IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 84-3569 & 84-3590

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, *et al.*,

Plaintiffs-Appellees-Cross-Appellants,

—v.—

STATE OF WASHINGTON, *et al.*,

Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF AMICI CURIAE OF THE NATIONAL ORGANIZATION FOR WOMEN AND THE NOW LEGAL DEFENSE AND EDUCATION FUND

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INTEREST OF AMICI CURIAE

This brief Amici Curiae is submitted, with the consent of all parties,* on behalf of the National Organization for Women (NOW) and the NOW Legal Defense and Education Fund (NOW LDEF).

The National Organization for Women is the largest feminist organization in the United States, with a membership of over 225,000 women and men in more than 750 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex discrimination in employment, and the elimination of barriers that deny women economic opportunities and the ability to become economically self-sufficient. NOW believes that economic equality in the paid workforce is fundamental to women's ability to achieve equality in other aspects of society. In furthering its commitment to that goal, NOW has participated in numerous cases and commented on proposed legislation and regulations to secure full enforcement of laws prohibiting employment discrimination.

NOW LDEF is a non-profit civil rights organization founded in 1971 to perform a wide range of legal and educational services in support of women's efforts to eliminate sex-based discrimination

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*/ Letters from counsel for all parties, consenting to the filing of this brief, are being filed with the Clerk.

and secure equal rights. It was established by the National Organization for Women. NOW LDEF participated as an amicus in County of Washington v. Gunther, 452 U.S. 161 (1981) in the Supreme Court, and has a particular interest in eliminating sex discrimination in employment.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as set forth in the brief submitted by appellees.

SUMMARY OF ARGUMENT

The wage gap found to exist between men and women occupying male and female-dominated job classifications in Washington State mirrors the wage gap in the labor force nationwide. In both instances, the wage gap is historic, and entrenched. A primary cause of this earnings gap is the occupational segregation of women in selected jobs which are then assigned disproportionately low wages by employers.

The Willis Study commissioned by the State of Washington uncovered a 20% wage gap between workers in male and female dominated jobs considered to be of equal value. Other evidence produced at trial suggested a wage gap in excess of 30% between male and female job classifications of equal value. National data reflect a similar earnings gap.

Despite an accelerated movement of women into traditionally male occupations in the last decade, neither the wage gap nor the

occupational segregation of women have been substantially reduced. Offset somewhat by a simultaneous increase in the number of women entering female dominated occupations, these data confirm that women continue to be underpaid in integrated as well as segregated jobs.

The Court's reliance on the Willis job evaluation as a basis for finding discrimination is consistent with industry as well as judicial practice. Job evaluations have been recognized since the late 1950's as a standard ingredient of American labor management relations. Indeed, employer-respresentatives aggressively and successfully lobbied Congress to include the four standard measures of job worth found in virtually all job evaluation systems when it passed the Equal Pay Act in 1963. Since then, in cases brought pursuant to both the Equal Pay Act and Title VII, Courts have routinely considered job evaluation evidence in deciding claims of discrimination in compensation. Moreover, courts have had no difficulty in distinguishing between _bona fide_ and _non-bona fide_ job evaluations and have not hesitated to reject both plaintiffs and defendants' job evaluation evidence where appropriate. Courts have identified several factors to assist them in assessing the reliability of this type of evidence.

Finally, defendants' contention that their reliance on the market to establish wages insulates their wage structure from review is without merit. It is incorrect because it is based upon an unrealistic image of the market which bears little relationship to the complexities of today's economy, is inconsistent with judicial

precedent under the Equal Pay Act, and ignores decades of Congressional regulation of, and interference with market forces to achieve broad social goals. Adoption of minimum wage laws, the National Labor Relations Act, and the Equal Pay Act itself, as well as the use of price supports for certain agricultural commodities and the periodic enforcement of wage and price controls are but a few examples of long-standing Congressional regulation in this area to avoid economic harm to certain individuals, groups, or industries.

INTRODUCTION

The court below characterized plaintiffs' claims as a challenge to the State of Washington's failure to rectify an acknowledged disparity in pay between predominately female and predominately male job classifications by compensating the predominately female job employees in accordance with their evaluated worth, as determined by the state. 33 FEP Cas. at 822 (emphasis added). The court explained further that "[t]he threshold question presented to this court is whether Defendant's failure to pay the Plaintiff's their evaluated worth, under the provisions of Defendant's comparable worth studies (fn. omitted), constitutes discrimination in violation of the provisions Title VII." Id.

In reaching its decision the court considered evidence which showed, inter alia, that defendants had maintained a highly sex segregated workforce, with substantial wage disparities between the male and female job classifications. The defendants' own job evaluations, which established point values for jobs based on skill, effort, responsibility, and working conditions, and then compared salaries for similarly rated jobs, revealed a 20% wage disparity between male and female jobs of equal value to men's jobs, while women's jobs were discounted. When the State was made aware of the wage gap created by its own salary schedule -- and graphically illustrated by its own study -- the State deliberately continued its prior practice and refused to adjust the wages of predominantly female jobs upwards in conformity with their evaluated worth.

In the face of this evidence, the lower court correctly held that defendants' deliberate and continued adherence to a compensation system which underpaid jobs performed largely by women constituted unlawful sex discrimination in violation of Title VII, 42 U.S.C. § 2000(e)-2(a)(1). Despite arguments of defendants and their amici otherwise, this is not a radical holding at odds with basic tenets of our economic system. To the contrary, the decision below is faithful to well established judicial and legislative precedents. It reflects not only Title VII's broad remedial goal to eliminate all forms of sex discrimination in employment; it is also entirely consistent with nearly a century of governmental regulation of "market" forces to achieve broad public and social policy goals. In its acceptance of defendants' job evaluations as indicative of discrimination, the court merely acknowledged decades of employer use of these evaluations to establish salaries and develop wage relationships within their own industries. The problem presented by this case -- the historic and systematic underpayment of "women's work" -- cannot be overstated. Affirmance by this court of the decision below would represent an important step towards its ultimate resolution.

ARGUMENT

A. THE DISCRIMINATORY WAGE GAP IN THE WASHINGTON STATE LABOR FORCE MIRRORS WAGE DISCRIMINATION IN THE WORKFORCE NATIONWIDE.

In its much-heralded 1981 study entitled Women, Work and Wages, Equal Pay for Jobs of Equal Value, D.I. Treitman and H.I. Hartmann, Ed., National Academy Press, Washington, D.C. (1981) (hereinafter "NAS Study"), The National Academy of Sciences concluded that "job segregation by race, sex and ethnicity is common in today's labor market, and is an important source of wage differentials. Not only do women do different work than men, but also the work women do is paid less and the more an occupation is dominated by women the less it pays." Andrea Beller, a nationally recognized expert on job segregation, has similarly demonstrated, through her own research, that earnings are 30-50% higher in traditionally male occupations than in predominantly female or integrated occupations. Andrea Beller, Occupational Segregation and The Earnings Gap, (presented at Consultation on Comparable Worth, U.S. Commission on Civil Rights, Washington, D.C. June 6-7, 1984) at p. 2 (hereinafter "Beller").

The conclusions of the NAS Study, as well as those of Beller, were readily foreseeable. Sex-based job segregation and its attendant wage inequities reflect historic employment patterns in our society whose roots reach back for decades. Since 1939, women's earnings on the average have reached only 60% of men's. Comparisons of the median earnings of year-round full-time workers by sex for the years 1939-1981 show this gap quite clearly:

YEAR	Median Earnings: WOMEN	Median Earnings: MEN	WOMEN'S EARNINGS AS A PERCENT OF MEN'S	YEAR	Median Earnings: WOMEN	Median Earnings: MEN	WOMEN'S EARNINGS AS A PERCENT OF MEN's
1981	$12,001	$20,260	59.2	1966	$3,973	$6,848	58.0
1980	11,197	18,612	60.2	1965	3,823	6,375	60.0
1979	10,151	17,014	59.7	1964	3,690	6,195	59.6
1978	9,350	15,730	59.4	1963	3,561	5,978	59.6
1977	8,618	14,626	58.9	1962	3,446	5,974	59.5
1976	8,099	13,455	60.2	1961	3,351	5,644	59.4
1975	7,504	12,758	58.8	1960	3,293	5,317	60.8
1974	6,772	11,835	57.2	1959	3,193	5,209	61.3
1973	6,335	11,186	56.6	1958	3,102	4,927	63.0
1972	5,903	10,202	57.9	1957	3,008	4,713	63.8
1971	5,593	9,399	59.5	1956	2,827	4,466	63.3
1970	5,323	8,966	59.4	1955	2,719	4,252	63.9
1969	4,977	8,227	60.5	1946	1,710	2,588	66.1
1968	4,457	7,664	58.2	1939	863	1,356	63.6
1967	4,150	7,182	57.8				

Women's Bureau, U.S. Dept. of Labor, Equal Opportunity for Women: U.S. Policies (1982).

Likewise, the distribution of women workers among occupations remains rigidly stereotyped and limited. The Department of Labor divides job types into twelve major occupations which are further sub-divided into 427 detailed occupations. The majority of women workers, 52%, work only in two of the twelve major occupational categories -- clerical work and service work (other than in private house-

holds). Bureau of Labor Statistics, Dept. of Labor, Employment and Earnings, Table 22 (Jan. 1983) Among the 427 detailed occupations, similar work patterns can be seen: 50% of employed women work in only twenty occupations. In 1982, more than half of all employed women worked in occupations which were 75% female, and 22% of employed women were in jobs that were 95% female. Id. Women comprise 80% of all administrative support workers (including clerical), but only 8% of craft and repair workers; 70% of retail/sales workers but only 32% of manager and administrators. The wage gap created by this uneven distribution of male and female workers is by itself striking. Male craft and repair workers earn on average $360 weekly compared to female administrative support workers whose average earnings are $220 weekly. Female retail sales workers earn an average of $190 weekly, while male managers and administrators average $466 weekly. Bureau of Labor Statistics, Dept. of Labor, Monthly Labor Review, Vol. 105, No. 4, Table 1, p. 27 (April 1982).

More than 60% of all employed women work in clerical or sales jobs. The degree of sex-based job segregation is most evident among nurses and secretaries whose work forces are 97% and 99% female, respectively. Bureau of Labor Statistics, U.S. Dept. of Labor, The Female-Male Earnings Gap: A Review of Employment and Earnings Issues (1982).

As suggested above, job segregation by sex, like the wage gap, is historically entrenched and not easily corrected.
While many labor economists hailed the 1970's as a "decade of change" in which women's participation in the labor force increased

geometrically,[1] the recent influx of women into male-dominated professional and technical jobs has actually done very little, over-all, to substantially minimize job segregation or to lessen the persistent wage gap. The Wage Gap: Myths and Facts, National Committee on Pay Equity, Washington, D.C. (1984) (hereinafter The Wage Gap). This is because the movement of women into predominantly male jobs has been eclipsed by the entry of new women workers into predominantly female jobs. Thus in 1982, although 45% of professional and technical workers were women, only 18% of all employed women were professional and technica workers. Thirty-two percent of all managers and administrators were women, but only 7% of all employed women could be found in those occupations. The Wage Gap, supra, at 7.

Additionally, as women enter new major occupational groups, they remain segregated in a small number of jobs within those broad groupings. Professional and technical workers, for example, are further subdivided by the Department of Labor into 50 detailed occupations such as engineer and nurse. While women currently comprise 45% of professional and technical workers, half of those women can be found in only five of those 50 detailed occupations. Id.

Similarly, although women's movement into managerial jobs increased from 19.5% in 1972 to nearly 32% in 1982, women remained clustered in such traditional fields as health administration, sales, education and office management. More importantly, job integration has not eliminated the earnings gap: less than 15% of all women managers

1/ According to Beller, supra, p. 3 , at 10 between 1972 & 1981 the "index" of segregation declined at an annual average rate nearly three times the rate during the sixties. Professional occupations experienced the greatest reduction in occupation -- an annual average rate of nearly one percentage point. Id. at 11. The "index" (footnote continued)

earned weekly salaries of $500 or more in 1982, compared to 51.3% of their male counterparts. Jill A. Fraser, "In Full Career," Vogue (November, 1984), p. 179.

In view of such overwhelming evidence of historical job segregation and its effect upon wage discrimination, it is hardly surprising that the Washington State labor force mirrored the employment picture painted above. Indeed, as plaintiffs' evidence showed, of the 1700 job classifications officially maintained by Washington State DOP, 1106, or 64.2% were over 70% male; 321 classifications or 18.64%, were 70% female. Overall, three-quarters of the segregated jobs were predominantly female. Only 17.13% of all DOP classifications were integrated; less than one-third (30.56%) of all DOP employees work in integrated classifications (plaintiffs' Exhibit #135P). A similar pattern of job segregation was found to exist at the University of Washington where, as recently as 1976, three quarters of the classifications at the University were 85-100% segregated (plaintiffs' Exhibit #64).

And again, consistent with national data, substantial segregation of the workforce invariable coincided with depressed wages for the segregated women workers. Thus, for example, the wage differential for male and female workers in jobs which defendants themselves determined to have equivalent educational experience requirements was in many instances dramatic:

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represents the proportion of workers of either sex who would have to move to an occupation dominated by members of the other sex in order for the occupational distribution of the sexes to be identical. H. Hartmann & B. Reskin, "Job Segregation: Trends and Prospects," Occupational Segregation and Its Impact on Working Women. A Conference Report, Center for Women in Government, New York (1982), p. 58.

Average Salary

	Predominantly Male Classes	Predominantly Female Classe
Jobs requiring no H.S.	18.90	12.75
Jobs requiring H.S.	23.37	15.00
Jobs requiring 1 yr. bus. school	23.20	16.09
Jobs requiring 2 yrs. bus. school	28.47	23.29

(Plaintiffs' Exhibits #10 & # 75).

Similar wage disparities were evident in a comparison of jobs with closely related duties but sex-segregated workforces, with consistently higher wages being paid to the predominantly male classifications. (Plaintiffs' Exhibit # __). In general, as the original Willis study ultimately determined, the wage disparity for men's and women's classes considered to be of "comparable job worth" in the state was approximately 20%. (Joint Exhibit #2, p. 20).

At trial, plaintiffs introduced further evidence derived from a series of regression analyses performed by their own expert statistician, Dr. Stephan Michelson, based upon salary, sex, and job evaluation data provided by defendants. This evidence more than confirmed the earlier findings of Willis: on average, in 1982, predominantly male jobs at DOP earned salaries 31% higher than predominantly female jobs at DOP which defendants themselves evaluated to be of the same worth. It was demonstrated further that the average monthly salary actually decreased by $4.51 for each 1% increase in

the number of women in the classification. (Plaintiffs' Exhibit # 135 F).

What is ultimately most disturbing about the data summarized above is the apparent intractability of the wage gap, and the indication that it will remain so for years to come. Despite recent figures showing a more accelerated desegregation of the workforce, women as a group continue to make very slow progress in their efforts to eradicate the wage gap. While this is due in part to offsetting increases among women entering the clerical and service fields, traditionally low-paying occupations, and the continued low participation rate of women in the traditionally high paying and male dominated blue-collar and craft jobs (Beller, supra, p. 3, at 14-15) this slow rate of change must also be viewed as evidence of the continued discriminatory underpayment of women workers in non-integrated as well as integrated professions.

Moreover, arguments of defendants and its amici that the remedy to this wage disparity is through increased integration of occupations, along with their further suggestion that women "freely" choose to enter low-paying fields, are themselves premised on discriminatory as well as inaccurate assumptions. Indeed, their latter contention is tantamount to the old argument that Blacks "freely choose" to attend schools of inferior educational quality. More importantly, these arguments completely ignore one of the primary reasons underlying passage of Title VII: the long history of occupational barriers severely circumscribing women's choices in employment, and the lingering

effects of those barriers which continue to this day despite their official removal.

Furthermore, the fact that many women are finally entering male-dominated occupations hardly justifies perpetuating wage discrimination against those who have not. Nor can it seriously be suggested that it is even desirable for women to forsake careers in such traditionally female-dominated professions as nursing, teaching, or childcare to pursue employment as toll collectors or custodians. The value which we as a society derive from women's contribution to these professions necessitates their continued involvement in them. The answer to the earnings gap women in these professions experience is not their abandonment of these jobs; the remedy, to the contrary, is precisely what the lower court ordered -- the elimination of sex based wage discrimination.

B. THE LOWER COURT PROPERLY CONSIDERED DEFENDANTS' JOB EVALUATIONS AS EVIDENCE OF DEFENDANTS' UNLAWFUL UNDERPAYMENT OF PREDOMINANTLY FEMALE JOBS.

Defendants urge this court to discount evidence of discrimination derived from their own job evaluations as too subjective and unscientific to "serve as the foundation for a judicial determination that wage discrimination exists." (Brief for Appellant, Sec. IV. A.) Defendants' disclaimer of what is in effect their own evidence is reason in itself to view such arguments skeptically. These arguments moreover represent an about-face by employer-representatives who only twenty-years ago successfully lobbied Congress to adopt an "equal work"

standard in the Equal Pay Act which conformed to job evaluation techniques widely used then and now by American industry to establish wage structures. Their abrupt reversal is neither credible nor persuasive. Among employers, workers and the courts, job evaluation has now been uniformly accepted as a standard ingredient of American labor-management relations, and hence an appropriate measure of employer fairness in its wage setting practices.

1. Job Evaluations Have Been Used Traditionally By American Industry To Establish Wage And Salary Structures.

Job evaluation is not new. Its origins can be traced to the U.S. Congress' adoption of four grades of clerks in the mid-1800's (the forerunner of today's "G.S." job classification system); the first published job evaluation system which assigned points to a variety of factors used to evaluate jobs appeared in 1924. *See* Brief *Amicus Curiae*, The National Center for Economic Alternatives.

Job evaluation involves the rating of jobs in relation to others within a particular plant or enterprise. The ultimate objective of all job evaluation schemes is to identify the rank order of jobs to determine their relative worth. Its focus is on *job content*, not the person holding the job, on job function as it would exist regardless of who ultimately performed the job. E. James Brennan, *Job Evaluation Practices and Their Impact on Equitable Pay For Women*, National Commission on Working Women, (1983) Washington, C.D. (hereinafter "Brennan"). However, job evaluation only rationalizes internal wage relationships after which wages are then assigned. Wages are assigned specific classifications by

the employer. The classification scheme is designed to ensure that the lowest-rated and highest-rated jobs receive the lowest and highest wages, at least theoretically. See ______________ p. 8; see also Brennan, supra, p.11. 2/

Two developments during the first half of this century, the advent of labor unions and the experience of compulsory arbitration under the War Labor Board during World War II, hastened the growing acceptance of job evaluation by American industry, , supra, at 3, and by 1954, "(t)he technique of job evaluation (was). . .widely accepted as sound and effective business procedure." Jay L. Otis and Richard Leukhart, Job Evaluation, A Basis For Sound Wage Administration, Prentice-Hall (2nd Ed. 1954).

2/ While there are many job evaluation techniques currently in use by American industry, all involve the comparison of jobs to determine their relative worth and all refer to job content as the basis of comparison. Job content has traditionally been measured in four different dimensions: the skill and effort required to perform the job, the responsibilities of the job, and the working conditions under which the job is performed. There are six classic methods of job evaluation under which all varieties can be identified. These methods are further divided into two groups: "non-quantitative" or "whole job" methods and "quantitative" or "factor" methods. The former group, which consider only the whole without measuring discrete elements of the job, include the method known as Ranking Classification and Slotting. Under the "quantitative" or "factor" methods, job content is evaluated by assigning a numerical score to each of several factors, with the total value of the job reflecting the sum of the individual factor values. Methods found in this grouping include Point Plans, of which the Willis Study is an example, Factor Comparison and Regressed Questionnaire. See generally Brennan, supra, p.11, 3-6.

For unions, the resort to job evaluation was a way to require employers to compensate jobs requiring similar skills with wages of similar or equal amounts. Their demands were in direct response to past employers' practices of setting wages for a particular job within a particular plant without regard to another. ___________, supra. At the same time, as the War Labor Board became increasingly overburdened by its responsibilities to determine wage levels, maintain wage controls, settle new collective bargaining contracts and resolve wage disputes, job evaluation became an increasingly attractive tool both to stabilize wage rates and to settle alleged wage inequities. Id.[3]

These two developments in combination forced an awareness on both management and unions, by the mid-1950's, that job evaluation and wage classification schemes were essential tools to handle their respective affairs and to keep their relationships viable. Id. at 6.

Against this backdrop, employer concerns about the future vitality of job evaluation as expressed during Congressional debates over passage of the Equal Pay Act in 1963 are understandable.

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[3] See also Newman and Vonhof, "Separate But Equal"--Job Segregation and Pay Equity In the Wake of Gunther, 1981 U. of Ill. L. Rev. 269, 302, n. 152. In a letter from the War Labor Board Chairman to the Secretary of Labor, the role of job evaluation was emphasized in cases involving intraplant inequalities: "Their determination should not be related to the 'equal pay for equal work' question; they should be determined on the basis for maintaining or developing a proper balance of wage rates for various jobs based upon job evaluation." (Citing 8 War Lab. Rep. (BNA) XXViii (1943).

The Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56, (hereinafter EPA) amended Section 6 of the Fair Labor Standards Act by adding a new subsection (d). Section (d)(1), most relevant to this discussion, provides as follows:

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for <u>equal work on jobs performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to</u> (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) <u>a differential based on any other factor other than sex</u>: Provided, that an employer who is paying a wage differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee. (emphasis added)

The original wording of the EPA required equal pay for "equal work on jobs the performance of which requires equal skills." *See* S. 882, 88th Cong., 1st. Sess., §4 (1963), quoted in *Corning Glass Works v. Brennan*, 417 U.S. 188, 199 (1974). During hearings on the bill, several witnesses criticized the Act's limitation to consideration of equal "skills" as "vague and incomplete". *Id.* Testimony to the contrary was offered regarding industries' increasing use of formal, systematic job evaluation systems which measured *four* factors in determing job worth: skill, effort, responsibility, and working conditions. As Corning's own

representative testified:

> Job evaluation is an accepted and tested method of obtaining equity in wage relationships. A great part of industry is committed to job evaluation by past practice and by contractual agreement as the basis for wage administration.
>
> 'Skill' alone, as a criterion fails to recognize other aspects of the job situation that affect job worth.
>
> We sincerely hope that this committee in passing legislation to eliminate wage differences based on sex alone will recognize in its language the general role of job evaluation in establishing equitable rate relationships.

Corning Glass Works v. Brennan, 417 U.S. at 200 .

Employers additionally feared that the bill's original definition of equal work would put the Secretary of Labor in the position of "second-guessing" the validity of a company's job classification system. Id. Congress responded to these various fears by incorporating traditional job evaluation terminology into the definition of equal work. As explained by a spokesperson for the amended bill during the House debate:

> The concept of equal pay for jobs demanding equal skill has been expanded to require also equal effort, responsibility, and similar working conditions. These factors are the core of all job classification systems. They form a legitimate basis for differentials in pay.

109 Cong. Rec. 9195 (1963)(Rep. Frelinghuysen) quoted in Id. at 200-203. Congress thus chose to explicitly incorporate the principles of job evaluation schemes into the EPA to ensure, as the House Report expressly stated, "that a bona fide job classification system that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination." H.R. Report No. 309 at 3, quoted in Id. at 201.

2. Courts Have Regularly Relied Upon Job Evaluation As a Basis For Finding Discrimination In Compensation.

In acknowledgement of the central role job evaluations play in the establishment of wage structures, courts have not hesitated to consider and rely upon such evaluations in analyzing sex-based claims of wage discrimination. Indeed, in County of Washington v. Gunther, 452 U.S. 161 (1981), in which the Supreme Court expressly held that wage discrimination claims filed pursuant to Title VII were not limited to claims of equal pay for equal work, job evaluations undertaken by the defendant formed the basis of plaintiffs' claims. In evaluating the worth of female prison guards and male correction officers--classifications which admittedly did not meet the equal work standard of the EPA--the County of Washington had determined that the female jobs should be paid 95% of the male jobs, and then proceeded to actually pay the female jobs at a rate of 70%. Faced with this evidence, the Court ruled that plaintiffs were entitled to prove that the County of Washington's failure to pay them their full evaluated worth was attributable to sex discrimination.

The similarities between Gunther and the case at bar are of course striking. Stated most simply, both involve claims of wage discrimination based upon the defendants' failure to pay women in female-dominated jobs their full evaluated worth, as determined by defendants' own job evaluations. The Court's acceptance of the job evaluations in Gunther as evidence of

potentially discriminatory wage practices should in itself foreclose arguments to the contrary by defendants herein regarding the inherent subjectivity and unreliability of such evaluations. In any event, there is ample judicial precedent both before and after Gunther which further supports the use of job evaluations to assess claims of discrimination.

In IUE v. Westinghouse Electric Corp., 631 F.2d 1094 (3rd Cir. 1980), cert. denied, 452 U.S. 967 (1981), for example, the Third Circuit was confronted with an analogous claim by women employees that Westinghouse had deliberately set their wages lower than the wages assigned male-dominated jobs of equal value. Again, the measure of "equal value" accepted by the Third Circuit was Westinghouse's own job classification system originally established in the late 1930's. Using a method somewhat similar to the Willis study, the Westinghouse system "point-rated" all of its jobs by taking into account knowledge and training requirements, and the specific job demands and responsibilities. 631 F.2d at 1097. Each job was then assigned a numerical value based upon these factors, and finally an hourly wage was assigned. Id. Plaintiffs argued that the wage rates for female jobs were set lower than the wage rates for male jobs with the same point rating -- a fact readily acknowledged by Westinghouse in its own wage manual, as well as the fact that the lower wage was sex-based. Id. The Third Circuit easily found that such evidence would establish discrimination under these circumstances:

> Under the applicable law it is clear that Westinghouse could not create job classifications whereby different wages were paid to one group solely because of consideration of religion, race or national origin. The statutory issue here is whether Congress intended to permit Westinghouse to willfully discriminate against women in a way in which it could not discriminate against . . . any other group protected by the Act . . . we hold that this alleged intentional discrimination in formulating classifications of jobs violates Title VII.

Id. at 1086-97.

Similarly, in Heagney v. University of Washington, 642 F.2d 1157 (9th Cir. 1981), this court reversed a lower court decision adverse to plaintiff based upon the lower court's exclusion of evidence of job evaluation results adhered to by defendant in its compensation of male, but not female employees. This court expressly approved the use of job evaluation for the purposes of analyzing wage discrimination claims involving dissimilar jobs, noting that the job evaluation study established "a standardized basis for comparing job content with pay even though the job may be unique." 642 F.2d at 1165. See also, Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1984) (First Circuit upheld jury verdict that defendants' failure to recommend pay increases for women in equivalently-rated jobs as men, in accordance with outside job evaluation, while adopting recommended pay increases for men, constituted unlawful discrimination); Connecticut State Employees Association v. State of Connecticut, 31 FEP Cas. 191,193 (D. Conn. 1983) (in denying defendants' motion to dismiss, court state that "if the defendants did in fact determine that dissimilar jobs were of equal value, but did not

provide equal pay because of the sex of the employees, then this would be evidence of intentional discrimination.")

The cases cited above, like the case at bar, essentially involve discriminatory application or implementation of employer-sponsored job evaluation studies. Under these circumstances, judicial reliance on the underlying job evaluation as evidence of the employer's discriminatory wage practices is well-established.

Defendants further suggest that this judicial use of job evaluations as a basis for identifying and correcting wage discrimination somehow places courts in the position of setting wages for American industry. (Br. of Appellant, Sec. IVA). This contention is likewise without merit. In their rush to assert the rights of American industry to establish wage structures, defendants choose to ignore the responsibilities of the courts to ensure that such wage structures do not discriminate unlawfully, pursuant to both Title VII and the Equal Pay Act. The important role job evaluation plays in the determination of wages has been well documented. Judicial consideration of these evaluations in its scrutiny of wage setting practices is inevitable.

Finally, defendants' concern that courts are somehow ill-equipped to weigh "subjective" job evaluation evidence must also be dismissed as unfounded.

To the extent that either side wishes to challenge the validity of the underlying job evaluation, courts have shown themselves competent in Equal Pay Act cases to address these challenges. See e.g., Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982) (defendant's classification system which segregated men's and women's jobs based upon traditional industry practices rejected as defense to EPA claim as representing a continuing practice of sex discrimination); Angelo v. Bacharach Instrument Co., 555 F.2d 1164 (3rd. Cir. 1977) (court rejected plaintiff's job evaluation study which, in arguing the equality of two assembly line jobs, offset the heavier physical effort required of one with the heavier mental-visual effort required of the other). Courts have also had no difficulty analyzing classification systems which in their weighing of various job characteristics may reflect bias in favor of traits typically associated with male-dominated jobs. See. e.g., Brennan v. Jersey City Board of Education, 374 F. Supp. 817 (D.N.J. 1974) (judge found that male and female custodian jobs required equal effort although exerted in different ways.) See also, Thompson v. Boyle, 499 F. Supp. 1147 (D.D.C. 1979), aff'd. in part, remanded in part, 678 F.2d 257 (1982).

Usery v. Bd. of Baltimore City, 462 F.Supp. 535 5 (D. Md. 1978); Brennan v. South Davis Community Hospital, 538 F.2d 859 (10th Cir. 1976). Further, courts have not hesitated, in accordance with their responsibilities generally to consider and weigh expert testimony, to formulate principles which guide their assessment of job evaluation evidence. In Marshall v. J.C. Penny Co., Inc., 464 F.Supp. 1166 (N.D. Ohio 1979) the court favorably noted several characteristics of the job evaluation, including the qualifications of the expert who designed the study, the amount of time spent, the use of methods to minimize internal bias, and the type of system used to support its finding that the job evaluation was bona fide. Conversely, in Thompson v. Boyle, 499 F. Supp. 1147 (D.D.C. 1979), aff'd in part remanded in part, 678 F.2d 257 (1982), court found the job evaluation clearly illegitimate, where the defendant's job evaluator, inter alia, had never used the evaluation system before, did not adapt the system for use in the plant to which it was to be applied, only visited the plant for two days, and had no rationale for his assignment of points to any of the twelve factors he took into consideration. Ironically, the type of job evaluation system used by Willis, the point-factor analysis, has been recognized by courts and commentators alike as the "most precise and objective method of job evaluation." Marshall v. J.C. Penny Co., Inc. 464 F. Supp. at 1190. See also R. Beatty and J. Beatty, "Some Problems with Contemporary Job Evaluation Systems," Comparable Worth and Wage Discrimination 70-71 (ed. Remick. 1974)

C. TO WHATEVER EXTENT DEFENDANTS' DISCRIMINATORY SCHEME REFLECTED MARKET RATES FOR PREDOMINANTLY MALE OR FEMALE JOBS, THIS IS NOT A PROPER DEFENSE UNDER EITHER THE EQUAL PAY ACT OR TITLE VII.

As plaintiffs point out in their brief, defendants' reliance on "market rates" in the establishment of their own wage structure was far from uniform. (Br. of Appellee at ____). Indeed, the record evidences a clear intent that the state's reference to outside salaries was to be "advisory only;" consequently, examples of instances in which defendants either deviated from the market or failed even to ascertain the market rate for particular jobs abound. Id. at ______. Despite defendants' admitted lack of any coherent strategy for utilizing the market in their wage-setting practices, however, defendants and their Amici have argued to this court, in the wake of Spaulding v. University of Washington, 35 FEP 217 (9th Cir. 1984) that any reliance on the market by them shields their discriminatory compensation scheme from review -- and deprives plaintiffs of any relief.

In Spaulding, a panel of this court concluded that an employer's policy of "relying on the market to set . . .wages . . . is not the sort of 'policy' at which disparate impact analysis is aimed." 35 FEP at 232. The court assumed that market-prices are "inherently job-related," Id., and reasoned further that since employers "deal with the market as a given," Id., they "do not meaningfully have a 'policy' about it in the relevant Title VII sense." Id.

Defendants' flawed interpretation of Spaulding is thoughtfully and carefully discussed in the brief of Amici National Committee

on Pay Equity *et. al.* Amici herein wish to elaborate that discussion slightly by looking at the market defense in cases under the Equal Pay Act, the inter-relationship between the Equal Pay Act and Title VII, and the overwhelming evidence that Congress has routinely interfered with the operation of the market when necessary to achieve social goals.

1. Reliance on the Market Has Been Uniformly Rejected As a Defense to Wage Discrimination Claims Under the Equal Pay Act.

The Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56, § 206 (d), provides in pertinent part as follows:

> No employer having any employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages . . . at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other than sex.

In Corning Glass Works v. Brennan, 417 U.S. 188 (1974) the Supreme Court flatly rejected the market justification as a defense to sex-based wage claims under the Equal Pay Act. The case arose out of Corning's practice of paying male night shift inspectors higher wages than female day shift inspectors.[4] Corning had attempted to justify the wage differential as a legitimate additional compensation for night work. The Supreme Court found, to the contrary, that "the higher night rate was in large part the product of the generally higher wage level of male workers and the need to compensate them for performing what were regarded as demeaning tasks." 417 U.S. at 205. The Court accepted that the differential reflected a job market in which Corning could pay women less than men for the same work; but rejected any suggestion that prevailing market rates relieved Corning Glass of liability:

> That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principal of equal pay for equal work.

417 U.S. at 205.

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[4] Corning Glass epitomizes the range of obstacles to equal employment opportunity women workers have historically endured in our society. When Corning Glass elected to institute a night shift at its plants in 1925, neither Pennsylvania nor New York permitted women to work between 10 p.m. and 6 a.m. 417 U.S. at 191, n.3. When the company began recruiting male workers from its day shift to work at night, the men demanded substantially higher wages than those being paid to women working the day shift. That Corning Glass acceded to their demands is not surprising: men working the day shift had grown accustomed to earning nearly twice as much as their female day shift counterparts. (Women's wages ranged between 20-30 cents per hour; men working the day shift earned no less than 48 cents per hour. As night shift inspectors, they earned 53 cents per hour.) Id.

Every court which has addressed the question of whether the market is a defense to sex-based wage disparities under the Equal Pay Act has answered that it is not. See, e.g. Laffey v. Northwest Airlines, 567 F. 2d 429, 451 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086, aff'd, 642 F. 2d 785 (D.C. Cir. 1980) ("This evidence leads convincingly to the conclusion that the contrast in pay is a consequence of the historical willingness of women to accept inferior financial awards for equivalent work -- precisely the outmoded practice which the Equal Pay Act sought to eradicate."); Hodgson v. Brookhaven General Hospital, 436 F. 2d 719, 726 (5th Cir. 1970) ("Clearly the fact that the employer's bargaining power is greater with respect to women than with respect to men is not the kind of factor [other than sex] Congress had in mind."). Brennan v. City Stores, Inc., 479 F. 2d 235 (5th Cir.), rehearing and rehearing en banc denied, 481 F. 2d 1403 (5th Cir. 1973) ("There is no excuse for hiring sales-women and seamstresses at less rates [than males] simply because the market will bear it."); Marshall v. Georgia Southwestern College, 489 F. Supp. 1322, 1330 (M.D. Ga. 1980) ("the defendants contend that. . .each professor or instructor was paid what he or she was worth in the market place of higher education. . .This market force defense is not the kind of factor included within the catch all exception in the Act . . ."); Schulte v. Wilson Industries, Inc., 547 F. Supp. 324, 340 (S.D. Tex. 1982) ("Utilization of a so-called market rate where

the market rate reflects discrimination against women in an insufficient justification of wage disparities under the Equal Pay Act.") [5/] See also, Brennan v. Victoria Bank and Trust Co., 493 F. 2d 896, 902 (5th Cir. 1974); Di Salvo v. Chamber of Commerce of Greater Kansas City, 416 F.Supp. 844, 593 (D. Mo. 1976) aff'd as modified 568 F. 2d 593. 597 (8th Cir. 1978); Hodgson v. Maison Miramon, Inc. 344 F.Supp. 843 (E.D. La. 1972).

2. The Principle Articulated in Corning Glass Should Apply with Equal Force to Sex-Based Wage Claims Brought Pursuant to Title VII.

Title VII makes it unlawful for an employer "to discriminate against any individual" with respect to "compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e - 2 (a) (1). The Bennett Amendment, which was added to Title VII as a

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5/ In similar fashion, both the War Labor Board and the EEOC have rejected the market defense in both race and sex discrimination cases. In General Electric Co. and Westinghouse Electric Corp., 28 War Lab. Rep. (BNA) 666, (1945), The War Labor Board expressly held irrelevant the companies' defense that the disparate rate for women's jobs was proper because it was in line with community practice or market rates, or that an increase in rates would place these companies at an "unfair competitive disadvantage in the industry." The Board stated, "the real question is whether any exploitation exists. If it does exist, as we believe that it does from the evidence in this case, it should be ended, and the fact that others practice it ought not to stand as a bar.
Id. at 687. See also EEOC DECS. No. 70-547 & 71-2629A. See Newman & Vonhof, supra, p. 13.

"technical amendment" to resolve potential conflicts between Title VII's ban on discrimination in compensation and the provisions of the Equal Pay Act,[6] provides further that:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the (Equal Pay Act.)

42 U.S.C. § 2000e - 2 (h).

Prior to the late 1970's, the majority of federal courts construed the Bennett Amendment as incorporating the EPA's "equal work standard" into Title VII's ban on wage discrimination. With the Third Circuit's decision in IUE v. Westinghouse, 631 F.2d 1094 (3rd Cir. 1980), cert denied, 452 U.S. 967 (1981) in 1980, however, in which the court permitted plaintiffs to pursue sex-based wage claims under Title VII challenging defendants' compensation scheme which assigned lower salaries to predominantly female jobs than predominantly male jobs, courts began to rethink and modify their position. See. e.g., Gerlach v. Michigan Bell Telephone Company, 501 F. Supp. 1300 (E.D. Mich. 1980); Taylor v. Charley Brothers, Inc., 25 FEP Cas. 602 (W.D. Pa. 1981).

6/ Senator Bennett's purpose in proposing the Amendment was to ensure. . . that in the event of conflicts, the provisions of the Equal Pay Act (would) not be nullified." 110 Cong. Rec. 13, 647 (1964). See also Newman & Vonhof, "Separate But Equal" - Job Segregation and Pay Equity in the Wake of Gunther, 1981 Univ. of Ill. L. Rev. 269, 278, n. 45 and accompanying text (1981).

In 1981, the Supreme Court, in County of Washington v. Gunther, 452 U.S. 161 (1981), largely foreclosed further speculation about the meaning of the Bennett Amendment and expressly held that individuals bringing compensation discrimination claims under Title VII were not required to satisfy the equal work standard of the Equal Pay Act. While the court declined to construe the Bennett Amendment as incorporating the entire equal work/equal pay formula of the EPA, it did conclude that the Amendment incorporated the EPA's four affirmative defenses into Title VII. Id. at p. 168-71. Thus, sex-based compensation claims may be brought under Title VII regardless of whether the work performed is "substantially equal" to another job classification, provided that the higher wage is not based on seniority, merit, quantity or quality of production, or "any other factor other than sex."[7/]

In accordance with Gunther, "The only justificable pay differentials under Title VII are those attributable to the four affirmative defenses of the Equal Pay Act." Schulte v. Wilson Industries, 547 F. Supp. at 339. See also, Lanegan-Grimm v. Library Association

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7/ The Court based its analysis in Gunther on the meaning of the word "authorized" as set forth in the Bennett Amendment. Interpreting the word "authorize" to mean "to empower, to give authority to act," 101 S. Ct. at 2247, the Court refused to incorporate the first part of the EPA, establishing the equal work/equal pay formula, as "purely prohibitory" and not " authorizing anything at all." Id. Only the second part of the EPA, according to the Court's analysis, which expressly authorizes unequal pay for equal work provided it is based upon one of the four affirmative defenses, could logically be viewed the concern of the Bennett Amendment. Id. See Newman and Vonhof, supra, at 276.

of Portland, 560 F. Supp 485, 489-490 (D. Or. 1983); Odomes v. Nacare, 653 F. 2d 246 (6th Cir. 1981); Power v. Barry County, Michigan, 439 F. Supp. 721, 724 (W.D. Mich. 1982).

Given the express holding by the Supreme Court in Corning Glass that the Equal Pay Act does not "authorize" market-based wage differentials, it is incongruous and illogical for defendant to argue herein that market-based compensation schemes may nevertheless, under Title VII, "authorize" lower wages for predominantly female jobs. Defendants in effect seek to revive the arguments rejected by the Supreme Court in Corning Glass: that they may pay certain job categories less where their wages reflect the "going market rate." To accept this argument is to support a policy which sanctions discrimination against women workers so long as they are generally discriminated against in the relevant market -- indeed the more they are discriminated against, the more the discrimination becomes justified. Such reasoning would subvert any meaningful judicial remedy to the problem of occupational segregation and its attendant wage disparity -- a problem so graphically illustrated by the facts of this case. It also ignores the implicit message of Gunther which, in acknowledging the existence of wage discrimination outside the equal pay/equal work context, recognized the depth of discrimination women have been forced to endure in employment, and expressly upheld Title VII as a remedy to such discrimination. This Court would fail in its obligation to enforce Title VII if it accepts as inevitable the notion that the historic underpayment of "women's work" is too entrenched in the market to be undone.

Indeed, analogous arguments seeking to justify discriminatory compensation schemes by reference to industry-wide practice have been uniformly rejected by the Supreme Court in related Title VII contexts. In Arizona Governing Comm. v. Norris, 77 L.Ed 2d 1236 (1983), involving a challenge to a state-sponsored discriminatory contribution plan for retirement benefits, the Court unambiguously held that "(i)t is no defense that all annuities immediately available in the open market may have been based on sex-segregated actuarial tables," and considered as "irrelevant" the question "whether any other insurer offered annuities on a sex-neutral basis." Id. at 1251 . The Court refused to permit the state to "disclaim responsibility" for the discriminatory practices of a third party. Id. at 1252.[8/]

Similarly, in Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978), the Court was also confronted with a challenge to an employer-sponsored retirement plan providing lower monthly payments to women based upon their assumed longer life span. Despite arguments that the actuarial tables underlying the plan were used industry-wide, the Court viewed the plan as discriminatory under Title VII:

> So here, even if the contribution differential were based on a sound and well-recognized business practice, it would nevertheless be discriminatory, and the defendant would be forced to assert an affirmative defense to escape liability.

435 U.S. at 670, n. 31.

8/ In the Ninth Circuit opinion in Norris, the Court stated: "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the market place" 671 F.2d. 330, 335 (9th Cir. 1982).

More importantly, the Court expressly noted in Manhart, that "neither Congress nor the Courts have recognized (a cost justification defense) under Title VII. Id. at. 717.

The teachings of the Supreme Court are clear. Neither the market nor the economic consequences of deviating from the market may be raised as defenses to sex-based compensation claims under either the Equal Pay Act or Title VII.

3. Government Has Routinely And Historically Regulated The Market To Avoid Economic or Other Harm To Protected Groups or Entities.

The Spaulding court, and defendant and its amici herein, apparently view the market as a "sacred cow" with which Congress could not possibly have intended to interfere by its passage of Title VII. This position is untenable for two reasons: 1) it is based upon an image of the market which bears little resemblance to the reality of our economic system; and 2) it ignores decades of Congressional regulation of the market to achieve broad social and public policy goals.

The image of the market invoked by defendant, rooted in abstract elementary economic theory of competitive product markets and price determination, has little relevance to wage administration in today's complex business economy. To whatever extent supply and demand truly govern material prices, their relationship to the cost of labor is far less clear. When the supply of applicants for a particular job increases, the salary paid to incumbents does not fall. When supply of applicants decreases, wages do not automatically increase. Brennan, supra, p. 11 at 8. Empirical evidence confirms

that supply and demand considerations do not truly govern wage decisions. For example, despite a large and growing shortage of nurses throughout the nation -- an occupation which is 97% female -- their salaries have not risen appreciably in response to increased demands. Hearings before the United States Equal Employment Opportunity Commission on Job Segregation and Wage Discrimination, Statement of Ellen Cassidy, at 340 (1980). Similarly, despite a nationwide shortage of skilled secretaries -- an occupation which is 99% female -- employers in several major cities are believed to have entered into wage-fixing agreements to assure that wages are artifically suppressed. Id,

More typically, while wage determination may indeed be influenced by markets, additional forces such as collective bargaining, state law, and traditional internal wage structures contribute to the final assigned wage -- all factors, coincidentally, which influenced wage determination in the case at the bar.

In the face of such "imperfect" market forces determining wages and prices, Congress, as well as the states, has historically acted to regulate the market to achieve balance and fairness, and to avoid economic harm. A complete accounting of the myriad ways in which Congress has regulated, artifically stimulated, or otherwise interfered with the market would far exceed the limits of this brief. A few relevant examples are offered.

Not surprisingly, some of the earliest Congressional attempts to regulate the employment sector took the form of "protectionist"

legislation, intended to protect largely women workers from harsh or undesirable working conditions but which more particularly also served to substantially curtail women's employment opportunities.[9] While the motivation behind this legislation has today been discredited, and its restrictions eliminated, it nevertheless opened the door to future Congressional regulation of employer-employee relationships.

The Fair Labor Standards Act, of which both the Equal Pay Act and federal minimum wage laws are a part, remains one of the clearest illustrations of Congressional interference with the market to correct and redress economic hardship in the workplace. Originally passed by Congress in 1938, President Roosevelt, in his message to Congress a year earlier in support of the legislation, stated:

> Our nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. A self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers' wages or stretching workers' hours.
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> Enlightened business is learning that competition ought not to cause bad social consequences which inevitably react upon the profits of business itself. All but the hopelessly reactionary will agree that to conserve

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9/ See, e.g., Mueller v. Oregon, 208 U.S. 412 (1908)

our primary resources of manpower, Government must have some control over maximum hours, minimum wages, and the evil of child labor, and the exploitation of unorganized labor.

[1977] U.S. Code Cong. & Ad. News 3207-3208.

Since 1938, the minimum wage has been raised many times, to enable lowest paid workers to keep pace with our economy. The Committee Report accompanying an increase in 1966 spoke directly of the need to aid workers "whose earnings . . . are unjustifiably and disproportionately low." [1966] U.S. Code Cong. & Ad. News 3003. The Committee Report expressed "shock" that 41% of all children living in poverty lived in families with one full-time worker, and correctly acknowledged the futility of equal opportunity laws that fail to redress economic inequality:

> Full employment and equal employment opportunity, are now widely endorsed objectives, but to be employed equally to substandard wages is no social achievement at all.

Id. (emphasis added).

More importantly, the Report readily conceded the Act's interference with the "market":

> Providing the protection of the minimum wage to the American worker has been an important element in our national policy for almost 30 years. Underlying this policy has been the recognition that some segments of our labor markets work imperfectly

and that many workers are at a disadvantage with their employers.

Id. at 3020. (emphasis added).[10/]

The Committee Report adopting a further increase in 1977 specifically noted the plight of women workers:

> Today there are almost 52 million workers subject to coverage of the minimum wage provisions of the Fair Labor Standards Act. Almost all are paid higher than the minimum, but approximately 3 million were paid $2.30 or less as of December 1976. Of those at this low wage level, two out of three are women, and a substantial number are the primary source of household income. According to the Bureau of the Census, contrary to the popular belief that most women work out of boredom or for extra money, 68 percent of the women in the work force in 1975 worked because it was economically necessary. Either they were heads of households or they were helping their husbands supplement an annual income of under $10,000, an austerity budget for a family of four. Economist Edward M. Gramlich found in his study on minimum wages for the Brookings Institute that "the evidence suggests that adult females are the main beneficiaries of increases in the minimum wage."

[1977] U.S. Code Code & Ad. News 3215.

Congressional concern about inequality of bargaining power and its tendency to produce disproportionately depressed wages

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10/ The Supreme Court, in Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1944) also recognized that the purpose of the FLSA was to protect certain segments of the population who suffered as a result of unequal bargaining power:

> The (FLSA) was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required Federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.

324 U.S. at 706-707.

similarly motivated passage of the National Labor Relations Act. 29 U.S.C. §151 of the Act, Findings and Declaration of Policy, provides in pertinent part:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contracts, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
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29 U.S.C. § 151. See also American Shipbuilding Co. v. NLRB, 380 U.S. 300, 316 (1965) ("While a primary purpose of the National Labor Relations Act was to redress the perceived imbalance between labor and management, it sought to accomplish that result by conferring certain affirmative rights on employees and by placing certain . . .restrictions on . . .employers."); Pittsburg Plate Glass v. N.L.R.B. 427 F.2d 936, 946 (6th Cir. 1970), aff'd, 404 U.S. 157 (1971) ("The purpose of federal labor legislation is to reconcile and, insofar as possible, equalize the power of competing economic forces within the society . . .").

Most importantly, in passing the Equal Pay Act in 1963, Congress explicitly acknowledged and thereby sought to correct widespread wage discrimination against women. As stated by the Supreme Court in Corning Glass Works v. Brennan, supra, Congress sought to rectify:

> . . .the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same." S Rep. No. 176, 88th Cong, 1st Sess., 1 (1963).

417 U.S. at 195. Congress of course recognized that the discrimination was furthered by the historic willingness of women to work for lower wages:

> (W)e are all familiar with the fact that generally speaking, women can be hired to perform a job for less than a man can be hired to perform the same job.

Hearings on Equal Pay before the Special Subcommittee on Education and labor, 88th Cong. 1st Sess., 191 (Rep. O'Hara) (1963).

Finally, President Kennedy, in signing the Equal Pay Act into law, remarked:

> (T)he average woman worker earns only 60 percent of the average wage for men. . . Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force. It is extremely important that adequate provision be made for reasonable levels of income to them, for the care of the children . . . and for the protection of the family unit. . . .

XXI Cong. Q. No. 24, p. 978 (June 14, 1963), quoted in Schultz v. First Victoria National Bank, 420 F.2d 648, 657, n. 20 (5th Cir. 1969)

A common theme running throughout the legislation discussed above is a concern that the market, when left alone, invariably -- because it is not perfect -- leads to the exploitation of workers who possess little or no bargaining power. Low wages are attributable not to the interplay between supply and demand, but to this imbalance in bargaining power between worker and employer. When this occurs, Congress has stepped in to correct and avoid further economic harm.[11]

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[11] The above examples represent instances in which Congress has deliberately interfered with the market to achieve a more equitable and appropriate wage structure. Congressional intent, in passing the legislation, to aid chronically disadvantaged members of the workforce is clear. Examples of Congressional regulation or manipulation of the market to affect other economic factors, such as prices and profit, likewise abound. Price supports to the agricultural industry are among the clearest illustrations. Price support programs were first established under the Agricultural Adjustment Act of 1933, Act of 5/12/33, C. 25, Tit. I, 48 Stat. 31 (codified in 7 U.S.C. §§601-624 (1976 & Supp. III 1979). Certainly, at the time the Act was passed, America generally was experiencing unprecedented economic hardship. Congress sought to stabilize the farm economy through passage of this Act. The purposes of the price support programs are, _inter alia_, to lend stability to the agricultural sector by _levelling out severe swings in farm prices to assure farmers an equitable income in the market place_ and to raise farm prices to parity levels. Price supports are now required by law for many agricultural products, including wheat, corn, peanuts, rice, tobacco, cotton, honey, milk and milk products, sugar beets and sugarcane. The Agricultural Stabilization and Conservation Service (ASCS), established 1961 as an agency of the U.S. Dept. of Agriculture, now administers the agricultural price support programs. ASCS is authorized, _inter alia_, _to make direct payments to farmers if open market prices fall below a support "target price" fixed by law for each commodity_.

The periodic adoption of wage and price controls by the federal government is a further example of governmental interference with the market. Adopted both during World War II and the Korean conflict, wage and price controls were most recently imposed during the Nixon Administration. _See_ Executive Order 11615 (August 15, 1971). The controls were adopted in response to high unemployment, inflation, and international monetary speculation which in combination were weakening the American economy at that time. The purpose of the (footnote continued)

Job segregation and low wages for women similarly find their roots as well as their present vitality in the historic exploitation of women. Women's traditional lack of economic or political power permitted the enactment of initial legislative barriers to their equal employment opportunity. Despite the official removal of those barriers, occupational fences between women's work and men's work persist. Women's lack of bargaining power has further fueled the consistent underpayment of their work by employers.

The artificially depressed economic status of women is no less worthy of Congressional or judicial attention than the disadvantages suffered by unorganized labor, impoverished workers generally, or agricultural workers experiencing undue economic hardship. Indeed, Congress has acted to correct women's dismal economic condition and lack of equal employment opportunity through

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wage and price controls was to stabilize wages and prices across the board, which was to be accomplished by an actual freezing of wages, prices, and rents for a ninety day period during 1971. See generally Owen T. Smith, The Emergency Wage and Price Controls Manual (1971); Hugh Rockoff, A History of Wage and Price Controls in the U.S., (1984).

A current example of proposed governmental involvement in this area is the Reagan Administration's proposal for the establishment of "Enterprise Zones" to stimulate economic development in the inner city through a variety of tax incentives.

its passage of both Title VII and the Equal Pay Act. To the extent that the "free" operation of the market has in fact contributed to their discrimination, Congress is clearly free to legislate to correct that "imperfect" operation of the market. It simply flies in the face of long-standing Congressional regulation of the market under precisely these types of circumstances to suggest that the market now precludes full implementation of of Title VII in this case.

CONCLUSION

For the foregoing reasons, Amici respectfully urge this Court to affirm the ruling below that defendants' discriminatory underpayment of plaintiffs violates Title VII.

Respectfully submitted,

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