tree, 315 Md. at 293-96, 554 A.2d at 386-87 (finding that legislation in force after Bainum constitutes state action violative of the ERA).

C. As Construed By Equitable, The Pertinent Provisions Of The Insurance Code Abridge Equality Of Rights Based On Sex

As to whether the provisions of Article 48A abridge equality of rights because of sex, the Bainum and Burning Tree cases are again analytically indistinguishable from the case at bar. In Bainum, Judge Rodowsky found the subject statute unconstitutional on its face because, like Article 48A, it "single[d] out for special exception from an otherwise uniformly applicable anti-discrimination measure private discrimination of a certain type -- sex -- and to a certain degree -- total -- which neither the State nor a private club receiving a tax exemption could otherwise practice." 305 Md. at 85, 501 A.2d at 833. See also State v. Burning Tree, 315 Md. at 294, 554 A.2d at 386.

Judges Eldridge, Cole and Bloom expressed the same view, stating that the statute at issue in Bainum was fatally flawed in drawing

> an express distinction between race, color, creed and national origin discriminations on the one hand, and sex discrimination on the other hand. It also expressly distinguishes between two types of sex discrimination, allowing sex discrimination when it is the 'primary purpose' of the club and disallowing it in other situations.

305 Md. at 92, 501 A.2d at 837. See State v. Burning Tree, 315 Md. at 294, 54 A.2d at 386.

The construction of Article 48A urged by Appellant places it squarely within the ambit of the Court of Appeals decisions in Bainum and Burning Tree. Appellant argues that the Insurance Commissioner may permit insurers to engage in sex discrimination, unlike discrimination based on race, creed, color or national origin, if the sex discrimination is "actuarially justified." Further, as a result of the 1986 amendment to the Code, claims of sex discrimination, alone of all types of discrimination, are within the exclusive jurisdiction of the Insurance Commissioner.

Bainum and Burning Tree also make clear that the requirements of the ERA are not satisfied by elimination of facially discriminatory, gender-specific insurance ratemaking alone. Addressing this issue in Bainum, Judge Eldridge noted that "[e]ven when a statute is not facially discriminatory, or does not expressly draw or recognize a suspect classification, an inquiry into the actual facts, to determine the existence of a discriminatory purpose and impact, is appropriate." Bainum, 305 Md. at 100, 501 A.2d at 841. See also Peppin v. Woodside Delicatessen, 67 Md. App. 39, 46, 506 A.2d 263, 266 (1986) (holding that restaurant's "Skirt and Gown Night," while ostensibly gender neutral, violated Maryland ERA and public accommodations law). Thus, ostensibly gender-neutral income floors and occupational criteria which disparately impact upon women cannot, consonant with the ERA, be justified merely by

reference to actuarial data. As with sex-segregated life and disability insurance tables that impermissibly link insurance benefits to gender, the Insurance Code must be construed to require the Insurance Commissioner to measure practices that disparately impact on women against the standards of the ERA.

Once it has been determined that the construction of the Insurance Code advanced by Appellant violates the ERA, the burden of justifying the sex-based classifications in the Code shifts to the State. The level of scrutiny is at least the same scrutiny as that accorded racial classifications, if not a higher standard. Bainum, 305 Md. at 98, 501 A.2d at 839. Compare Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977) (Maryland ERA mandates absolute standard of review).[12]

Again borrowing a page from the Burning Tree book, the only justifications for sex-based ratemaking offered thus far in this litigation are "generalizations" of the type previously rejected by the Maryland Court of Appeals. According to Appellant, gender-based ratemaking is justified by actuarial tables that set rates based upon the "average" woman, the "average" low income individual or the "average" part-time worker. Equitable

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[12] In Peppin v. Woodside Delicatessen, 67 Md. App. 39, 506 A.2d 263 (1986), the Court of Special Appeals reiterated that the ERA "prescribes an 'absolute standard' and not a balancing test. Therefore, once discrimination is proved, a court cannot consider arguments attempting to 'balance' the discriminatory practice against other concerns." Id. at 47, 506 A.2d at 267. See also 74 Op. Att'y Gen. ___ (1989) [Opinion No. 89-045 (November 30, 1989)] (stating that only exception to absolute standard of Maryland ERA is when immutable, physical characteristics found only in one sex are at issue).

Mem. at 60 (rates are based on "statistical analysis of . . . insured population"). See Brilmayer, Hekeler, Laycock & Sullivan, "Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis," 47 U. Chi. L. Rev. 505, 553 (1980). However, as succinctly stated in State v. Burning Tree, the Maryland ERA prohibits disparate treatment of men and women based upon generalizations about differences between "most" or "average" men and women, unless those differences are narrowly based on immutable, inarguable physical characteristics never found in one sex.[13] State v. Burning Tree, 315 Md. 254, 295-96, 554 A.2d 366, 387 (1989). See 74 Op. Att'y Gen. ___ (Nov. 30, 1989). Accordingly, the justifications offered by Equitable to support its interpretation of Article 48A are insufficient to sustain the pertinent provisions of the Insurance Code under the ERA.

The Pennsylvania Supreme Court has similarly rejected insurance companies' claim that statistical averaging creates an exception to the Pennsylvania ERA. See Hartford v. Ins. Comm'r, 505 Pa. 571, 584, 482 A.2d 542, 548 (1984) ("[g]ender-based rates . . . rely on and perpetuate stereotypes similar to those condemned [in the past]"); Bartholomew v. Foster, 541 A.2d 393, 397 (Pa. Cmwlth. 1988) (Pennsylvania ERA requires elimination of

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[13] The same principle was articulated by the United States Supreme Court in Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978). Citing "fairness to individuals rather than fairness to classes," the Court held that, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." Id. at 708-09.

discrimination on all bases except those based on characteristics unique to one sex). In Hartford, for example, the Pennsylvania Insurance Commissioner, rather than defending sex-based auto insurance rates, disallowed such rates on the ground that they were "unfairly discriminatory" in violation of both the express terms of the Rate Act (the Pennsylvania statute regulating insurance ratemaking) and the Pennsylvania ERA. In upholding the Insurance Commissioner, the Pennsylvania Supreme Court ruled that the Rate Act's ban on unfairly discriminatory rates -- in terms similar to the provisions of the Maryland Insurance Code discussed above -- manifests the legislature's recognition that "a rate may be justified by the actuarial data offered in its support, yet unfair in its underlying assumptions and its application to the individual." Hartford, 482 A.2d 542, 547. The Court concluded that the Pennsylvania ERA squarely prohibits such discrimination:

> Unquestionably, sex discrimination in this Commonwealth is now unfair discrimination. It is a cardinal principle that ambiguous statutes should be read in a manner consonant with the Constitution. To read the term 'unfairly discriminatory' as excluding sex discrimination would contradict the plain mandate of the Equal Rights Amendment to our Pennsylvania Constitution.

Id. at 549

In sum, the construction of the Maryland Insurance Code urged by Appellant is unconstitutional, a possibility explicitly recognized by the State Attorney General in 1986 when he opined that any attempt to pose "actuarial justification" under Article

48A as a defense to sex discrimination would "raise a constitutional question under the ERA as interpreted in Burning Tree." MCHR Answer, Exh. D (Att'y Gen. letter, Feb. 14, 1986 at 6-7). If the Court accepts Equitable's construction, it must treat the statute as a nullity. Johnson v. State, 271 Md. 189, 195, 315 A.2d 524, 528 (1974) (an unconstitutional law is "as inoperative as though it had never been passed"). In the alternative, this Court must avoid the constitutional issue posed by Equitable's construction, as did the Pennsylvania Supreme Court in Hartford, and find that the Insurance Code's general prohibition on unfairly discriminatory practices bars ratemaking classifications that discriminate on the basis of sex. Moberly v. Herboldsheimer, 276 Md. 211, 217, 345 A.2d 855, 858 (1975) (statute must be construed to avoid conflict with the Constitution whenever possible).[14]

POINT II

THE APPELLANT'S RATEMAKING PRACTICES ARE DISCRIMINATORY

As set out in MCHR's Answer of November 7, 1990, the agency's decision below is based on substantial evidence in the record which overwhelmingly demonstrates that Equitable unlawfully discriminated against individuals on the basis of

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[14] In the alternative, even if the Maryland ERA does not dictate the construction of Article 48A of the Insurance Code, the Insurance Commissioner should be guided by the requirements of the ERA and its prohibition of classifications that discriminate on the basis of sex in determining what constitutes "unfairly discriminatory" ratemaking under the Insurance Code. 68 Op. Att'y Gen. 164, 172 n.7 (1983).

their sex and race in violation of Article 49B, §8. See MCHR Answer, pp. 22-31. In reaching this conclusion, the MCHR Hearing Examiner and Appeal Board properly rejected Equitable's unsubstantiated arguments that (1) its practices did not adversely affect women, and (2) creating unisex rates would significantly impair Equitable's business. MCHR Answer, pp. 24-31.

In addition to the ample evidence in the record of the discriminatory effect of Equitable's ratemaking practices, there is substantial evidence from other jurisdictions that such practices are discriminatory. Moreover, the evidence available from other jurisdictions conclusively demonstrates that non-discriminatory rates are an effective and viable alternative to Equitable's discriminatory practices. This evidence was, for the most part, unavailable in 1986, when the Hearing Officer in this case rendered her landmark decision prohibiting gender discrimination in life and disability insurance under Maryland's public accommodations laws. For example, the Hearing Examiner did not have the benefit of the data obtained as a result of Montana's abolition of discrimination in insurance less than a year before, in 1985, and she could not have known that in 1987 Massachusetts would prohibit gender discrimination in insurance, with none of the ill-effects predicted by Appellant here. Particularly because these developments occurred subsequent to the initial decision in this case, in the event that this Court determines that the decision below is not supported by substantial evidence, Amici respectfully submit that the Court

should remand this matter to the agency for consideration of additional evidence, as described below. See Md. State Gov't Code Ann. §10-215(g) (1984 & Supp. 1990).

A. Overview Of Discriminatory Effects Of Gender-Based Ratemaking

Equitable's circular reliance on so-called actuarial "justifications" for its discriminatory classifications obscures the actual effect of gender-based ratemaking on individual women seeking insurance. In fact, women are particularly hard hit by the use of sex-based policies in private insurance, including income floors and occupational criteria, because they are the group most in need of this type of insurance. Women, more frequently than men, work part-time, as temporary staff or in lower paying jobs such as clerical or service positions in which the employer does not provide health, disability or retirement benefits. See, e.g., Nardone, "Part-Time Workers: Who Are They?" Monthly Lab. Rev., Bureau of Labor Statistics, U.S. Dep't of Labor, Feb. 1986 (two-thirds of part-time workers are female); D. Chollet, Employer-Provided Health Benefits, Coverage Provisions and Policy Issues, Employee Benefits Research Institute, Washington, D.C. (1984) (42 percent of part-time workers have no access to health insurance benefits). Thus, women are more likely to need privately purchased insurance and are less able to afford it because of their lower, or non-existent, salaries. Figures from the Health Insurance Association of America show that nationwide, women buy well over 50% of the individually-held health insurance policies.

Income floors, such as those enforced by Equitable, also have particularly harsh effects on women at all stages of their lives. Older women are, as a group, the poorest people in the United States. Only one in five has any kind of pension, either her own or her spouse's. Current Population Survey, Bureau of Census, U.S. Dep't of Commerce (March 1987). In 1987, twenty-five percent of single women over age 65 had incomes below the poverty level. Statistical Abstract of the United States, 1990, Bureau of the Census, U.S. Dep't of Commerce, at 460, Table 746 (1990). Similarly, in 1987, forty-five percent of single female heads of household had incomes below the poverty line. Id. at 462, Table 750.

Particularly because of the feminization of poverty, gender-based discriminatory insurance practices such as Appellant's have a devastating impact on women who must look to private insurers for coverage. Elimination of sex discrimination in ratemaking and underwriting practices is thus essential for the economic well- being of thousands of women, and a crucial step in effectuating the promise of the Maryland ERA.

The economic effect of sex-based ratemaking is graphically illustrated by the experiences in two states, Montana and Massachusetts, that have barred gender discrimination in all forms of insurance rate-setting.[15]

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[15] In addition to Massachusetts and Montana, the Pennsylvania Insurance Commissioner has stated that she intends to eliminate sex as a factor for all insurance categories.

B. The Montana Study Of Nondiscriminatory Ratemaking

Montana's comprehensive non-gender insurance law took effect October 1, 1985. Since that date, two surveys of the law's results have been conducted, one by the Montana Insurance Department and one by the Montana Nongender Insurance Project of the Montana Women's Lobby. While the surveys were similar, the survey conducted by the Nongender Insurance Project considered a greater variety of relevant data, categories of insurance and types of consumers. Both surveys, however, reached the same conclusion: that despite insurers' dire predictions, Montana's nongender insurance law has not penalized women, has not resulted in a mass exit of insurance companies and has led insurance companies to rely on factors that reflect their insurance risk more accurately than gender. Testimony of Andy Bennett, Montana Auditor and Commissioner of Insurance, to the New Jersey Senate Labor, Industry and Professions Committee, June 8, 1989 (annexed hereto as Exh. A) (hereinafter "Bennett testimony").

The Nongender Insurance Project study, for example, examined auto, health, disability, life insurance and annuities and found that, in the aggregate, these policies improved $22,000 in lifetime value for women buying them after the law took effect.[16]

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[16] The description of the Nongender Insurance Project study presented here is drawn from the Testimony of Marcia Youngman, Director, The National Clearinghouse for Ending Sex Discrimination in Insurance and the Non-Gender Insurance Project of the Montana Women's Lobby to the New Jersey Senate Labor, Industry and Professions Committee, June 8, 1989 (annexed hereto as Exh. B) (hereinafter, "Youngman Testimony"), the "Fact Sheet on Montana's Non-gender Insurance Law" prepared by the Nongender Insurance Project (annexed hereto as Exh. C) (hereinafter,

Thus, after enactment of the law, many women and families were able to afford certain types of insurance for the first time -- particularly health insurance -- and their economic security increased because of the overall improved value of women's insurance policies and enhanced settlement options on life insurance.

With respect to the types of insurance at issue in the case at bar, disability and life insurance, this same effect was apparent. The increase in term life insurance rates as a result of the law -- an average of $9 a year for women -- were more than offset in Montana by savings in other areas. For example, in the disability insurance area, it appears that female rates dropped and male rates increased; prior to the law's enactment, a Montana woman holding a typical disability income insurance policy paid $7,100 more for 34 years of coverage than a similarly situated man. Montana Fact Sheet at p. 5 (Exh. C hereto); "Women and Insurance: An Overview," Women's Equity Action League, at p. 3 (annexed hereto as Exh. D). In whole life insurance, the increase in dividends and cash values more than offset the expected premium increase, making whole life insurance policies more valuable to women than before the law took effect. The Montana study also revealed a significant improvement in annuity values for all women and some men since the law took effect. On the policies studied by the Project, women will receive almost

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"Montana Fact Sheet"), and Brodsky, Leamon and Youngman, "Effects of Montana's Non-Gender Law on Whole Life and Term Insurance."

$6000 more over 10 years than they would have from gender-based monthly payments, an important development for the large group of elderly poor women.

Moreover, contrary to the claims of insurers opposed to elimination of gender discrimination in insurance, non-discriminatory insurance appears to be good for both consumers and the insurance industry. A wide variety of market choices are still available five years after the law's effective date. According to Montana Insurance Commissioner Andrea Bennett, 128 insurance companies have become newly licensed to do business in Montana since the law took effect, compared to only 44 that have left the state (none claiming that it was because of the law). Bennett Testimony at 2 (Exh. A hereto). In fact, since the law took effect, premium sales volume in all lines of insurance has climbed steadily. Id.

C. The Massachusetts Experience With Nondiscriminatory Ratemaking

The Massachusetts Insurance Commissioner banned sex discrimination in insurance by a regulation promulgated in 1987. While no comprehensive study has been conducted of the effect of this regulation, it is clear that, as in Montana, the dire predictions of insurers were baseless. In fact, Massachusetts insurance companies have responded to the regulation by favorably re-adjusting their insurance products for all consumers -- a beneficial result that spilled-over to the Montana insurance market, where some of these new products have become available. Youngman Testimony at 8 (Exh. B hereto).

The positive effects of unisex insurance in Massachusetts comport with the analyses prepared by John Hancock Financial Services, the fifth largest life insurance company in the country. According to John Hancock's studies, "[i]n the long run, unisex rates would basically be economically neutral for insurers if all companies selling within a state convert to unisex rates." And for consumers, John Hancock found that

> our actuarial studies show that changing to unisex rates would not greatly increase costs. . . . For the individual consumer who typically purchases more than one type of insurance, the overall cost of insurance would not be significantly greater under a unisex rating scheme. Some costs would increase, while others would drop, thus balancing each other out. The net cost differential, of course, depends upon an individual consumers choice of coverages. For example, if a 45 year old woman purchased term life insurance, major medical coverage, disability coverage and an annuity from John Hancock her overall insurance cost would drop by 2% under unisex rates.

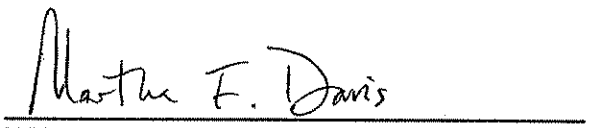
Statement of John Hancock Financial Services on Gender-Neutral Insurance (annexed hereto as Exh. E).

The Montana and Massachusetts examples demonstrate that, contrary to Equitable's claims, unisex insurance is a viable business alternative to the discriminatory practices adopted by Equitable. In both states, studies show that nondiscriminatory insurance laws have resulted in rate adjustments favorable to women. Because gender discrimination has been eliminated from insurance ratesetting in Montana and Massachusetts, many poor women in those states who must rely on private insurance policies can, for the first time, afford the insurance that they need.

CONCLUSION

For the reasons set out above, Amici respectfully urge this Court to affirm the decision of the Hearing Examiner below or, in the event that this Court determines that the Hearing Examiner's decision is not supported by substantial evidence, to remand this matter to the agency to consider additional evidence.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of December, 1990, I caused a copy of the foregoing Memorandum of Amici Curiae NOW Legal Defense and Education Fund, the National Organization for Women, Maryland Chapter, the National Organization for Women, Baltimore Chapter, the American Association of University Women, Maryland Division, and the Women's Law Center to be served by overnight mail, postage prepaid to Sally L. Swann, Esq., Assistant General Counsel, Maryland Human Relations Commission, 20 East Franklin Street, Baltimore, Maryland 21202, attorney for Appellee; Barrett W. Freedlander, Esq., Weinberg & Green, 100 South Charles St., Baltimore, Maryland 21201-2773, attorney for Appellant; and Deborah R. Rivkin, Shapiro and Olander, 36 South Charles St., Suite 2000, Baltimore, Maryland 21201, attorney for amicus curiae League of Life and Health Insurers of Maryland, Inc.

Martha F. Davis

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